



HISTORY
LAW &
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HISTORY

**RELIGION, IDEOLOGY,
POLITICS, AND LAW.**
A MULTIDISCIPLINARY
APPROACH IN THE FRAME
OF EUROPEAN HISTORY

edited by
Ulrico Agnati and Mario Varvaro



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PRESS

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PROCEEDINGS OF THE
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PREFACE

ULRICO AGNATI, MARIO VARVARO

The contemporary interconnected world showcases particularly tight knots, each made up by many threads. Having a deep knowledge of the threads is necessary to unravel the knots.

The secularized Western population has been awakened in recent years and has been forced to dismiss its self-referential confidence, discovering numerous knots to disentangle: one, of particular importance for social living in a globalized scenario, is that which tightly intertwines religion, ideology, politics, and law.

The scholars who contributed to this volume, even from different backgrounds, share an interest in this intertwining, due to their previous individual experiences in their research's fields.

Each scholar has faced a knot represented by a specific problem, more or less extensive, more or less dramatic and epochal. Therefore, the reciprocal influences of religion, politics, law, and ideology are shown by various and different angles.

The focus of the events discussed in the following pages spans over two millennia. The most recent events thoroughly analyzed date back to the eighteenth century, but numerous connections with contemporaneity appear in each essay, which examine situations that show analogies with the present and give possible suggestions for the future. Moreover, each paper pulls the strings of some processes, mechanisms and realities that are still flourishing today and that deserve to be fully understood through the study of their origins and developments in order to be governed.

In his commencement speech at Stanford University in 2005, Steve Jobs stated: "You can't connect the dots looking forward; you can only connect them looking backwards. So you have to trust that the dots will somehow connect in your future". In various ways, the present collection of studies represents an attempt to connect some dots looking backwards and heading towards the future.

This *humus* gave birth to this book; it collects the Proceedings of the international congress about *Religion, Ideology, Politics, and Law. A Multi-disciplinary Approach in the Frame of European History* and reproduces the papers in the same chronological order as the speakers delivered their lectures. In fact, the Congress explored from an historical perspective the intertwining of religion, ideology, politics, and law in European history, from Greek times to the Enlightenment.

The discussion was carried out in an interdisciplinary way, involving various fields, such as ancient and medieval history, Roman and medieval and modern legal history, the history of Christianity and the Churches, the history of the Jews, the history of religions and ecclesiastical law with a particular focus on Islamic legal tradition.

The congress, held in Palermo on 5 of March 2020, was supported by several institutions: the Universities of Palermo, Parma, and Urbino 'Carlo Bo'; the Department of Culture Heritage of the University of Salento and the Department of History and Cultures of the University of Bologna; the Open Universiteit of the Netherlands; the European Academy of Religion and the Association for Religious Studies 'Giovanni XXIII' (*Associazione per le Scienze religiose Giovanni XXIII*); the Union of Jewish Communities in Italy (*Unione delle Comunità Ebraiche in Italia*) and the Sicilian Institute of Jewish Studies (*Istituto Siciliano di Studi Ebraici*); the Mayor, the Culture Department, and the Library System, Ethno-anthropological Spaces and City Archives (*Sistema bibliotecario Spazi etnoantropologici e Archivio Cittadino*) of the City of Palermo.

When we began to organize the congress, we planned an edition of the Proceedings which could be published both in a printed version and in open access.

We wish to thank Emanuela Prinziavalli for writing the introduction to the book, and the authors of the articles for their contributions.

We also would like to express our gratitude to the University of Palermo, the Open Universiteit of the Netherlands and the Department of Economy Society and Politics of the University of Urbino 'Carlo Bo' for the financial support of the editorial and publication costs of these Proceedings.

INTRODUCTION

EMANUELA PRINZIVALLI
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Religion, Ideology, Politics, and Law. A Multidisciplinary Approach in the Frame of European History, conceived and edited by Ulrico Agnati and Mario Varvaro, aims at satisfying an increasingly felt need in the research field: integrating different disciplinary paths that, if they are limited to running parallel, as often happens, lead to 'squinting' in historical understanding. Beyond the method adopted, the volume is meritorious and innovative because of the *focus* around which the interdisciplinary perspective is built, represented by the primary attention paid to the relationship between law and religion, according to a broad diachrony reaching from late antiquity to the modern age.

In the late antique age, a series of novelties concerning the subject are produced. Lucio De Giovanni¹ summarizes them as follows: the transition from jurisprudence to codes, the formation of a bureaucracy, the relationship of a *lex* considered *generalis* with the law of God, the emergence of the confessional state, the first formation of canon law, legislation on relations between state and church, and the issues resulting from the intermingling with different peoples which took place in the West where the Roman Empire was only a name at the time. The volume offers numerous insights and an expanded perspective in these directions. The decision to push the investigative gaze forward to the eighteenth century allows the book to analyse some of the outcomes of the 'laboratory' in which Europe, and not only Europe, was being formed.

Starting from the above-mentioned *focus*, the seven papers collected in these proceedings highlight the following fundamental historical and historiographical junctions:

- (a) the historically determined interpretation adapted to the present need that the reader, in the various epochs, makes of the sources, whether they are juridical or whether they are the books considered 'inspired' or the patristic texts;

1 L. De Giovanni, *Istituzioni, scienza giuridica, codici nel mondo tardoantico. Alle radici di una nuova storia*, Roma 2007, xi.

(b) the interaction between the three Abrahamic religions, in the sought-after and attempted ways of coexistence with the 'other' and the rejection of the 'other';

(c) the pendular movement in Christianity from the initial desacralization of power to the subsequent re-sacralization.

Ulrico Agnati's opening essay (*The Kingdom and the Empire. Christianity and the Politics of the Roman Empire*) well represents the curators' purpose and deserves special attention because it features the initial coordinates and the trajectory along which the history of the West unfolds. He sketches with punctuality the fundamental moments of the institutional/legislative relationship between Christianity and the Roman Empire, starting from the Gospel message that, at the beginning, with its apocalyptic announcement, challenges the usual interweaving of the religious and political spheres that characterized ancient society. One may discuss Agnati's interpretation of the exquisitely spiritual nature of the kingdom of God preached by Jesus of Nazareth, who most likely announced the forthcoming transformation of earthly reality itself into the kingdom of God, anticipated by his practice of life and teachings that indicated a new way of relating between human beings. But certainly, the Nazarene remains alien to the political power of the time, the Romans. "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's" implies, as Agnati rightly affirms, a decisive desacralization of civil power. The early Christians challenged the sacredness of political power refusing to worship the emperor's *genius* and to take part in civic cults, both of which represented, in the eyes of the Roman authorities, the confirmation of social cohesion and political obedience. Christian exclusivism was frightening, directly opposing a traditional system open to the multiformity of cults – provided they were not exclusive. On the other hand, in that same period Christian thinkers such as Tertullian were theorizing the freedom of conscience in religious matters, foreseeing the idea of tolerance. Decius' decision to impose a public *supplicatio* marks – as Agnati underscores – a decisive turning point in the religious policy of the Empire, establishing a publicly certified religious obligation. Equally acute is the analysis of Constantine's novelty: it did not consist in a change of role because Constantine, exactly like Diocletian, continued to be the guarantor of the correct relationship of the subjects with the divinity, which the role of *pontifex maximus* imposed; it was the favored divinity that changed, being now the Christian God. Even if Constantine did not take repressive

measures towards traditional cults, the direction he marked is clear: the growing favour towards Christianity is not only accompanied by contempt towards paganism, but also implies a mechanism of control towards the favored religion. In fact, Christianity presents a considerable doctrinal component, which imposes from time to time the clarification of who represents the authentic *ecclesia catholica* (with regard first to Donatism and then to Arianism) and makes heresy a juridical category assimilating it to the crime of lese-majesty. The trajectory going from Theodosius I's *Cunctos populos* (381) – important because in some way it imposes the *religio catholica* as state religion – arrives at Justinian who inserts a doctrinal exposition at the beginning of his Code. The circle therefore closes, returning to the origin: the interweaving of the religious and civil spheres that Christians had initially opposed. At the same time, the discourse on tolerance was also abandoned by the Christians, or rather, the idea that the emperor could impose penal sanctions on the heretic was accepted. Augustine himself (following Giovanni Catapano's indication)² never doubts the legitimacy of the punitive intervention of the sovereign, but changes his opinion on its appropriateness, finally accepting it for the Donatists.

The interpenetration of the religious and political spheres means that, if contrasting, the traditional imperial model prevails, as in the case study examined by Viola Heutger (*Law meets Religion in the Hippodrome of Constantinople. Sundays and Imperial Birthdays*). The competition between the new religious reverence to the *dies dominica* and the veneration due to the emperors is evident in the permission granted by the Theodosian emperors to hold games in the hippodrome of Constantinople on Sundays to celebrate the imperial birthday.

Mario Varvaro's essay (*Law, Politics, and Religion in Justinian Legislation*) introduces the fascinating circumstance that if, on one hand, as I have previously said, Justinian's legislative work closes a circle, on the other, it marks the transition from the Roman to the medieval world in the Mediterranean area, with a series of consequences unfolding in the upcoming centuries. The Eusebian ideology of the emperor as the mimetic mirror of the Christian God, allows Justinian in the *Codex* to legitimize his power on the dual basis of divine origin and Romanity, as restorer of the unity of the empire: thus, Justinian can utilize the double register of the restoration of what is

2 G. Catapano, *La giustificazione dei provvedimenti antidonatisti di Costantino nel primo libro del Contra epistulam Parmeniani di Agostino*, in *Etica & Politica / Ethics & Politics*, XVI.1, 2014, 472-486.

best (that is, the introduction of novelties) and of deference to the tradition. Political theology makes territorial and doctrinal unity descend from monarchical unity, finding its most appropriate weapon in legislation: consequently, Justinian identifies and imposes orthodoxy. The inclusion in the opening title of the first book of the *Codex Iustinianus* (Cl. 1.1.5.1) of the explanatory / interpretive rereading of the Nicene Symbol (contained in an imperial constitution of 527, which Varvaro aptly quotes in his essay) is impressive: this means that the emperor, who considers himself the supreme authority on earth after God, has full power to explain (in fact to integrate) the symbol of faith issued by a council. This act of supreme intervention in matters of faith, as a premise of legislation, implies, behind the declared defense of the right faith, an unheard intention of theological-political reinforcement of imperial power. Varvaro thus illustrates the dark side – represented by the fanaticism of the imposition of a single dogma grafted onto the intersection of politics, ideology and religion – of a legislative *corpus* considered by Ernst Stein “the most important text for the evolution of mankind after the Bible”.

Giancarlo Anello (*Ummah wāḥidah: Religiosity, Political Inclusion, and the Legacy of the Sahifah-al-Madina [622 C.E.]*) studies Muḥammad’s *Charter of Medina*, a legal document that takes us back to the beginnings of the religious phenomenon of Islam, destined to play a leading role in subsequent history. A rigorous historical examination – suggests Anello – allows us to extract new meanings and to provide a trans-historical and inter-religious interpretation able to provide useful insights for today’s globalized Muslim society, even though the *Charter* is linked to a specific historical context since it was conceived for a particular purpose (which is to defuse the conflictual potentiality of the tribal organizational system), and even though after the conquest of Mecca the situation changed and the break with the Jews was consummated. In fact, in the *Charter* Muḥammad established some fundamental points that can be applied in the current multi-religious and multicultural climate; he aimed at establishing an inclusive community (the *um-mah*), to be interpreted in the light of the parallels with the *Koran* as *um-mah wāḥidah*, a community that shares a universalizing religiosity, therefore respectful of the single cults for the purpose of a peaceful coexistence.

Luciana Pepi’s essay (*L’ideologia religiosa nell’editto di espulsione degli ebrei dalla Sicilia – Religious Ideology in the Edict of Expulsion of the Jews from Sicily*) addresses a tragic event less known than other similar ones: the edict of expulsion of 18th June 1492. This

measure imposed that any Jews who had not accepted conversion had to leave Sicily (where they had lived since the first century) on 12th January 1493, by the order of King Ferdinand. The analysis of the edict shows the ideological ambivalence of the Church: the Jews were seen as defeated witnesses of Christian truth and therefore were tolerated; on the other hand, they were reproved for their obstinacy. This ambivalence was transformed, when necessary, into persecutory pronouncements by the kings, invested with the task of protecting good Christians from perfidious Jewish influence. The legal justification for the expulsion was based on the condition of the Jew as property of the crown (*servi regiae camerae*), at the disposal of the king's will.

The intertwining of classical and patristic sources characterizes Hugh Grotius' reflection on *occupatio bellica*, a technical expression used to indicate the taking possession of a part of the enemy's territory by an opponent during war operations. The essay by Davide Dainese (*Christendom's Ashes. Grotius's Occupatio Bellica and the Thirty Years' War*) highlights the relationship between the troubled era of the Thirty Years' War and the development of *De iure belli ac pacis* (1625). Grotius uses Cicero for the *ius ad bellum* and distances himself from Augustine, the established authority for the *ius in bello*, in that he seemed to dissuade Christians from military heroism at a time when the need for military operations led, on both Protestant and Catholic sides, to exalt as models the figures of the Old Testament heroes. Rather, Grotius uses Cyril of Alexandria and his glorification of figures such as David and Samson.

Finally, Bastiaan van der Velden (*The Ban on Marriages between Christians and Muslims in the Dutch Republic [1580-1795]*) shows, in an extensive contribution, among other things, the persistent role played by Justinian's authority. In fact, the jurist Johannes Voet (1647-1713), overturning the 'liberal' position of Grotius and Simon van Leeuwen on marriages between Christians and Muslims, forbids such unions by relying on Theodosian and Justinian legislation, which had once forbidden unions between Christians and Jews, and Christians and Samaritans. Confirming what has been said above about the use and interpretation of sources according to the needs of the present, van der Velden illustrates the various stages of a progressive tightening by the Reformation in the Netherlands, and thus by legislation. However, the contribution closes with the observation that, in practice, it was difficult – in administrative terms – to exercise control over marriages, because of the difficulty of establishing the actual religious choice of individuals.

This conclusion seems to me to be a good warning for any research in the historical field: the daily existence of individuals, their silent vitality, the history made up of small stories and unknown sufferings but also of equally unknown and stubborn strength and resistance, it all moves behind and beyond the strictures of laws and precepts.

THE KINGDOM AND THE EMPIRE. CHRISTIANITY AND THE POLITICS OF THE ROMAN EMPIRE

ULRICO AGNATI

University of Urbino Carlo Bo

Abstract: The paper analyses various documents from Trajan to Justinian times, dealing with religion, politics and law. These sources show the absence of any major change in the traditional intertwining of religion and politics in the Roman Empire. In fact, after its conversion to Christianity, the Empire in the end remained faithful to itself. Christian writers endorsed religious freedom until the beginning of the 4th century AD on the basis of the autonomy of religion from politics. At the end of the 4th century AD Augustine fostered a different approach, revising his own opinion on religion, politics and coercion. Christian emperors firmly opposed religious freedom, applying the traditional intertwining of religion and politics without the flexibility allowed until then by a polytheistic pantheon.

Keywords: Religion; Politics; Law; Polytheism; Christianity; Religious Freedom.

Religion must be of no concern to the state, and religious societies must have no connection with governmental authority. ... No subsidies should be granted to the established church nor state allowances made to ecclesiastical and religious societies. These should become absolutely free associations of like-minded citizens, associations independent of the state. ... Complete separation of church and state is what the socialist proletariat demands of the modern state and the modern church. The Russian revolution must put this demand into effect as a necessary component of political freedom.

[Lenin 1905: 83-87.]

1. Religion, politics and law are intimately connected. In the Greek world the *pólis* "assumed the responsibility and authority to set a religious system into place, to mediate human relationships with the

divine world”.¹ The Italic tradition, and the Roman tradition within it, was of the same kind, although some gods – for instance Zeus-Jupiter – were worshipped in different towns and regions.²

Pax deorum was a relationship between the supernatural and the entire community. Politics and religion were intertwined in Roman *sacerdotia*. The long history of the *pontifex maximus*, which became part of the emperor’s functions and entrusted him the supreme authority over Roman religion, manifested this intimate connection.³ Momigliano underscored this fact: “As the head of the Roman religion, the Roman emperor was therefore in the paradoxical situation of being responsible not only for the relations between the Roman State and the gods but also for a fair assessment of his own qualification to be considered a god, if not after his life, at least while he was still alive”.⁴

The Roman Senate decreed *supplicationes*, acts of general worship, to propitiate or give thanks to the gods; *supplicationes* became a part of the imperial cult. The imperial cult was universal, but, in the first centuries AD, was organized at a local level. Some rites, however, took place simultaneously all over the Empire.⁵ People participated spontaneously, motivated by tradition, feasts and loyalty towards the emperor. The cult of the emperor became a political religion and tried to attain a universal level.

Religion is one of the main features of the local community as well as of the Empire, a fundamental element of the core identity, a means of social control, intended to guide the individuals’ decisions as well as the decisions of the assemblies. In the Graeco-Roman culture the civic cults (*sacra*) were the foundation of the political community (*civitas*).

Jesus’ preaching contrasted the religious approach of his times. The Christians living in the 2nd century AD were perfectly aware of this fact.

1 Sourvinou-Inwood 1990: 302. Paul Veyne describes as “international, contractual, occasional” the relationship between the human race and the pagan deities (Veyne 2010: 14).

2 Troiani 1999; Rüpke 2001; Cancik, Rüpke 2009. The Roman religion is public, political, ritualistic (with a special attention to the *orthopraxis*); see Schied 2001; Schied 2002; Schied 2011; Schied 2013.

3 Orestano 1939; Sordi 1985; Rinolfi 2005; Vallocchia 2008; Franchini 2008; Santangelo 2008; Gill 2008: 117 ff.; Richardson, Santangelo 2011; Turelli 2020; Ravizza 2020: 9-42.

4 Momigliano 1987a: 183. See also Ando, Rüpke 2006; Letta 2021. Momigliano refers to the ‘Roman State’; occasionally ‘State’ will be used in this paper as well, even though it is a form of government and a concept related to the Modern age and non perfectly fitting to the Roman juridical, administrative and religious system; see, on this topic, Orestano 1968.

5 For instance: anniversaries of reigning emperors or the *vota pro salute Imperatoris* (3 January).

The Judaism of Jesus' times was way different – the Jewish wars give an example for that. Moreover, Jesus as a charismatic teacher re-interpreted and, as a consequence, contrasted many of the Hebrew élites' views on Judaism. Leaving aside the discussion on the eschatological / non-eschatological nature of Jesus' preaching, there is no doubt that, according to the 2nd century sources, Jesus' announcement of the Kingdom of God had hinted at a spiritual realm.

Rousseau observed that Christianity “est une religion toute spirituelle” and the Kingdom of God is “un royaume spirituel”; as a consequence it is completely unfitting with the pagan intertwining of the political sphere with the religious sphere (“cette idée nouvelle d'un royaume de l'autre monde n'ayant pu jamais entrer dans la tête des payens”).⁶ Jesus announced the coming of a Kingdom which is not a mundane kingdom. Justin Martyr, in his *First apology* (11.1-2) written around 153 AD, addressed to the emperor Antoninus Pius (and to his sons and to the Roman Senate and to the Roman people), is clear on this point:

Καὶ ὑμεῖς, ἀκούσαντες βασιλείαν προσδοκῶντας ἡμᾶς, ἀκρίτως ἀνθρώπινον λέγειν ἡμᾶς ὑπειλήφατε, ἡμῶν τὴν μετὰ θεοῦ λεγόντων, ὡς καὶ ἐκ τοῦ ἀνεταζομένου ὑφ' ὑμῶν ὁμολογεῖν εἶναι Χριστιανούς, γινώσκοντες τῷ ὁμολογοῦντι θάνατον τὴν ζημίαν κείσθαι, φαίνεται. Εἰ γὰρ ἀνθρώπινον βασιλείαν προσεδokῶμεν, κἂν ἡρνούμεθα, ὅπως μὴ ἀναιρώμεθα, καὶ λανθάνειν ἐπειρώμεθα, ὅπως τῶν προσδοκωμένων τύχωμεν· ἀλλ' ἐπεὶ οὐκ εἰς τὸ νῦν τὰς ἐλπίδας ἔχομεν, ἀναιρούντων οὐ πεφροντίκαμεν τοῦ καὶ πάντως ἀποθανεῖν ὀφειλομένου.⁷

This perspective basically recalls New Testament passages alluding to a non-earthly kingdom. Jesus, in fact, preaches about a spiritual Kingdom in which every man can enter being born again, from above.⁸ He affirms himself the king of this Kingdom,⁹ which is gov-

6 See Rousseau 1762: b. 4 ch. 8.

7 Justin. Mart. *ap.* / 11.1-2: “And when you hear that we look for a kingdom, you suppose, without making any inquiry, that we speak of a human kingdom; whereas we speak of that which is with God, as appears also from the confession of their faith made by those who are charged with being Christians, though they know that death is the punishment awarded to him who so confesses. For if we looked for a human kingdom, we should also deny our Christ, that we might not be slain; and we should strive to escape detection, that we might obtain what we expect. But since our thoughts are not fixed on the present, we are not concerned when men cut us off; since also death is a debt which must at all events be paid”. (transl. by M. Dods and G. Reith). See Guerra 1992; Keith 1992; Troxel 1995; Sheather 2018; Nyström 2018.

8 Jn 3.3: “Very truly I tell you, no one can see the kingdom of God unless they are born again” (all the quotations from the Bible are taken from the New International Version).

9 Mt 27:11; Mk 15:2-5; Lk 23:1-4; Jn 18:28-38.

erned according to rules much different from those that govern the earthly reigns;¹⁰ moreover he refused to become an earthly king¹¹ and opened the way to a personal relationship with God, revealed by Jesus himself as the Father of everyone who believes.¹² Even reduced to these basic features, the Kingdom of God is clearly different from the mundane kingdoms.

According to Jesus' announcement, Christianity at first challenged the unity of religion and politics, and experienced persecution until the unity of religion and politics was restored, when the Roman Empire adopted Christianity as its religious ideology.¹³ As soon as Christianity became the religion of the Roman Empire the unity of religion and politics was challenged no more and the nature and the substance of the traditional relationship between religion and politics was restored, even wearing different garments, bearing the cross or other Christian symbols, underwent some changes. Hence the root cause of the denial of the religious freedom in the public sphere.¹⁴

The traditional Graeco-Roman religious system was open to multiformity and non exclusive; diversity of beliefs and practice in a multiplicity of divinities was a given fact. The religious-political system reacted only to what was perceived as a challenge to the civic cults, a menace to the very basis of the *πóλις* / *civitas*.¹⁵

10 Mt 20.20-28; Mk 10. 42 ff.; Lk 22.24-27; Jo 13.3-17.

11 Jn 6.15: "Jesus, knowing that they intended to come and make him king by force, withdrew again to a mountain by himself". See also Mt 4.8-9.

12 Jn 1.12-13: "Yet to all who did receive him, to those who believed in his name, he gave the right to become children of God – children born not of natural descent, nor of human decision or a husband's will, but born of God".

13 Ellul 2018: 19-21: "En vérité, l'essence même de la subversion est déjà indiquée par la désignation de 'christianisme', chaque fois que nous rencontrons cette désinence 'isme', cela désigne un courant idéologique ou doctrinal ... La désinence 'isme' consiste à intégrer un neuf dans un ensemble catégoriel bien repéré, et surtout défini. Mais dans le même temps, si l'originalité est éliminée pour être ramenée au lieu commun d'usage, une vie ou une pensée y perd sa radicalité et sa consistance ... Si l'on veut éliminer ce mot de 'christian-isme' que faudrait-il dire? D'une part la Révélation et l'Œuvre de Dieu accomplies en Jésus-Christ, en second lieu, l'Être vrai de l'Église en tant que corps du Christ, en troisième lieu, la foi et la vie du chrétien, dans la vérité et dans l'amour". Ellul uses 'christianisme' to designate "le mouvement idéologique et sociologique qui en est la la perversion" of the three main features just quoted. About Ellul's perspective see Monet 2014: 181 ff.; Cosmao 1981. Veyne 2010: 137 ff., does not quote Ellul, but firmly opposes any ideological interpretation of the conversion of the Roman Empire.

14 The historical facts give evidence of a radical change in the Christian approach to politics, power, coercion; as Rousseau pointed out, "les humbles chrétiens ont changé de langage, et bientôt l'on a vu ce prétendu royaume de l'autre monde devenir sous un chef visible le plus violent despotisme dans celui-ci" (Rousseau 1762: b. 4 ch. 8).

15 Agnati 2018; Banfi 2021.

On the other hand, Christianity evolved into a new religion characterised by a combination of all the features that, according to modern scholarship, denote what today we call ‘monotheism’: totalization (concerning a radical choice between Good and and Evil, reflected in all sectors of the human activity), homogeneity (hence the heresies: deviation from correct beliefs and practices to be severely repressed) and exclusivity (forbidding all kinds of contamination with other cults and opposing all the other deities, recognised as demons).¹⁶

Christianity, within a few decades after it was inserted in the old pattern linking religion and politics, strenghtened the rigidity of the traditional system, aiming to prevent liberty in the personal religious choice.¹⁷

2. To sum up some basic features, prodromic to the following observations, we can recall that Christians constantly declared themselves loyal to the Empire, but tended to avoid to serve in the army,¹⁸ usually refused public offices and kept themselves away from the State, sometimes even choosing to die instead of being involved in the public cults of the Roman religion. The Christians have to respect public authorities and to submit to the emperor, as it is written in the First epistle by Peter:

1Pt 2.13-14: Submit yourselves for the Lord's sake to every human authority: whether to the emperor, as the supreme authority, or to governors, who are sent by him to punish those who do wrong and to commend those who do right.¹⁹

16 On totalization, homogeneity and exclusivity, see Rives 2005.

17 Garnsey 1984; Fowden 1993; Athanassiadi, Frede 1999; Stroumsa 1999; Edwards 2004; Assmann 2008; Mitchell, Van Nuffelen 2010; Guittard 2010; Sfameni Gasparro 2010; Athanassiadi 2010.

18 See Siniscalco 1974; Pucciarelli 1987.

19 See also Rm 13:1-6: "1. Let everyone be subject to the governing authorities, for there is no authority except that which God has established. The authorities that exist have been established by God. 2. Consequently, whoever rebels against the authority is rebelling against what God has instituted, and those who do so will bring judgment on themselves. 3. For rulers hold no terror for those who do right, but for those who do wrong. Do you want to be free from fear of the one in authority? Then do what is right and you will be commended. 4. For the one in authority is God's servant for your good. But if you do wrong, be afraid, for rulers do not bear the sword for no reason. They are God's servants, agents of wrath to bring punishment on the wrongdoer. 5. Therefore, it is necessary to submit to the authorities, not only because of possible punishment but also as a matter of conscience. 6. This is also why you pay taxes, for the authorities are God's servants, who give their full time to governing. 7. Give to everyone what you owe them: If you owe taxes, pay taxes; if revenue, then revenue; if respect, then respect; if honor, then honor". Ti 3:1: "Remind the people to be subject to rul-

But there are relevant differences, all centred on the severing of faith and politics, according to Jesus' teaching. In fact Christians have to pray for the emperor, not to worship the emperor, implore God on behalf of the emperor and not implore the emperor as a god.

1Tm 2.1-2: I urge, then, first of all, that petitions, prayers, intercession and thanksgiving be made for all people – for kings and all those in authority, that we may live peaceful and quiet lives in all godliness and holiness.

But Christians had to pray their own way on behalf of the emperors; in fact they were forbidden to eat the meat of the sacrifices, reinterpreting the Jewish prescriptions found in Leviticus;²⁰ and in case of conflict between God's rules and human rules they had to obey to the former ones.²¹ Moreover, they considered the pagan deities as demons: hence Christians' refusal to worship them, followed by the charge of atheism or impiety. These are, in short, the main causes of the severe friction between Christianity and the contemporary society. In a sociological perspective²² Christians adopted deviant behaviours (not necessarily criminal behaviours) conflicting with general rules observed in the multicultural society of the Roman empire; they challenged some fundamental aspects of the current way of living, following the example of Jesus whose "attitude", according

ers and authorities, to be obedient, to be ready to do whatever is good". Cfr. *Ad Diognetum* 5.1 ff. See Jullien *et al.* 1967; Rizzi 2009.

- 20 Lv 3.16-17, 17.10-14. See also 1Cor 10.20-21: "No, but the sacrifices of pagans are offered to demons, not to God, and I do not want you to be participants with demons. You cannot drink the cup of the Lord and the cup of demons too; you cannot have a part in both the Lord's table and the table of demons". Acts 15.23-29: "... With them they sent the following letter: "The apostles and elders, your brothers, to the Gentile believers in Antioch, Syria and Cilicia: Greetings. We have heard that some went out from us without our authorization and disturbed you, troubling your minds by what they said. So we all agreed to choose some men and send them to you with our dear friends Barnabas and Paul – men who have risked their lives for the name of our Lord Jesus Christ. Therefore we are sending Judas and Silas to confirm by word of mouth what we are writing. It seemed good to the Holy Spirit and to us not to burden you with anything beyond the following requirements: You are to abstain from food sacrificed to idols, from blood, from the meat of strangled animals and from sexual immorality. You will do well to avoid these things. Farewell". See Panimolle 1976; Gangemi 2007.
- 21 Acts 4.19-20: "Then they called them in again and commanded them not to speak or teach at all in the name of Jesus. But Peter and John replied, «Which is right in God's eyes: to listen to you, or to him? You be the judges!»".
- 22 Joas 2001: 170; Rüpke 2016.

to J. Ellul, is not only “apolitique, mais effectivement anti-étatique et antipolitique”.²³

The most relevant conflict was related to the fact that religion and imperial ideology overlapped in the Roman perspective. Refusing to sacrifice to Roman gods, to the *genius Augusti*, to the *divi imperatores*, to the goddess Rome was considered a heinous and incomprehensible rebellion to the Roman political order.²⁴

Reading the well known epistle written to the emperor Trajan by Pliny the Younger, we can perceive the traditional point of view on the destabilizing and incomprehensible novelty of the Christian faith. Pliny the Younger, the governor of Pontus / Bithynia (111-113 AD), in ep. 10.96 describes the procedure he observed in the case of those who were denounced to him as Christians; he discharged those who denied that they were Christians, when they (a.) invoked the gods in words dictated by the governor himself, (b.) offered prayer to the emperor's image, (c.) cursed Christ.²⁵

Pliny was puzzled: he was badly impressed by the stubbornness of the Christians and their extremist and unheard form of religiosity,²⁶ but he couldn't find criminal profiles in their conducts. In fact they had meals together, they met before dawn and sang hymns to Christ, bound themselves by oath not to commit fraud, theft, or

23 Ellul 2018: 179.

24 To these days the legal basis of the prosecution against Christians has been a disputed topic; scholars propose three main hypothesis: pre-existing criminal laws; the *coercitio* of the Roman officials; a specific law targeting the profession of Christianity. See Weis 1899: 2-8; Millar 1973; Fayer 1976; Momigliano 1987b: 136; Sordi 1992; Solidoro Maruotti 2002; de Ste. Croix 2006: 123: “under the *cognitio* process no foundation was necessary, other than a prosecutor, a charge of Christianity, and a governor willing to punish on that charge”; Sperandio 2009; Siniscalco 2009; Saggiaro 2011; Oliviero Niglio 2011; Rives 2011.

25 Plin. ep. 10.96.5: *Qui negabant esse se Christianos aut fuisse, cum praeunte me deos appellarent et imagini tuae, quam propter hoc iusseram cum simulacris numinum afferri, ture ac vino supplicarent, praeterea male dicerent Christo, quorum nihil cogi posse dicuntur qui sunt re vera Christiani, dimittendos putavi.*

26 Plin. ep. 10.96.3: *Neque enim dubitabam, quaecumque esset quod faterentur, pertinaciam certe et inflexibilem obstinationem debere puniri.* Plin. ep. 10.96.8: *Nihil aliud inveni quam superstitionem pravam et immodicam.* Cfr. Marcus Aur., *ad se ipsum* 11.3: Οἷα ἐστὶν ἡ ψυχὴ ἡ ἔτοιμος, ἐὰν ἦδη ἀπολυθῆναι δέη τοῦ σώματος καὶ ἦτοι σβεσθῆναι ἢ σκεδασθῆναι ἢ συμμεῖναι. τὸ δὲ ἔτοιμον τοῦτο ἵνα ἀπὸ ἰδικῆς κρίσεως ἐρχεται, μὴ κατὰ ψυλὴν παράταξιν ὡς οἱ Χριστιανοί, ἀλλὰ λελογισμένως καὶ σεμνῶς καὶ ὥστε καὶ ἄλλον πείσαι, ἀτραγῶδως. Beyond any legal basis to prosecute Christians, there was a lot against them according to the popular perception; Walsh, Gottlieb 1992 give reasons regarding the popular hostility towards Christians, which can be summarized as follows: atheism, novelty of their eastern cult, association with Jews, parting from public life, stubbornness and fanaticism, bold and outrageous speech, pretensions to a adhere to a superior set of moral rules, division and difficulties within families and marriages, secret and disturbing rites, negative impact on local economies (see, e.g., Acts 19.23 ff.: in Ephesus arose a great disturbance because a silversmith who made silver shrines of Artemis, assembled the craftsmen and predicted to them the negative consequences on their business following Paul's preaching).

adultery, not falsify their trust, nor to refuse to return a trust.²⁷ In spite of the absence of other criminal offenses, the Christian social and religious phenomenon in itself, along with other forms of associations, were considered potentially dangerous for the Empire. In spite of the absence of other criminal offenses, the Christian social and religious phenomenon in itself, along with other forms of associations, were considered potentially dangerous for the Empire. Pliny, following the instruction given by the emperor Marcus Ulpius Traianus (53-117 AD),²⁸ promulgated an edict forbidding *hetaeriae*, fraternities or brotherhoods which were considered as political associations.²⁹

Pliny and Trajan's words and measures manifest the intertwining between politics and religion and the control exerted by the public administration on these kinds of associations. They give evidence of the predominant role played by politics and religion over the law: lacking any crime against Christians, there were difficulties in dealing with this social phenomenon and the governor had to ask directly the emperor, and had to issue a specific edict against the *hetaeriae*. Moreover emerges the novelty of the Christian monotheistic perspective and the aim to separate politics and religion, when religion was a non-Christian religious ideology. The emperor himself confirms this fact by establishing a proof to recognize the Christians: the Christians are the ones who refuse to worship pagan gods.³⁰

The sacrifice to the pagan gods and to the Emperor's *genius* was required as a sign of religious and political adherence to the Roman order. But Trajan clearly dictated: *conquirendi non sunt*. He ordered the governor Pliny not to search, seek and pursue the Christians. On the contrary he answered with a specific letter to the questions asked by the governor.

From within the administrative and judicial structures of the Roman Empire we receive a first hand testimony of the feature of the

27 Plin. ep. 10.96.7: *Affirmabant autem hanc fuisse summam vel culpae suae vel erroris, quod essent soliti stato die ante lucem convenire, carmenque Christo quasi deo dicere secum invicem seque sacramento non in scelus aliquod obstringere, sed ne furta ne latrocinia ne adulteria committerent, ne fidem fallerent, ne depositum appellati abnegarent. Quibus peractis morem sibi discedendi fuisse rursusque coeundi ad capiendum cibum, promiscuum tamen et innoxium* rel.

28 The emperor's mandata banned *hetaeriae*; see Marotta 1991; Randazzo 2005; Humphries 2006; Costabile 2007; Franchini 2019. Cfr. Plin. ep. 10.34.

29 Plin. ep. 10.96.7: ... *quod ipsum facere desisse post edictum meum, quo secundum mandata tua hetaerias esse vetueram*.

30 Plin. ep. 10.97.2 (Traianus): *Conquirendi non sunt; si deferantur et arguantur, puniendi sunt, ita tamen ut, qui negaverit se Christianum esse idque re ipsa manifestum fecerit, id est supplicando dis nostris, quamvis suspectus in praeteritum, veniam ex poenitentia impetret*. On the refusal to offer prayers to pagan deities, see the judicial records of the trials against the Christians: Lanata 1989; Saxer 1989.

persecutions against Christians in this period (the so-called second phase of the persecution). The emperor didn't establish persecutions; he didn't adopt general acts (as, for instance, an edict) and didn't even imagine a hunt for Christians. The Roman authorities chased the deviance on a local basis, not acting but simply reacting to denunciations (maybe due to personal discord or envy within the local population), seldom and spotty, even if sometimes in a cruel and bloody way.³¹ Under the emperor Trajan the Empire was strong and healthy. And Trajan along with Augustus was considered the best emperor the Empire could desire, until the 4th century AD.³²

3. After less than 140 years since Trajan wrote his answer to Pliny, the Empire was in dire straits. In the middle of the 3rd century AD. looking back to Trajan's years meant looking back to the glory days of the Empire. The Roman emperor Decius (249-251 AD) inserted 'Traianus' in his nomenclature: Caesar Gaius Messius Quintus Traianus Decius Pius Felix Augustus.³³

The hope for a restoration of the past greatness and stability of the Roman empire was contained in the name 'Traianus'. The complete name of the emperor Decius appears, for instance, on a certificate issued in Oxyrhynchus on the 14th of June 250 AD, relevant to our subject:

P. Oxy. IV.658: τοῖς ἐπὶ τῶν ἱ(ε)ρῶν [καὶ] / θυσιαῶν πόλ[εως] / παρ' Αὐρηλίου Λ[...] /
 θίωνος Θεοδώρου μη[τρὸς] / Παντωνυμίδος ἀπὸ τῆ[ς] / αὐτῆς πόλεως. αἰεὶ μὲν /
 θύων καὶ σπένδων [τοῖς] / θεοῖς [δ]ιετέλλ[εσσα] ἔ[τι] δὲ / καὶ νῦν ἐνώπιον ὑμῶν /
 κατὰ τὰ κελευσθ[έ]ν[τα] / ἔσπεισα καὶ ἔθυσσα κα[ὶ] / τῶν ἱ(ε)ρῶν ἐγευσάμην /
 ἅμα τῷ υἱῷ μου Αὐρη- / λίου Διοσκόρου καὶ τῆ / θυγατρὶ μου Αὐρηλία / Λαί(ε)δι
 ἀξιῶ ὑμᾶς ὑπ[ὸ] / σημιώσασθαι μοι. / (ἔτους) αὐτοκράτορος Καίσαρος / Γαί(ε)
 ου Μεσσίου Κύντου / Τραι(ε)ανοῦ Δεκίου / Εὐσεβοῦ[ς] Εὐ[τυχοῦς] / [Σεβασ]τοῦ
 [Παῦ]νι κ. / [...]ν() / -ca.?-] / -----³⁴

31 But see MacMullen 1986.
 32 Eutropius, the latin historian, *magister memoriae* of Valens (364-378, emperor of the Eastern part of the Empire), wrote: *Huius tantum memoriae delatum est, ut usque ad nostram aetatem non aliter in senatu principibus adclametur, nisi "Felicior Augusto, melior Traiano". Adeo in eo gloria bonitatis obtinuit, ut vel adsentantibus vel vere laudantibus occasionem magnificentissimi praestet exempli* (Eutr. brev. 8.5).
 33 Ceconi, Hostein 2018.
 34 "To the commission in charge of the sacred victims and sacrifices of the city. From Aurelius L[...]thion, son of Theodore and Pantonymis, his mother, of the same city. I have always and without interruption sacrificed and poured libations to the gods, and now in your presence in accordance with the decree I have poured a libation, and sacrificed, and partaken of the sacred victims, together with my son Aurelius Dioscorus and my daughter Aurelia Lais. I request you to certify this for me below. Year one of Imperator Caesar Gaius Messius Quintus

In the early winter of AD 249³⁵ Decius issued an edict ordering all the inhabitants³⁶ of the Empire (it's possible that the Jews were exempted) to perform in the presence of commissioners a religious sacrifice to the gods, eat the sacrificial meat, swear that they had always sacrificed.³⁷ The sacrifice performed was registered on a certificate. The refusal to sacrifice could lead to jail, exile, loss of property, torture and death; the bishops of Rome and Antioch were executed few months after the publication of the edict.

Rives has underscored the novelty of Decius' initiative: an imperial edict (a general provision intended to reach everyone in the Empire), a particular cult act required of all the inhabitants of the Empire, an administrative procedure of control and certification applied to the religious sphere. We face the institutional emersion of a new category of obligation, a religious obligation.³⁸ And we face the beginning of the third phase of the relations between Romans and Christians: less persecutions instigated from below, kindled by personal or popular hostility, in front of "empire-wide persecutions instigated from above".³⁹

Since the middle years of the 3rd century the emperors considered the preservation of Roman religion a priority, in order to obtain protection, to restore the *pax deorum* and to grant the success of the Roman armies.⁴⁰ Decius decided not to persecute the Christians, but to reaffirm – in a time of crisis – the relevance of the Roman religion, after centuries of widespread flourishing of new cults, personal devotions, private cult associations. Of all the inhabitants of the Empire only the Christians suffered persecutions and only the Christian

Traianus Decius Pius Felix Augustus" (translation by Knipfing 1923: 345-390, esp. nr. 4); see also Luijendijk 2008: 162.

35 Sordi 1980; Pohlsander 1986; Selinger 1994; Rebillard 2012: 47 ff.

36 Not the Christians only. In the papyri we read of Aurelia Ammounis, a "priestess of the god Petesouchos [i.e. the crocodile god Sobek], the great, the mighty, the immortal, and priestess of the gods in the Moeris quarter" (Knipfing 1923: nr. 3).

37 This contents are written, with some variations, on the extant papyrus certificates; see forty-one certificates (texts and translations) in Knipfing 1923.

38 "The comparison of these documents thus lets us see Decius' edict on sacrifices as the application of well-established bureaucratic procedures to a new area, that of cult. Just as all the inhabitants of the Empire were required to submit an account of their persons and property to the government, so now they also had to register their performance of the specified cult act. And just as they were given receipts to prove fulfilment of their financial obligations, so now they were given certificates to prove fulfilment of their religious obligations" (Rives 1999: 150).

39 Rives 2011: 211.

40 Alföldy 1989.

historical sources give an account of the Decius' edict.⁴¹ The Christians were the only ones considering the pagan deities – if not mere human beings – nothing more than demons: obedience to the political power would have meant idolatry. Moreover we have to keep in mind that there is a specific Christian rule, forbidding to eat the sacrificial meat. The choice was between treason against God or treason against the Empire, according to the way in which the Christians' conduct was juridically qualified. And we will see how some Christian apologetes tried to give a different view of the juridical aspects.

The core profile was the cult act required by Decius. His decree, issued around 40 years after Caracalla's citizenship decree,⁴² contributed to a transformation of the Roman religion, overcoming the local dimension of the civic cults, focusing on an imperial dimension and on an Empire's religion, centred on a particular cult act. One Empire, one citizenship, one civic religion which requires to be manifested in a cult act: not performing the cult act meant to oppose the Empire.⁴³

It was the widespread confirmation of a traditional feature of the Roman religion: the orthopraxis, the correct performing of the rites. Religion, *id est cultu deorum*, was the very essence of the superiority

- 41 The Christians writers gave an harsh evaluation of Decius. See, for instance, Cypr. ep. 55.9.1: *Eo tempore cum tyrannus infestus sacerdotibus Dei fanda atque infanda comminaretur; Lact. de mort. persec. 4.1: Extitit enim post annos plurimos execrabile animal Decius, qui vexaret ecclesiam: quis enim iustitiam nisi malus persequatur?* On the other hand, the pagan writers painted Decius in a positive way; see, for instance, Zos. *hist. nov.* 1.23.3; (Ps.-) Aur. Vict. *epit. Caes.* 29.2: *Vir artibus cunctis virtutibusque instructus, placidus et communis domi, in armis promptissimus.* Fagnoli 2014: 215 f. wrote about legislative politics regarding the Christians: "Auf der anderen Seite ist aus den entdeckten libelli und deren Datierung herzuleiten, dass Decius' Religionskonstitution ein Opfertest und kein Verfolgungsedikt war. Wäre es ein Verfolgungsedikt gewesen, hätte es keinen Sinn gehabt, dass es nach einem knappen Jahr keine Anwendung mehr fand. Wenn es um die Christenverfolgung gegangen wäre, hätte Decius die Anwendung seines Edikts bis zum Ende seiner Regierung verlangt. Die späte Quelle von Georgius Cedrenus scheint diese These zu bestätigen. Decius' Verbot für christliche Frauen, eine Kopfbedeckung zu tragen, spricht gegen einen systematischen und blutigen Unterdrückungskampf gegen die Christen". See also Fagnoli 2015; Fagnoli 2016.
- 42 There is no certainty about the end which Caracalla was aiming for with his constitution on citizenship; one hypothesis is that it aimed to respond to the economic difficulties that afflicted the *aerarium militare*. Cfr. Duncan-Jones 1994: 33 ff.; Marotta 2009; Rocco 2012: 34 ff.; Imrie 2018: 76 ff.; Corbo 2013; Mercogliano 2017: 69 ff.; Costa 2019.
- 43 "Caracalla's citizenship decree: while the latter replaced the mishmash of local citizenships with a universal and theoretically homogeneous citizenship, the former summarized the huge range of local cults in a single religious act that signalled membership in the Roman Empire. By defining the minimal cult behaviour expected of all Romans, Decius was in effect establishing a kind of orthopraxy. This inevitably resulted in the identification and punishment of deviants, just as the definition of orthodoxy by later Christian leaders led to the identification and punishment of heretics. It is thus not surprising that before Decius' decree on universal sacrifice, there had been no centrally organized persecutions of Christians: it was only when a 'religion of the Empire' had been defined and its boundaries set that there could be a systematic persecution of people who transgressed those boundaries" (Rives 1999: 153).

of Romans compared to other people, according to Cicero (*nat. deor.* 2.8), and the cult had to be performed correctly.⁴⁴ This characteristic was assumed naturally as the characteristic of the Roman imperial religion;⁴⁵ this external, ritualistic and manifest adherence to the Empire's religion will endure also under the 'Christian' Empire (which is an oxymore in an evangelic perspective).

The Christians perceived this intertwining as idolatry and as a deceiving melting pot of two separate realms. So they accepted the public authority within the political sphere, but refused to overlap it to the religious sphere, in which they preserved their freedom even if it cost their lives.⁴⁶ On the other side, the Roman empire was suffering a deep crisis and Decius, even if not directly targeting Christians, aimed to ensure the *pax deorum* for the Empire and for himself, to compact and unify the citizens of the Empire, in order to make it through the ongoing crisis. The circumstances differed from that of the age of Trajan and the reaction of the Empire (on the political, administrative and legal level) took a different form, according to the new scenario. Uniformity was required and control became capillar; the initiative stemmed from the centre to the periphery of the Roman Empire.

4. The Christian writers of the first three centuries fostered the idea of religious tolerance within the Roman borders, in order to preserve their very existence along with respect for their own religious free-

44 Cic. *har. resp.* 11.23: *An si ludius constitit, aut tibicen repente conticuit, aut puer ille patrimus et matrimus si tensam non tenuit, si lorum omisit, aut si aedilis verbo aut simpuvio aberravit, ludi sunt non rite facti, eaque errata expiantur, et mentes deorum immortalium ludorum instauratione placantur. Pax deorum depends on the correct performing of the rituals; and the magistrates (aediles) were involved in uttering the correct words of the prayers.*

Plin. *nat. hist.* 28.3.10-11: *videmusque certis precationibus obsecrasse summos magistratus et, ne quod verborum praetereatur aut praeposterum dicatur, de scripto praeire aliquem rursusque alium custodem dari qui attendat, alium vero praeponi qui favere linguis iubeat, tibicinem canere, ne quid aliud exaudiat, utraque memoria insigni, quotiens ipsae dirae obstrepentes nocuerint quotiensve precatio erraverit.* Pliny the Elder attests the formalistic approach and the intertwining of religion and politics; in fact Roman chief magistrates have adopted fixed formulas for their prayers.

45 The identification of the Imperial religion with the cult act is attested in the laws and deeds of several emperors; for instance, under Valerianus (253-260), as soon as the Christians were subjected to questioning, we read in *Acta Cypriani* I: *eos qui Romanam religionem non colunt, debere Romanas caeremonias recognoscere*; see Sordi 1979: 370. Diocletianus, according to Eus. *Περὶ τῶν ἐν Παλαιστίνῃ Μαρτυρησάντων* by means of the second edict compelled the entire population in every city to sacrifice to the idols; see Sperandio 2013; Cecconi 2018; Sini-scalco 2009: 94 ff. See also Galerius (305-311) in Lact. *mort. pers.* 34.3: *nostra iussio extitisset, ut ad veterum se instituta conferrent; 34.2: tanta eosdem Christianos voluntas invasisset ... ut non illa veterum instituta sequerentur.* See Minale 2018; Prinzivalli 2009; Marcone 1993; Amarelli 2007a; Rives 2012.

46 Rev 12.11: "They triumphed over him by the blood of the Lamb and by the word of their testimony; they did not love their lives so much as to shrink from death".

dom. They were able to conceive, according to Jesus' teachings, a different way of thinking the relationship between religion and politics, a new perspective in which religious freedom could have a place, a new dimension in which the freedom of conscience could flourish.

Tertullian, born in Carthage, soon after his conversion to Christianity⁴⁷ wrote the Apology (*Apologeticum*) around AD 197; he fostered complete religious freedom (*religionis libertas*), a 'fundamental right' to be granted to Christians as well as to everybody. So fundamental a right that it must be granted even to idolaters, who are nothing more than demons-worshippers.

In brief, Tertullian argues as follows. Pagans adore demons as if they are gods. The evidence is given by the demons themselves: once questioned by Christians, the demons confess that they are demons and not gods (*apol. 23.4*), compelled by the Jesus-given authority that Christians exert (*apol. 23.15*).

Moreover, demons affirm the existence of only one God, the one who the Christians serve (*apol. 24.1*). If the demons themselves deny their own divinity, the Roman religion is not a religion. So, the Christians cannot be guilty of injury to that religion (*crimen laesae religionis*), when that religion does not exist. If there is no object of the crime (the interest or juridical good safeguarded by the norm) there will not be the crime itself.

apol. 24.1: Omnis ista confessio illorum, qua se deos negant esse quaque non alium deum respondent praeter unum, cui nos mancipamur, satis idonea est ad depellendum crimen laesae maxime Romanae religionis. Si enim non sunt dei pro certo, nec religio pro certo est; si religio non est, quia nec dei, pro certo, nec nos pro certo rei sumus laesae religionis.

Tertullian also considers the other side of the coin and accuses the pagans of worshipping demons instead of God and of interfering with the due worship of the true God. So, he brought against the pagans the charge of injury to religion. The 'legal strategy' is not intended to pursue the pagans, of course, but to force them to dismiss the charge of *laesa religio* against the Christians.

apol. 24.2: At e contrario in vos exprobratio resultabit, qui mendacium colentes veram religionem veri dei non modo

47 See Krykowski 2001.

neglegendo, quin insuper expugnando, in verum committitis crimen verae irreligiositatis.

The clash is harsh. Tertullian denounces the error and the perversion of the Roman religion, but he affirms religious freedom anyway. So, let one dedicate his soul to God and another to a goat.⁴⁸ In fact he considers a sort of blasphemy (*irreligiositas*) denying religious freedom as well as worshipping demons. And even the Christians can be accused of the first kind of *irreligiositas* if they deny religious freedom to pagans.

apol. 24.6: Videte enim, ne et hoc ad irreligiositatis elogium concurrat, adimere libertatem religionis et interdicare optionem divinitatis, ut non liceat mihi colere quem velim, sed cogar colere quem nolim. Nemo se ab invito coli volet, ne homo quidem.

The last sentence underscores a relevant spiritual concept of Jesus' preaching: it is useless in the eyes of God to perform exterior acts (religion) without inner participation, without love, without a relationship pouring from the heart of man (faith). Jesus quotes the prophet Isaiah (Mt 15:6-9; see Mk 7:6-8): "Thus you nullify the word of God for the sake of your tradition. You hypocrites! Isaiah was right when he prophesied about you: «These people honour me with their lips, but their hearts are far from me. They worship me in vain; their teachings are merely human rules»."⁴⁹

To sum up the argument made by Tertullian, we can identify two points: a) Christians are not liable of irreligiosity because there is no object of the crime; b) who denies religious freedom (*religionis libertas*) is liable of irreligiosity.

In the apologetic epistle (*Ad Scapulam*) addressed to the governor of Africa, Publius Scapula Tertullus Iulius Priscus, who was persecuting Christians,⁵⁰ Tertullian deals briefly with the same subject,

48 Tert. *apol. 24.5: Colat alius Deum, alius Iovem; alius ad caelum manus supplices tendat, alius ad aram Fidei manus; alius (si hoc putatis) nubes numeret orans, alius lacunaria; alius suam animam deo suo voveat, alius hirci.* Tertullian preaches freedom of religion but his approach is far from the 'politically correct' standard; he openly despises the other religions and writes: "let one dedicate his own soul to his own God, another to a goat".

49 Is 29:13: "The Lord says: «These people come near to me with their mouth and honor me with their lips, but their hearts are far from me. Their worship of me is based on merely human rules they have been taught»".

50 Cfr. Rinaldi 2004: 489.66. See also Dunn 2002.

paying more attention to the juridical profiles.⁵¹ The premise is clear: there is a true God and a true religion; all the rest is nothing more than idolatry.

Scap. 2.1: Nos unum Deum colimus, quem omnes naturaliter nostis, ad cuius fulgura et tonitrua contremiscitis, ad cuius beneficia gaudetis. Ceteros et ipsi putatis deos esse, quos nos daemonas scimus.

Christians worship the true and only God, everybody else worships demons. But there is a right accepted by every man which is meanwhile a *naturalis potestas*, namely religious freedom:⁵²

Scap. 2.2: Tamen humani iuris et naturalis potestatis est unicuique quod putauerit colere; nec alii obest aut prodest alterius religio. Sed nec religionis est cogere religionem, quae sponte suscipi debeat, non vi, cum et hostiae ab animo libenti expostulentur. Ita etsi nos compuleritis ad sacrificandum, nihil praestabitis diis vestris: ab invitis enim sacrificia non desiderabunt.

Tertullian distinguishes the laws produced by man and the right directly assigned to each man by nature⁵³. The *naturalis potestas* pre-dates the *ius positum*, the human law; the *naturalis potestas* belongs to a superior rank of the law and dictates rules which are over the human legislative level; no human law has the power to modify the natural law.

Religious freedom is a fundamental right, established by nature. Therefore, it is beyond the approval or the disapproval of the public

51 See Beck 1930; Vitton 1972; Martini 1975; Gaudemet 1978: 15; Amarelli 1994; Amarelli 2002; Amarelli 2007b; Rizzelli 2011: 5; Rebillard 2012: 34 ff.

52 In the domain of public law, *potestas* “generally indicates the power of a magistrate whether he is vested with *imperium* or not. Potestas embraces all the rights and duties connected with a particular magistracy”; in the field of private law, *potestas* “refers either to the power of a head of a family over its members (*patria potestas*), or the power over a thing”. In its broader sense *potestas* “means either the physical ability (= *facultas*) or the legal capacity (= *ius*) to do something” (all the quotations from Berger 1953: 640).

53 Cfr. *Cic. Mil. 4.10: Est igitur haec, iudices, non scripta, sed nata lex; quam non didicimus, accepimus, legimus, verum ex natura ipsa adripuimus, hausimus, expressimus; ad quam non docti sed facti, non instituti sed imbuti sumus, – ut, si vita nostra in aliquas insidias, si in vim et in tela aut latronum aut inimicorum incidisset, omnis honesta ratio esset expediendae salutis.* On this subject see Kofanov 2009; Mantovani, Schiavone 2007; Fontanella 2012. Specifically on Tertullian: Wysocki 2013; Giagnorio 2018: 143.

authority; its content is summed up in letting everyone worship the gods he freely chooses, according to his own convictions. Hence, in Tertullian's perspective, the Roman governor Scapula has no legal basis to pursue Christians exerting religious freedom.

Tertullian underscores the individual dimension of personal faith (a personal relationship which differs from religion conceived as the performance of cult acts): the religious choice affects only the individual who makes that choice (*nec alii obest aut prodest alterius religio*).⁵⁴ Moreover, it is disrespectful, unreligious, in some way blasphemous to exert compulsion in religious matters. This space is a free space, in which Tertullian requires complete individual freedom to allow the expression of the free will of every single human being. According to this perspective, it is useless even for the imperial *pax deorum* to force somebody to sacrifice (*Ita etsi nos compuleritis ad sacrificandum, nihil praestabitis diis vestris*).

Tertullian goes on anticipating the theme of *patientia Dei* and eternal judgment, that we will consider also in Lactantius (in adherence to Tertullian's perspective)⁵⁵ and in Augustine (who affirms a different doctrinal and practical solution).

Scap. 2.3. *Denique qui est verus, omnia sua ex aequo et profanis et suis praestat. Ideoque et iudicium constituit aeternum de gratis et ingratīs.*

God gives his gifts to every man, to Christians as well to non-Christians (*profanis*), but, in the end, everyone will face God's eternal judgment.

The immediate goal pursued by Tertullian with this apologetic epistle was to deprive the persecution of Christians of any moral, reli-

54 See Wilken 2019: 1 ff., 189 ff. about the influence of Tertullian on Thomas Jefferson. Jefferson affirms (in *Notes on the State of Virginia*, 1785) that "it does me no injury whether my neighbour says that there are twenty gods or no god, it neither picks my pocket nor breaks my leg." Wilken had discovered in Jefferson's own personal copy of *Notes on the State of Virginia* (now held in the Albert and Shirley Small Special Collections Library at the University of Virginia) the quote *nec alii obest aut prodest alterius religio*, written by Jefferson with a pencil; and in his copy of *Ad Scapulam* (now in the Jefferson collection of the Library of Congress) Jefferson had underlined that passage. Wilken 2019: 190 affirms: "It is unlikely Jefferson knew the passage from Tertullian when he wrote the Notes. He probably learned about it years later, though from whom and when is not known. But after he learned of it, the words became fixed in his mind". Lactantius, writing between 304 and 311, before the end of the persecution, affirmed: "Nothing is as personal as a religious choice" (Lact. *inst.* 5.19.23: *Nihil est enim tam voluntarium quam religio*). See Marotta 2016.

55 Christians ought to behave patiently, inspired by the *patientia Dei*; in fact God *iubet nos expectare patienter illum coelestis iudicii diem* (Lact. *inst.* 5.23.3).

gious, or legal justification.⁵⁶ But he attained a more relevant, enduring, and general objective: he illustrated several aspects of religious freedom, recognising it as a fundamental right inscribed in nature.

To sum up: Tertullian affirms that there is only one true God, the Christian God, and only one true religion, the Christian religion; all the rest is nothing more than idolatry and blasphemous cults of demons. Among the rules inscribed in the nature, and superior to the *ius positum* created by the political authority, he indicates the religious freedom (*religionis libertas*). This inalienable and fundamental right is articulated in some limits imposed on the public authority: the prohibition to ban religious freedom (*adimere libertatem religionis*), to prevent anyone from choosing his god (*interdicere optionem divinitatis*) and to impose unwanted worshipping (*cogar colere quae nolim*). It is a clear, solid, contemporary description of some basic legal contents of religious liberty.

There is only one true and holy religion; anyway the separation between religion and politics (therefore the secular nature of the state or at least the non-interference of the state in matters of conscience) guarantees tolerance and religious freedom. Even from a Christian perspective as Tertullian's, or, indeed, thanks to the original Christian perspective, rooted in the teaching of Jesus.

5. Christianity received acceptance and toleration in the second decade of the 4th century AD. At the Milan meeting Constantine and Licinius,⁵⁷ the two co-emperors, established some points, as we read in Lactantius, *De mortibus persecutorum* 48.1-13.⁵⁸ First of all (a.) tolerance is based on religion, therefore the faculty to worship was given to Christians and to everybody alike (*ut daremus et Christianis et omnibus liberam potestatem sequendi religionem quam quisque voluisset*). The Deity (b.) was not precisely identified: the State had

56 Giagnorio 2018: 144; Dattrino 2007.

57 Seeck 1891; Siniscalco 2013.

58 The most relevant section of the text to our subject is Lact. *mort. pers.* 48.2-3: [2] *Cum feliciter tam ego [quam] Constantinus Augustus quam etiam ego Licinius Augustus apud Mediolanum convenissemus atque universa quae ad commoda et securitatem publicam pertinerent, in tractatu haberemus, haec inter cetera quae videbamus pluribus hominibus profutura, vel in primis ordinanda esse credidimus, quibus divinitatis reverentia continebatur, ut daremus et Christianis et omnibus liberam potestatem sequendi religionem quam quisque voluisset, quod quicquid <est> divinitatis in sede caelesti nobis atque omnibus qui sub potestate nostra sunt constituti, placatum ac propitium possit existere. [3] Itaque hoc consilium salubri ac recticissima ratione ineundum esse credidimus, ut nulli omnino facultatem abnegendam putarem, qui vel observationi Christianorum vel ei religioni mentem suam dederet quam ipse sibi aptissimam esse sentiret, ut possit nobis summa divinitas, cuius religioni liberis mentibus obsequimur, in omnibus solitum favorem suum benivolentiamque praestare.* See Amarelli 1970; Rougé, De Decker 2013.

not officially chosen it yet.⁵⁹ The aim (c.) was to gain the favour of the supernatural powers for the emperors' and their subjects' sake: the mechanism of *pax deorum* therefore was still in force, but presented a monotheistic nuance (*pax divinitatis*). Religion was confirmed to be a major political concern, a public duty to take care of.

Recalling the same meeting, Eusebius (*Historia ecclesiastica* 10.5.1-14)⁶⁰ confirms Lactantius: the emperors granted religious liberty to everybody, the deity's identity was undetermined, the goal was the common prosperity.

The freedom of religion, however, was embedded in the traditional *do ut des* mechanism, in order to gain the favour of whatever heavenly power existed. In some way the Christian God was inserted in the pagan pantheon, but the individual choice was free and

59 Lact. *mort. pers.* 48.2: *quicquid <est> divinitatis in sede caelesti*. Martini 1995; DePalma Diger 2000; Alicino 2014; MacMullen 2014.

60 The most relevant section of the text to our subject is Eus. *hist. eccl.* 10.5.1-5: [1] Φέρε δὴ, λοιπὸν καὶ τῶν βασιλικῶν διατάξεων Κωνσταντίνου καὶ Λικινίου τὰς ἐκ τῆς Ῥωμαίων φωνῆς μεταληφθείσας ἐρμηνείας παραθώμεθα. ΑΝΤΙΓΡΑΦΟΝ ΒΑΣΙΛΙΚΩΝ ΔΙΑΤΑΞΕΩΝ ΕΚ ΡΩΜΑΙΚΗΣ ΓΛΩΤΤΗΣ ΜΕΤΑΛΗΦΘΕΙΣΩΝ Ηδὴ [2] μὲν πάσαι σκοποῦντες τὴν ἐλευθερίαν τῆς θρησκείας οὐκ ἀρνητέαν εἶναι, ἀλλ' ἐνὸς ἐκάστου τῆ διανοῦ καὶ τῆ βουλήσει ἐξουσίαν δοτέον τοῦ τὰ θεῖα πράγματα τημελεῖν κατὰ τὴν αὐτοῦ προαίρεσιν ἕκαστον, κεκελεύεμεν τοῖς τε Χριστιανοῖς ...τῆς αἰρέσεως καὶ τῆς θρησκείας τῆς ἑαυτῶν τὴν πίστιν φυλάττειν: [3] ἀλλ' ἐπειδὴ πολλαὶ καὶ διάφοροι αἰρέσεις ἐν ἐκείνῃ τῇ ἀντιγραφῇ, ἐν ἧ τοῖς αὐτοῖς συνχωρήθη ἡ τοιαύτη ἐξουσία, ἐδόκουν προστεθεῖσθαι σαφῶς, τυχὸν ἴσως τινὲς αὐτῶν μετ' ὀλίγου ἀπὸ τῆς τοιαύτης παραφυλάξεως ἀπεκρούοντο. [4] εὐτυχῶς ἐγὼ Κωνσταντίνος ὁ Αὐγουστος καὶ γὰρ Λικίνιος ὁ Αὐγουστος ἐν τῇ Μεδιολάνῳ ἐληλύθειμεν καὶ πάντα ὅσα πρὸς τὸ λυσιτελεῖν καὶ τὸ χρῆσιμον τῷ κοινῷ διέφερον, ἐν ζητήσει ἔσχομεν, ταῦτα μεταξὺ τῶν λοιπῶν ἄτινα ἐδόκει ἐν πολλοῖς ἅπασιν ἐπωφελεῖ εἶναι, μᾶλλον δὲ ἐν πρώτοις διατάξαι ἐδογματίσαμεν, οἷς ἡ πρὸς τὸ θεῖον αἰδῶς τε καὶ τὸ σέβας ἐνείχεται, τοῦτ' ἔστιν, ὅπως δῶμεν καὶ τοῖς Χριστιανοῖς καὶ πᾶσιν ἐλευθέραν αἴρεσιν τοῦ ἀκολουθεῖν τῇ θρησκείᾳ ἧ ὃ ἂν βουληθῶσιν, ὅπως δ' τί ποτέ ἐστιν θεοῦ καὶ οὐρανοῦ πράγματος, ἡμῖν καὶ πᾶσι τοῖς ὑπὸ τὴν ἡμετέραν ἐξουσίαν διάγουσιν εὐμένες εἶναι δυνήθη. [5] τοίνυν ταύτην τὴν ἡμετέραν βούλησιν ὑγιεινῶ καὶ ὀρθοτάτῳ λογισμῷ ἐδογματίσαμεν, ὅπως μηδενὶ παντελῶς ἐξουσία ἀρνητέα ἢ τοῦ ἀκολουθεῖν καὶ αἰρεῖσθαι τὴν τῶν Χριστιανῶν παραφυλάξιν ἢ θρησκείαν ἐκάστῳ τε ἐξουσία δοθεῖν τοῦ διδόναι ἑαυτοῦ τὴν διάνοιαν ἐν ἐκείνῃ τῇ θρησκείᾳ, ἣν αὐτὸς ἑαυτῷ ἀρμόζει νομίζει, ὅπως ἡμῖν δυνήθη τὸ θεῖον ἐν πᾶσι τὴν ἔθιμον σπουδῆν καὶ καλοκάγαθιαν παρέχειν. "1. Let us finally subjoin the translations from the Roman tongue of the imperial decrees of Constantine and Licinius. Copy of imperial decrees translated from the Roman tongue. 2. Perceiving long ago that religious liberty ought not to be denied, but that it ought to be granted to the judgment and desire of each individual to perform his religious duties according to his own choice, we had given orders that every man, Christians as well as others, should preserve the faith of his own sect and religion. 3. But since in that rescript, in which such liberty was granted them, many and various conditions seemed clearly added, some of them, it may be, after a little retired from such observance. 4. When I, Constantine Augustus, and I, Licinius Augustus, came under favorable auspices to Milan and took under consideration everything which pertained to the common good and prosperity, we resolved among other things, or rather first of all, to make such decrees as seemed in many respects for the benefit of every one; namely, such as should preserve reverence and piety toward the deity. We resolved, that is, to grant both to the Christians and to all men freedom to follow the religion which they choose, that whatever heavenly divinity exists may be propitious to us and to all that live under our government. 5. We have, therefore, determined, with sound and upright purpose, that liberty is to be denied to no one, to choose and to follow the religious observances of the Christians, but that to each one freedom is to be given to devote his mind to that religion which he may think adapted to himself, in order that the Deity may exhibit to us in all things his accustomed care and favor" [transl. by A. Cushman McCiffert].

no cult act was required in order to prove the citizen's loyalty to the Empire.

Constantine, a few years later, in continuity with the traditional imperial role of the *pontifex maximus*, affirmed to be a bishop over the external affairs of the church (ἐπίσκοπος τῶν ἐκτός), appointed by God.⁶¹ In this way he affirmed the existence of a secular and universal episcopate, according to the will of God, which is nothing more than a new 'Christian' clothing draped on the traditional body of the emperor / *pontifex maximus*.

Constantine depicted himself as the supervisor of the Church in several occasions and decided to foster the Catholic church with his riches and his laws, excluding schismatics and heretics from the privileges accorded to the Christians.⁶² Several laws supporting the church⁶³ represent a "crescendo di favori e di privilegi che sono concepibili solo nella prospettiva di una religione che si voglia far asurgere al rango di religione di Stato".⁶⁴ Moreover, Constantine made clear his despise for paganism – which he considered nothing more than *aliena superstitio*, opposite to the Christian religion recognised

- 61 Eus. v.C. 4.24: "Ἐνθεν εἰκότως αὐτὸς ἐν ἐστιάσει ποτὲ δεξιούμενος ἐπισκόπους λόγον ἀφῆκεν, ὡς ἄρα καὶ αὐτὸς εἴη ἐπίσκοπος, ὧδέ πη αὐτοῖς εἰπὼν ῥήμασιν ἐφ' ἡμετέραις ἀκοαῖς: «ἀλλ' ὑμεῖς μὲν τῶν εἰσω τῆς ἐκκλησίας, ἐγὼ δὲ τῶν ἐκτός ὑπὸ θεοῦ καθεσταμένος ἐπίσκοπος ἂν εἴην.» ἀκόλουθα δὲ τῷ λόγῳ διανοοῦμενος τοὺς ἀρχομένους ἅπαντας ἐπεσκόπει, προὔτρεπέ τε ὅσηπερ ἂν ἡ δύναμις τὸν εὐσεβῆ μεταδιώκειν βίον. "Hence it was not without reason that once, on the occasion of his entertaining a company of bishops, he let fall the expression, that he himself too was a bishop, addressing them in my hearing in the following words: You are bishops whose jurisdiction is within the Church: 'I also am a bishop, ordained by God to overlook whatever is external to the Church'. And truly his measures corresponded with his words: for he watched over his subjects with an episcopal care, and exhorted them as far as in him lay to follow a godly life". [transl. by E. Cushing Richardson]. See Corsaro 2012. On the difference between the 'bishop of those outside the church' and the 'common bishop' see Dainese 2018: 155 f.
- 62 See Escribano Paño 2013; Minale 2013; Lenski 2016. Constantine's son, Constantius, adhered to the 'Arian' creed and persecuted Nicene orthodoxy, until Theodosius I, the first emperor who was baptized in the Nicene faith, became the emperor in 379 AD. On Theodosius' legislation see Fargnoli 2005; Escribano Paño 2014.
- 63 See, for instance, CTh. 16.8.1 (315) (with Cl. 1.9.3) the protection of the new converts to Christianity; *manumissio in ecclesia*: Cl. 1.13.1 (316); *episcopalis audientia* (318): CTh. 1.27.1; public transports: CTh. 16.2.2 (319 or 313); *caelibes* and *orbi* (CTh. 8.16.1, 320); tax-exemption for the clergy: CTh. 16.2.10; *dies solis* (321), Cl. 3.12.2 and CTh. 2.8.1; *manumissio in ecclesia* grants the citizenship, CTh. 4.7.1; bequest in favour of the churches (321): CTh. 16.2.4 and Cl. 1.2.1; the clergy and the sacrifices to pagan deities: CTh. 16.2.5 (323). On the identification of bishop and official in North Africa during the 4th and 5th centuries see Brown 1963: 292. On the juridical and political subject of the *episcopalis audientia* see Vismara 1995; Selb, 1967; Waldstein 1976; Cuena Boy 1985; Cimma 1989; Crifò 1992; Huck 2008; Rinaldi 2010; Maiuri 2012; Puliatti 2016; Huck 2020.
- 64 Marcone 2002: 98.

as *sanctissima lex*⁶⁵ – and that his own personal will was to not be involved in the sacrifices to pagan gods.⁶⁶

During the reign of Constantine the *do ut des* mechanism of the Roman religion (the *pólis* gives cults, the gods give protection) changed one part of the agreement: the *pólis* gives cults, God (the Christian God) gives protection. Constantine makes clear this fact, which represents strong continuity in the way of thinking the relationship between politics and religion.

A large number of facts, beginning directly after the capture of Rome, underlines Constantine's favour toward the Church, an incontrovertible sign of his gratitude to the Christian God and his hitching desire to confirm the Christian God's protection over himself. So Constantine not only granted the liberty of worshipping and righted the wrongs suffered by the Christians during the persecutions but also subsidized the Church with public funds, sustained the unity of the Church getting involved with the great problem of the schism that took place in Africa, hosted bishops at his court and considered some of them as totally trustworthy advisers (it is the case of the bishop Hosius of Corduba, in Spain).

A letter written by Constantine to Anullinus, governor of Africa, in 312-313, quoted by Eusebius of Caesarea in his Ecclesiastical History,⁶⁷ represents useful evidence of the emperor's ideas and conduct. In this document Constantine affirms that it is clear that when religion is despised great dangers are brought upon public affairs; on the other hand, the scrupulous observance of the religious rules brings

65 CTh. 16.2.5: *Idem A. ad Helpidium. Quoniam comperimus quosdam ecclesiasticos et ceteros catholicae sectae servientes a diversarum religionum hominibus ad lustrorum sacrificia celebranda compelli, hac sanctione sancimus, si quis ad ritum alienae superstitionis cogendos esse crediderit eos, qui sanctissimae legi serviunt, si condicio patiat, publice fustibus verberetur, si vero honoris ratio talem ab eo repellat iniuriam, condemnationem sustineat damni gravissimi, quod rebus publicis vidicabitur. Dat. viii kal. Iun. Sirmi Severo et Rufino cons. (323 mai. [?] 25).*

66 Cecconi 2012.

67 Eus. *hist. eccl.* 10.7.1-2: [1] ΑΝΤΙΓΡΑΦΟΝ ΒΑΣΙΛΙΚΗΣ ΕΠΙΣΤΟΛΗΣ ΔΙ' ΗΣ ΤΟΥΣ ΠΡΟΕΣΤΩΤΑΣ ΤΩΝ ΕΚΚΛΗΣΙΩΝ ΠΑΣΗΣ ΑΠΟΛΕΛΥΣΘΑΙ ΤΗΣ ΠΕΡΙ ΤΑ ΠΟΛΙΤΙΚΑ ΛΕΙΤΟΥΡΓΙΑΣ ΠΡΟΣΤΑΤΤΕΙ Χαίρε, Άνυλίνε, τιμώτατε ἡμῖν. ἐπειδὴ ἐκ πλείονων πραγμάτων φαίνεται παρεξουθνηθεῖσαν τὴν θρησκείαν, ἐν ἣ ἡ κορυφαία τῆς ἀγιωτάτης ἐπουρανίου αἰδῶς φυλάττεται, μεγάλους κινδύνους ἐνηνοχέαι τοῖς δημοσίοις πράγμασιν αὐτὴν τε ταύτην ἐνθρόμως ἀναληφθεῖσαν καὶ φυλαττομένην μεγίστην εὐτυχίαν τῷ Ῥωμαϊκῷ ὀνόματι καὶ σύμπαι τοῖς τῶν ἀνθρώπων πράγμασιν ἐξαιρέτων εὐδαμονίαν παρεσχηκέναι, τῶν θείων εὐεργεσιῶν τοῦτο παρεχουσῶν, ἔδοξεν ἐκείνους τοὺς ἀνδρας τοὺς τῆ ὀφειλομένη ἀγιότητι καὶ τῆ τοῦ νόμου τούτου παρεδρία τὰς ὑπηρεσίας τὰς ἐξ αὐτῶν τῆ τῆς θείας θρησκείας θεραπεία παρέχοντας τῶν καμάτων τῶν ἰδίων τὰ ἐπάθλα κομίσασθαι, Άνυλίνε τιμώτατε. [2] διόπερ ἐκείνους τοὺς εἰσω τῆς ἐπαρχίας τῆς σοι πιστευμένης ἐν τῇ καθολικῇ ἐκκλησίᾳ, ἡ Καικιλιανὸς ἐφέστηκεν, τὴν ἐξ αὐτῶν ὑπηρεσίαν τῇ ἀγίᾳ ταύτῃ θρησκείᾳ παρέχοντας, οὐσπερ κληρικοὺς ἐπονομάζειν εἰώθασιν, ἀπὸ πάντων ἀπαξ ἀπλῶς τῶν λειτουργιῶν βούλομαι ἀλείτουργήτους διαφυλαχθῆναι, ὅπως μὴ διὰ τινος πλάνης ἢ ἐξολισθήσεως ἱεροσούλου ἀπὸ τῆς θεραπείας τῆς τῆ θεϊότητι ὀφειλομένης ἀφέλκωνται, ἀλλὰ μᾶλλον ἄνευ τινὸς ἐνοχλήσεως τῷ ἰδίῳ νόμῳ ἐξυπηρετῶνται, ὧνπερ μεγίστην περὶ τὸ θεῖον λατρείαν ποιουμένων πλεῖστον ὅσον τοῖς κοινοῖς πράγμασι συνοίσειν δοκεῖ. ἔρρωσο, Άνυλίνε, τιμώτατε καὶ ποθεινότετε ἡμῖν.

prosperity to the Romans. According to this premise, the emperor establishes that those who serve with sanctity and with constant observance in order to grant the worshipping of the divine religion, should receive recompense for their labours. These men – specifically identified by Constantine in the clergy of the catholic Church – are exempted from all public burdens. Constantine motivates his decision in order to preserve the Catholic clergy's complete attention in the divine services; and, again, underscores that the observance of the religious duties produces prosperity for the State.

It is relevant that clerics were kept immune from all public burdens. But more relevant is the reason why Constantine acted this way. He wrote, with no hesitation, that thanks to the Christian God's favour everything had gone well for the Roman Empire and for himself. The prosperity and security of the Roman Empire was due to the protection of the Christian God, and worshipping this God was fundamental for the Roman State. Moreover, Constantine distinguished the Catholic Church, over which presided the bishop Caecilianus, from other Christian sects, specifically the Donatists. In some way, we perceive a stable continuity in the nature and role of religion: a public function, a direct concern of the political power, a *do ut des* mechanism to be scrupulously performed through rituals by specialized personnel publicly rewarded, a political and legal technique necessary to grant protection and success to the political guide and to the entire community. *Sacra* were the cornerstone of the *civitas*.

According to the will of the converted emperor, the Christian religion was rapidly transformed from a persecuted cult in the Roman Empire to the religion protecting the Roman Empire and the religion protected by the Roman emperors. And a full coverage of the Empire required a common religion, worshipping the emperor's God. Moreover, as Decius showed the unity of the Empire is confirmed and supported by the sharing of an imperial religion.⁶⁸ The traditional mechanism is fully at work in Constantine's way of thinking.

Two centuries later the emperor Justinian opened his *Codex Justinianus* with some of the more relevant doctrinal points of Christianity according to the emperor's view: a religious doctrine is affirmed in a legal text in order to be observed by all the people in the Roman

68 Rives 2011: 216: "it brought with it the idea that the empire, as a community, ought also to some extent have a common religion. emperors like Decius, Valerian, and Diocletian tried to achieve this within the framework of traditional Graeco-Roman religion, and consequently tried to restrict the potential of Christianity to function as an alternative locus for communal identity. In the end, however, it was the Christian emperors in the wake of Constantine who pursued this goal with more rigor and, arguably, with more success".

empire.⁶⁹ Anyway, since Constantine the religious sphere remained included in the civic / political sphere, in spite of the clear and radical dichotomy stated by Jesus and perspicuous to the early Christians, as Justin Martyr (see *supra*, § 1).⁷⁰ Moreover the new religion hosted in the pantheon and in the Roman politics was a monotheistic religion, an exclusive cult, allowing no others: tolerance was soon to be forgotten.⁷¹

6. The inclusion of the religious sphere into the political sphere changes the interpretation of God's will, of God's example, of the Gospel. The Christian message – divisive but not aggressive, as proved by Jesus himself in his life and death – underwent a major transformation.⁷²

Lactantius, a few years before the conversion of Constantine, wrote that Christians have to follow the example of God himself, who tolerates iniquity, paganism, doctrinal errors, persecutions against

- 69 See also the key role that *imperium* plays, according to Justinian's Nov. 6, a statute enacted in 535 in which the emperor deals with the procedure to ordain bishops and other ecclesiastics, and with the expenses of churches. The *imperium* is called to supervise the sound doctrine and the irreprehensible moral conduct of the clergy. Nov. 6 *praef.*: "The emperor Justinian to Epiphanius, Archbishop and Patriarch of Constantinople. The priesthood and the Empire are the two greatest gifts which God, in His infinite clemency, has bestowed upon mortals; the former has reference to Divine matters, the latter presides over and directs human affairs, and both, proceeding from the same principle, adorn the life of mankind; hence nothing should be such a source of care to the emperors as the honor of the priests who constantly pray to God for their salvation. For if the priesthood is, everywhere free from blame, and the Empire full of confidence in God is administered equitably and judiciously, general good will result, and whatever is beneficial will be bestowed upon the human race. Therefore We have the greatest solicitude for the observance of the divine rules and the preservation of the honor of the priesthood, which, if they are maintained, will result in the greatest advantages that can be conferred upon us by God, as well as in the confirmation of those which We already enjoy, and whatever We have not yet obtained We shall hereafter acquire. For all things terminate happily where the beginning is proper and agreeable to God. We think that this will take place if the sacred rules of the Church which the just, praiseworthy, and adorable Apostles, the inspectors and ministers of the Word of God, and the Holy Fathers have explained and preserved for Us, are obeyed" (transl. by S.P. Scott).
- 70 In the Christian tradition we face different evaluation of Constantine and his politics. In the Orthodox Church he is venerated as a saint and considered equal to the apostles. In the Protestant churches 'constantinism' is considered the root and the cause of the deviation of the Christian faith from its original path. See Hornus 1960; Sini, Onida 2003.
- 71 The Christian emperor, Gratianus (367-383), at the beginning of his reign issued another toleration law; see Socr. *Scol. hist. eccl.* 5.2.1; *Soz. hist. eccl.* 7.1.3. On the subject: Fargnoli 2009.
- 72 A clear example is briefly illustrated by Brown 1964: 108: "when Augustine wrote his *Retractationes*, he modified a quite innocuous remark in his *De Vera Religione*, in which he had said of Christ that: 'He did. nothing by force, but all things by persuading and admonishing' [*De vera rel.* 16.31]. He felt obliged to add another dimension: he now adds that Christ had driven the money-changers from the Temple, and that demons are exorcised by the 'force of his power' [*retract.* 1.12.6]. A remark such as this shows the extent to which issues of constraint and, even, of violence, that are usually extrapolated in isolation as a 'doctrine' of religious coercion, principally directed against the Donatists, had continued, throughout his life, to exercise Augustine on very many levels".

His people. God is patient, tolerant, he exerts *patientia*; and He will judge at the end of the times, on the judgment day. Christians must follow His example in their lives, being tolerant, exerting *patientia*; God – with the words of Lactantius – “orders us to wait patiently the judgment day”.⁷³ Lactantius does not renounce the affirmation of the exclusivity of his God, but indicates a Christian way of tolerance and respect for religious freedom. Jesus himself, narrating the parable of the weeds, orders to wait until the harvest.⁷⁴ The harvest, as Jesus explains, is the final judgment, which is entirely God’s responsibility.⁷⁵ God’s tolerance, or *patientia*, is reflected in this parable. And Lactantius wrote his text according to the Gospel. Translating *patientia Dei* in institutional and political terms means to prevent and forbid any of the State’s interventions in spiritual matter.

Less than a century later, during the crucial 4th century AD, Augustine (who was a bishop, a chief of the Catholic church) meditates several times on the parable of the weeds and produces the oxymoron ‘*misericors severitas*’, struggling to keep together the respect of truth and forgiveness, the need for a sound doctrine and the impossibility to discern the weed from the grain, the present struggle with heresies and God’s judgment at the end of times. In the end: Augustine was trying to balance tolerance and intolerance.⁷⁶

Reading Augustine’s letters to the imperial authorities an interesting and significant interpretation of *patientia Dei* emerges. *Patientia Dei* induces Augustine to write to the public authority in order to prevent the public force to kill the heretics. The Christian

73 Lact. *inst.* 5.23.3: *iubet nos expectare patienter illum coelestis iudicii diem*. On the freedom of conscience see also Lact. *inst.* 5.19-20.

74 Mt 13.28-30: “The servants asked him, ‘Do you want us to go and pull them up?’ ‘No,’ he answered, ‘because while you are pulling the weeds, you may uproot the wheat with them. Let both grow together until the harvest. At that time I will tell the harvesters: First collect the weeds and tie them in bundles to be burned; then gather the wheat and bring it into my barn.’”

75 Mt 13.40-42: “As the weeds are pulled up and burned in the fire, so it will be at the end of the age. The Son of Man will send out his angels, and they will weed out of his kingdom everything that causes sin and all who do evil. They will throw them into the blazing furnace, where there will be weeping and gnashing of teeth”.

76 Aug. *fid. et oper.* 3.3; Aug. *contra Gaud.* 2.3.3-2.6.6. On the subject: Joly 1955; Brown 1963; Brown 1964; Brown 1967: 236 ff.; Lettieri 2005: 90 ff.; Rizzi 2009: 89-106; Rebillard 2012: 61 ff. The Bible is fundamental to Augustine, but, of course, his interpretation moulds a personal shape to the Scripture. Augustine gave some innovative readings; for instance he substituted the triune anthropology (spirit, soul, body), which was mainstream since Origenes, with the binary and dicotomic anthropology soul and body (Rizzi 2009: 66 f.). Moreover, Augustine contradicted Origenes about the repressive function of political power against those who detach themselves from Catholic doctrine; see Aug. *contra Iulianum op. imp.* 2.103; Aug. *contra ep. Parmen.* 1.8.13 ff. Augustine recognises the Christian Roman emperor “an unquestioned right of *cohercicio*, in the strict legal sense, to punish, restrain and repress, those impious cults over which God’s providence had given them dominion” (Brown 1964: 110).

imperial authority has to take care of the religious wrong-doers (and wrong-believers: the heretics), only avoiding to kill them, in order to give them enough time to convert to the Christian Catholic religion. The Christian empire is obliged to take care of its people, imposing them to join the Catholic church;⁷⁷ in fact, this is the first formal step in order to achieve salvation: *extra (Catholicam) ecclesiam nulla salus*.⁷⁸ Once joined the Catholic church, the Roman citizen can choose to adhere spiritually to that religion or not. In fact, as Augustine obviously knew very well, to be saved it is necessary to believe with the heart: a mere execution of rituals is spiritually irrelevant.⁷⁹ But optimistically and self-interestedly he affirms that external coercion may as well provoke a sincere conversion.⁸⁰

A formal adherence is required from every citizen. And the Roman empire is required to compel every citizen to manifest that formal adherence. It is not a Christian goal: God the Father seeks worshipers, not acts of worship.⁸¹ On the contrary, compulsion and exterior performing of rites represents the persistence of what we saw under the Roman pagan empire, when the Christians had to sacrifice to the emperor and to the pagan gods as an exterior sign of loyalty. Personal faith was not required – and it is not detachable.

77 See, for instance, *Aug. contra Gaud.* 2.12.13: *Unde fit consequens ut religio sit etiam, qua christianus imperator ad curam suam iudicat pertinere, ne in res divinas impune peccetur: a quo tu non vis curari nisi ea quae terrena republica continentur*. There are two different ways of interpreting the relationship between religion and politics (and the law as a byproduct of the political choices). Augustine recognises the Christian emperor's duty (which goes with the emperor's office) not to allow sin (which becomes a crime) against divine matters. The opposite interpretation of the same relationship wish for a political power concerned exclusively with the sphere of the earthly matters.

78 The sentence derives from a remodelling of the well known saying by T. Caecilius Ciprianus *ep.* 72 (a letter sent to Pope Stephanus, in which Ciprianus asserts the necessity to re-baptize the heretics who repented): *Salus extra ecclesiam non est*. In brief Augustine considers the Catholic church the representative of the kingdom of God on earth. "From the fellowship of this Church salvation flows to the individual. To subserve the interests of this communion of saints is the highest task and duty of the State... In direct contradiction to his doctrine of salvation by means of the authority of the Church, he lived in the belief in the freely bestowed grace of God as the only source of salvation. His doctrine of the Church prepared the way for the Catholicism of the Middle Ages; his doctrine of sin and grace prepared the way for the reformation" (Sohm 1891: 85).

79 Rom. 10.9-10: "9. If you declare with your mouth, "Jesus is Lord," and believe in your heart that God raised him from the dead, you will be saved. 10. For it is with your heart that you believe and are justified, and it is with your mouth that you profess your faith and are saved". The problem of feigned conversion is well known by Augustine as by the bishops, but that problem is solved by God himself, who knows everything and is able to read the inner thoughts and heart of man, who exerts the final judgment.

80 *Aug. serm.* 112.8: *Foris inveniatur necessitas, nascitur intus voluntas*.

81 Jn 4.23-24: "Yet a time is coming and has now come when the true worshipers will worship the Father in the Spirit and in truth, for they are the kind of worshipers the Father seeks. God is spirit, and his worshipers must worship in the Spirit and in truth." See Mt 15:6-9, Mk 7:6-8 (*supra*, § 4).

In the same way the formal, 'institutional' adherence to the Empire's religion, which is now the Catholic Christianity, is required.⁸²

In ep. 100, written to Donatus, *proconsul Africae*, about the end of AD 408, the bishop Augustine has to ask *auxilium* to the *terrena potestas* in order to fight the heresy, but recommends not to kill the schismatic christians (Donatists).⁸³

Aug. ep. 100: 1. *diligimus inimicos nostros et oramus pro eis.*⁸⁴ *Unde ex occasione terribilium iudicium ac legum, ne in aeterni iudicii poenas incidant, corrigi eos cupimus, non necari; nec disciplinam circa eos neglegi volumus, nec suppliciis quibus digni sunt exerceri. Sic igitur eorum peccata compesce, ut sint quos poeniteat peccasse. 2. Quaesumus igitur ut cum Ecclesiae causas audis, quamlibet nefariis iniuriis appetitam vel afflictam esse cognoveris, potestatem occidendi te habere obliviscaris, et petitionem nostram non obliviscaris. ... Cito interim per edictum Excellentiae tuae noverint haeretici Donatistae, manere leges contra errorem suum latas rell.*⁸⁵

Augustine has changed his mind, as he himself testifies. At first, according to his reading of the Scriptures and to his personal experience of conversion to the Catholic faith (after testing Manicheism

- 82 The bishops, as the public officers under the emperor Decius, were entitled to issue certificates about the religious choice of the Roman citizens; Brown 1963: 302 recalls the case of the converted Manichees who were given certificates by the local bishop in order to avoid persecution according to the public laws.
- 83 On the complex scenario see Shaw 2011. In one of his following papers (Shaw 2015) Shaw demonstrates that Augustine had no prior connections with any of the addressees of his letters; moreover he underscores the substantial hiatus in status and power between Augustine and highranking imperial officials. On ep. 100 see Shaw 2015: 39-43.
- 84 Compare, in the Eastern part of the Empire, a few years earlier, John Chrysostom who, on one side, affirmed that Christians have to love heretics as well as heathens, and opposed their execution; on the other side he approved the restriction of their liberties (for instance, the freedom to reunite) and the confiscation of their churches, as John himself did against the Novatians and the Quartodecimanians. See John Chrys., Hom. 29 in Matth., Hom. 46 in Matth.; see also Socrat. *hist. eccl.* 4.19.
- 85 Aug. ep. 100.1-2: we "love our enemies," and we "pray for them." It is not their death, but their deliverance from error, that we seek to accomplish by the help of the terror of judges and of laws, whereby they may be preserved from falling under the penalty of eternal judgment; we do not wish either to see the exercise of discipline towards them neglected, or, on the other hand, to see them subjected to the severer punishments which they deserve. Do you, therefore, check their sins in such a way, that the sinners may be spared to repent of their sins. 2. We beg you, therefore, when you are pronouncing judgment in cases affecting the Church, how wicked soever the injuries may be which you shall ascertain to have been attempted or inflicted on the Church, to forget that you have the power of capital punishment, and not to forget our request ... Meanwhile, let the Donatist heretics learn at once through the edict of your Excellency that the laws passed against their error, which they suppose and boastfully declare to be repealed, are still in force, ... (transl. by J.G. Cunningham). Brown 1963: 300 ff.; Shaw 2009; Canella 2017: 158 ff.; Stanisław 2017.

and Neo-Platonism), he fostered a peaceful way to convert the heretics and non-believers.

ep. 93 (ad Vincent., a. 408) 5.17: Nam mea primitus sententia non erat, nisi neminem ad unitatem Christi esse cogendum; verbo esse agendum, disputatione pugnandum, ratione vincendum, ne fictos catholicos haberemus, quos apertos haereticos noveramus. Sed haec opinio mea, non contradicentium verbis, sed demonstrantium superabatur exemplis. Nam primo mihi opponebatur civitas mea, quae cum tota esset in parte Donati, ad unitatem catholicam timore legum imperialium conversa est rell.⁸⁶

His struggle to convert Donatists by persuasion and confutation proved useless, while he witnessed their conversion by means of the imperial coercion.⁸⁷ Only then Augustine changed his mind and fostered coercion in religious matters.

In order to measure this evolution it is useful to go back to Constantine. After his victory over Licinius (324 AD) he wrote a letter to his newly acquired subjects in the Eastern part of the Roman empire. In the epistle, preserved by Eusebius, we read a sentence opposing Augustine's perspective.

Eus. v. *Const.* 2.60.1: ἄλλο γάρ ἐστι τὸν ὑπὲρ ἀθανασίας ἄθλον ἐκουσίως ἐπαναιρεῖσθαι, ἄλλο τὸ μετὰ τιμωρίας ἐπαναγκάζειν.

86 "I have therefore yielded to the evidence afforded by these instances which my colleagues have laid before me. For originally my opinion was, that no one should be coerced into the unity of Christ, that we must act only by words, fight only by arguments, and prevail by force of reason, lest we should have those whom we knew as avowed heretics feigning themselves to be Catholics. But this opinion of mine was overcome not by the words of those who controverted it, but by the conclusive instances to which they could point. For, in the first place, there was set over against my opinion my own town, which, although it was once wholly on the side of Donatus, was brought over to the Catholic unity by fear of the imperial edicts ..." (transl. by J.G. Cunningham).

87 See also Aug. *retract.* 2.5.(32): *Sunt duo libri mei quorum titulus est: Contra partem Donati. Quorum in libro primo dixi non mihi placere ullius saecularis potestatis impetu schismaticos ad communionem violenter arctari. Et vere mihi tunc non placebat, quoniam nondum expertus eram, vel quantum mali eorum auderet impunitas, vel quantum eis in melius mutandis conferre posset diligentia disciplinae.* I recall another interesting text, a letter (*ep.* 185) Augustine wrote around 417 AD to Bonifacius, a general of 'Arian' Gothic mercenaries; see esp. *ep.* 185, 6.21, 6.23 (where Augustine affirms that Jesus compelled Paul to convert), 6.24 (where Augustine gives a personal interpretation of Jesus' sentence *Cogite intrare*, in the parable of the great supper (Lk 14.23), 7.25 (where Augustine recalls CTh. 16.5.21; see De Giovanni 1985: 89, 103. Augustine has been a source of inspiration; see Brown 1963: 283: "the advisers of Louis XIV cited Augustine's relations with the Donatists in order to justify the persecution of the Huguenots".

Constantine underscored the difference between the free choice of personal sanctification, represented as the struggle to achieve eternal life, and the constrained choice in order to achieve the same goal. It is clear that the second path is not useful on a spiritual level. Maybe Constantine was influenced by political reasons in writing this passage; anyway he affirms the independence of the individual religious choice and he fostered tolerance and freedom of religion.

Augustine's perspective, on the other side, as sketched by August Neander, contains the germ of the whole system of spiritual despotism, intolerance, and persecution, even to the court of the Inquisition.⁸⁸ The evidence of this observation is easy to give. Amongst the many one example comes to mind. Within few decades after Augustine's religious and political action, Pope Leo the Great appreciated the murderous intervention of the imperial authority against the Priscillianists.⁸⁹ The path opened up by Augustine (alongside with other Church fathers)⁹⁰ in a very short time became the main road; the limits imposed on the public authority by Augustine were soon forgotten.⁹¹ Pope Leo clearly manifested his complete support to the choice of the political authority to sentence to death for heresy the Priscillianists; in a letter written on the 21st of July 447 to Turribius, bishop of Asturia, upon the errors of the Priscillianists, he affirms what follows.

88 See Neander 1866: 217.

89 In *ep. 15 ad Turribium*, Leo mentions the execution of the Priscillianists with evident approbation. The Spanish bishop, Priscillian, with some of his followers, was beheaded at Augusta Treverorum in AD 385. They were sentenced to death because they were considered heretics under the Magnus Maximus, co-emperor with Theodosius I. In brief: religious freedom was denied by a Christian emperor, instigated by the bishop Ithacius and with the approval of the bishops assembled at Treves. Other bishops, as Ambrose of Milan and Martin of Tours, were horrified and condemned the bloodshed. See Pietrini 2002: 96 ff.; Escribano Paño 2002; Bravo Bosch 2010.

90 See, for instance, Jer. *ep. 37.3* (a. 404) *ad Riparium adv. Vigilantium*: *Non est crudelitas, pro Deo pietas. Unde et in Lege [Deut. 13.7-11] dicitur: Si frater tuus, et amicus, et uxor, quae est in sinu tuo, depravare te voluerit a veritate, sit manus tua super eos, et effundes sanguinem eorum, et auferes malum de medio Israel.* See Gieseler 1849: 60 f. See Firm. *Mat. err.* 16.4; around 340 he wrote that the emperor has to eliminate paganism, which is nothing but idolatry and demonic cult; moreover the emperor has to force the conversion of his unwilling (*invitos*) lest them be condemned to eternal punishment (*exitium*).

91 Brown 1963: 300: "The execution of Priscillian, the Spanish heretic, in Trèves, in 385, on a formal charge of magic and obscene practices, had caused a vocal reaction largely because his death had made plain how easy it might be for unscrupulous bishops and authoritarian officials to make a permanent breach in the thin wall of principle".

Leo I ep. 15 ad Turribium: *Etiam mundi principes ita hanc sacrilegam amentiam detestati sunt, ut auctorem eius cum plerisque discipulis legum publicarum ense prosternerent.*⁹²

The *legum publicarum ensis*, the sword of the imperial laws anticipates the words of the emperor Justinian, who will affirm that the imperial majesty should be armed with laws, in the *constitutio Imperatoriam*, pr.: *Imperatoriam maiestatem non solum armis decoratam, sed etiam legibus oportet esse armatam.*⁹³

7. Augustine, among others, provided the theological justification for the intervention of the Roman emperor in religious matters, for the use of coercion to obtain a formal adherence to the Imperial religion. The gap opened by Jesus' predication between faith (a relationship with God) and politics leads to religious freedom, as clearly pointed out by Tertullian. That gap was closed by the Christians, theologians and bishops, who provided the Roman empire with its 'new' religious ideology, which followed the traditional Roman pattern.⁹⁴

We find important evidence of the restored link between religion and politics in a brief letter (Cassiod. var. 10.26) written in AD 534-536 to the Catholic emperor Justinian by Cassiodorus for the Ostrogoth king Theodahad, an 'Arian', who exerted on Italy a power delegated by the Eastern emperor. The content of the letter, written by Cassiodorus on behalf of Theodahad, deals with two main subjects: the taxation on the land of a monastery (not identified by the historians) which have suffered from a flood;⁹⁵ and the case of

92 "... for even the leaders of the world so abhorred this profane folly that they laid low its originator, with most of his disciples, by the sword of the public laws" (transl. by Ph. Schaff).

93 See Varvaro 2022 (in this book): the scholar explores, in § 4, the subject of the law as a weapon in Justinian's hands.

94 Moreover frequently the churches requested the imperial power to intervene in religious matters by means of jurisdiction, legislation or public force.

95 A monastery of God's female servants appealed to Justinian (maybe through the competent local bishop) complaining about taxation: the tribute required resulted too heavy as a consequence of a flood which brought barrenness to the monastery's land with the curse of barrenness. King Theodahad answered appointing a careful inspector to visit the farm and to evaluate a reduction of the tribute required. Cassiod. var. 10.26.2: *Et ideo significamus gloriæ vestrae monasterium famularum dei, quod vobis insinuatam est tributorum gravi sorte laborare, eo quod ager eius nimia inundatione perfusus sterilitatis vitia de inimica humectatione contraxerit: ad virum eminentissimum Senatorem praefectum praetorio dedisse nos nihilominus iussionem, ut eius ordinatione provida ad praedium, de quo querella est, diligens inspector accedat et, rebus moderata inquisitione trutinatis, quicquid gravaminis potest habere possessio, rationabiliter abrogetur, ita ut competens atque sufficiens dominis remanere possit utilitas, quia vere nobis lucrum pretiosissimum iudicamus, quod*

a Goth woman, named Ranilda, who converted to Catholic Christianity.⁹⁶

The second subject, as Cassiodorus / Theodahad recalls, goes back several years: Ranilda in the reign of Theodoric converted from Christian 'Arianism' (the Goth's religion) to Christian Catholicism (the religion of the Eastern Roman Empire). The letter let us imagine that she had suffered some financial losses as a consequence of her conversion, and Theodahad compensated her loss by his own generosity, that she might not repent her change of religion (*tamen necesse nobis fuit negotium de propria largitate componere, ut tali facto eam non paeniteret mutata religio*). And then he wrote on the religious profile of the fact, which is relevant to our subject.

*Cassiod. var. 10.26.4: Earum siquidem rerum iudicium non praesumimus, unde mandatum specialiter non habemus. Nam cum divinitas patiatur diversas religiones esse, nos unam non audemus imponere. Retinemus enim legisse nos voluntarie sacrificandum esse domino, non cuiusquam cogentis imperio: quod qui aliter facere temptaverit, evidenter caelestibus iussionibus obviavit. Merito ergo pietas vestra invitat nos ad talia quae nobis praecipiant divina mandata.*⁹⁷

King Teodahad granted protection to the Goth Ranilda who converted to Catholic Christianity and kept her untouched by any consequence on the financial side. Moreover he recognized his incompetence in religious matters, affirming in this way the separation between the political and the religious sphere. He affirmed that

pro mansuetudinis vestrae voluntate concedimus. See Giardina et al. 2016: 156-157, 446-451 (R. Lizzi Testa).

96 Cassiod. var. 10.26.3: *De Ranildae quoque causa, unde vestra serenitas me commonere dignata est, quamvis ante longum tempus sub parentum nostrorum regno contigerit, tamen necesse nobis fuit negotium de propria largitate componere, ut tali facto eam non paeniteret mutata religio.* Amory 1997: 409, 476; the Author counts 46 Goths who converted to Catholicism, an astonishing number (Amory 1997: 465) which is discussed by Markus 1998. See also Giardina et al. 2016: 449 f.; Simonetti 1980b.

97 "Also, regarding the case of Ranilda, concerning which it was worthwhile that your serenity advise me, although it happened long before under the regnum of our kinsman, it was nevertheless important to us to settle the business from our own largesse, so that, with such a matter decided, she would not regret the change of religion. Indeed, we have not presumed to render judgment in her affairs, where we especially lack jurisdiction. For while divine authority permits various religions, we would not dare to impose a single faith. For we recall reading that we must sacrifice willingly to the Lord, not at the command of anyone compelling us: because he who attempts to do otherwise clearly resists heavenly ordinances. Therefore, your piety rightly summons us to that which divine mandate requires of us" (transl. by Bjornlie 2019: 414).

God's patience⁹⁸ tolerates the coexistence of different religions so the king shall not impose a religious choice over his people: the religious choice is strictly personal (it is not a public, institutional, politic matter), as God Himself requires. Everyone who does not act in this way, will act contrary to God's will. Teodahad indirectly reproached Justinian who has imposed over his people his religious preference; on the other hand, Teodahad's policy follows God's model. And the King of the Goths concluded appreciating that Justinian invited him to these acts of obedience to God.⁹⁹

Theodahad based his political choice on the Bible (*Retinemus enim legisse*). The sacred text of Christianity has become the basis on which the political power justifies its choices.¹⁰⁰ The Goth's politics, as represented in this epistle, is directly modelled on God's example, is an *imitatio Dei*. And differs from the coercive and intolerant politics of Justinian.¹⁰¹ Paolo Siniscalco sums up with great clarity the intertwining, or, at least, the strict association between the mundane and the spiritual domain in Justinian's cultural, political, juridical perspective: "Giustiniano, erede effettivo di Costantino e di Teodosio, ... traspone in un quadro cristiano l'ideale monarchico e sacrale di un Diocleziano: teologo e capo di stato, egli si sente dinanzi a Dio responsabile non solo del bene temporale dei suoi sudditi, ma pure di quello spirituale. I due domini in un primo tempo distinti sono così, se non confusi, di nuovo strettamente associati".¹⁰²

98 Sal 53.8 (Vulgata): *Voluntarie sacrificabo tibi, et confitebor nomini tuo, Domine, quoniam bonum est* = Ps 54.6 (NIV): I will sacrifice a freewill offering to you; I will praise your name, Lord, for it is good. Cassiodorus writes *patiatur*; the verb *patior* presents the same root of the word *patientia*. See Pesce 1999: 339-361. Canella 2017: 278-283 recognizes in the *patientia Dei* the theological fundation of the Christian tolerance in religious matters and investigates the topic as it recurs in the writings of Lactance, Augustine, Orosius and Cassiodorus.

99 On the historical profiles: Moorhead 1983; on the tradition of the *Variae* and on the case of Ranilda / Veranilda see Stone 1985. Rita Lizzi Testa in Giardina *et al.* 2016: 450-451, giving in brief sound arguments, asserts the absence of any polemic accent in the letter: Cassiodorus is only recalling a *topos* dating back, at least, to the beginning of the Principate, a *topos* commonly put forward in the political discourse from the age of the Tetrarchs, with the aim of pacify and create a common ground. See also Cassiod. *var.* 2.27.13-14 (about the Jews in Genua), *var.* 5.37.

100 Cf. Nov. 77.1, Nov. 141.1. See, among others, about the Christian Empire under Justinian Wilken 2012: 246-256; Moorhead 1994; Evans 1996; Gauthier 1998; Mazal 2001; Leppin 2011; Meier 2004; Maraval 2016; Varvaro 2018.

101 Eusebius, giving birth to the literary genre of the *specula principis*, considers the emperor as the image of the Logos (the transcendent God) and an instrument used by the Logos to govern over humanity; see Canella 2017: 272 f. Cassiodorus, writing in AD 533 for Atalaricus to pope John II, affirms: *Si antiquis principibus studium fuit leges exquirere, ut subiecti populi delectabili tranquillitate fruerentur, multo praestantius est talia decernere, quae possunt sacris regulis convenire* (Cassiod. *var.* 10.15.1).

102 Siniscalco 2009: 4. On Justinian's religious politics: Biondi 1936; Meyendorff 1968; Haacke 1973; Amelotti 1978; Rabello 1988; Dagron 1996; Menze 2008; Varvaro 2022.

Theodahad depended on Justinian's benevolence; as a consequence, the tolerance he proclaimed may be due to the difficult and unstable situation. Probably, this is the shared basis of the convergence of Tertullian, Lactantius, and the 'arian' Theodahad.¹⁰³

Augustine opposed the Donatist bishop Gaudentius an historical event: the Donatists at first asked the emperor to intervene in religious matters.¹⁰⁴ Moreover Augustine asked if the Donatists should have applied tolerance, in case the imperial power was on their side. The question is dramatically relevant to the topic in hand; in fact it underscores the ongoing temptation to transform the Kingdom of Heaven in a kingdom of the world, and to operate according to political rules.

8. The Kingdom of God is at hand but it differs intimately from the Christian Empire, in which the Gospel represents an ideological tool in the hands of an earthly power. The conversion of the Empire to Christianity meant a transformation of Jesus' preaching in a mundane ideology. And the conversion of the Empire's subjects followed, leaving untouched the intertwining between religion and politics. On the contrary, the conversion of the individuals is needed in order to change the political institutions.¹⁰⁵

"Christianity had by the early fourth century A.D. developed a large-scale and highly effective hierarchic organization that provided a much more suitable structure for a universal religion. Constantine

103 See Schaff 1870: 145: "Henceforth none but the persecuted parties, from time to time, protested against religious persecution; being made, by their sufferings, if not from principle, at least from policy and self-interest, the advocates of toleration". Canella 2017: 286 has observed: "Spesso il fatto di trovarsi in posizione marginale favoriva il recupero di uno spirito più 'evangelico', mentre le grandi istituzioni ecclesiastiche erano portate a rivedere alcuni principi originari adattandoli alle nuove condizioni sociali e politiche".

104 Aug. *contra Gaud.* 1.19.21: *Nam et maiores vestri iudicaverunt in huiusmodi iniuriis Dei liberum hominis arbitrium non relinquendum a regibus impunitum; quia licet haberent causam malam, Caecilianum tamen episcopum persequendo usque ad imperatoris Constantini iudicium perduxerunt.* Aug. *contra Gaud.* 1.39.53: *Quid ergo alium, nisi ut ille cui te bene arbitraris optare, nec Deo, nec imperatori suo servet fidem: quia scilicet per iustitiam non veram, sed vestram, ad imperatorum curam pertinere causae huiusmodi non debent, ut calumniosa divisio sanaretur, deberent autem, ut quando facta est firmaretur? Si doctrina ista, quam non de Scripturis sanctis, sed nescio unde didicistis, iusta vobis videtur, ut haec ad imperialem non pertineant potestatem: tunc maioribus vestris venisset in mentem, quando Caecilianum causam ad imperatoris iudicium Constantini accusando miserunt.* On the subject: Toom 2020: 77: "In short, while the doctrine of the separation of church and state was pretty much affirmed after the events of 347 CE, its application varied due to the particular circumstances until Donatists lost the right to voice their concerns entirely (i.e. until they were suppressed as 'heretics'). That is, the particular socio-religio-political situation largely dictated the use and acceptance of the doctrine of the separation of church and state".

105 Agnati 2020.

understood this, and attempted throughout his reign to promote the Church as the partner of the Empire".¹⁰⁶ Constantine's attempt was successful and the announcement of the Kingdom of God became the Christian religion of the Empire, the religious ideology of the Roman Empire, as it was recognized by the emperor Zeno, who wrote a law (Cl. 5.27.5 pr.) in AD 477 where he affirmed: *Divi Constantini, qui veneranda Christianorum fide Romanum munivit imperium*.¹⁰⁷ Zeno's sentence illustrates the path followed by the Christianization of the Empire, beginning with the personal choice of the political leader. Nothing is private in the emperor's life, as it was manifest since Augustus, as Ovid wrote: *privati nil habet illa domus*.¹⁰⁸ So the conversion of the Empire was due to hierarchy and politics, as it began from the head of the political structure and gradually involved the entire population. Even if Augustine referred to God himself, we can adapt his words to describe this political, public, religious process coming down from above: *Non vacat, non est inane, quod tam eminens culmen auctoritatis christianae fidei toto orbe diffunditur* (Aug. *conf.* 6.11.19).

The emperor and the Empire, as institutions, remained the same. The religious mechanism preserved itself as a *do ut des* mechanism, a public function which required to be exerted, a religious obligation required of every citizen, to be manifested by cult acts, with no relevance for the inner sphere, the beliefs of the heart. The political power, in order to control and govern by means of its religious ideology, exerted coercion to perform rites in order to achieve protection, success, righteousness and power. This is the Roman empire system preserved and transmitted in full, instead of the Kingdom of God, preached by Jesus. In the Kingdom of God each individual can enter by exerting the free choice to be in the Father-son relationship with God the Father through the living way of the Son, the King of the Kingdom, and through the inhabitation of the Holy Spirit, the inner guide of the children of God.¹⁰⁹ As a consequence the citizen of the Kingdom will be able to act according to God's standards and purposes. In this way the rules governing the behaviour are interiorized

106 Rives 1999: 154.

107 The law was issued when the restoration of the interests of ecclesial orthodoxy was taking place, in the aftermath of the expulsion of Basiliscus, who had openly adopted pro-Monophysite positions; see Dovere 1985; Luchetti 1990: 179.7, 195.34.

108 Ovid. *ex P.* 2.1.18.

109 In the Christian perspective the prophets foretold the gift of this Guide: Je 31.31-34, Ez 36.25-27; Joel 2.28-30; see also Sal 143.10. In the Acts of the Apostles the inner guidance of the Holy Spirit is attested, fulfilling "the promise of the Father" (Acts 1.4). An interesting view of the subject: Williams 1980.

and the children of God / citizen of the Reign will enforce them by observance instead of oboedience.

The Christian faith represents a different way for humans to relate to the supernatural. And it emerges, from time to time, as a caraic river in the European tradition, which followed a different path, according to the victorious persistence of the traditional idea of religion.¹¹⁰ The Roman religion, in the end, maintained some of its most relevant features, in substance and in several manifestations, adopting Christian garments inspired, in some ways, by an Old Testamentarian apparatus (which, of course, does not correspond to the Jewish faith), where the law, the temple, the priesthood, the political leadership of the community, the rituals prevailed over the grace and the truth, brought by Jesus,¹¹¹ and over the guide of the Holy Spirit, who

110 We can briefly recall some passages by Alberico Gentili, born in 1552 (in San Ginesio, under the Papal State in Italy), who died in 1608, in London, England; a well known jurist, he was exiled in 1579 because of his Protestantism; he was appointed Regius Professor of Civil Law at the University of Oxford in 1587. Hugo Grotius' *De jure belli ac pacis* (1625) is deeply influenced by Gentili's writings. Gentili stressed the separation of Roman Catholic theology and canon law from the secular law. His arguments stand on his idea of religion, as illustrated in *De iure belli libri tres* (1598): *Religio autem ab animo est, et voluntate; quae semper habet libertatem secum ... Animusque noster, et quicquid est animi a principio, aut principe non movetur externo. Et neque dominus est animae, nisi unus Deus; qui unus animam potest perdere*. Freedom itself, in all its facets, is based on religion, which is necessarily free: *Libertas religioni debetur. Coniugium quoddam Dei et hominis est religio. Si igitur coniugio alteri carnis libertas defenditur obstinate, etiam huic coniugio spiritus tribuatur libertas ...* The quotations are taken from Gentili 2008: 61; see Minnucci 2018.

111 See Jn 1.17: "For the law was given through Moses; grace and truth came through Jesus Christ". It is useful to recall a traditional point of view, which is not outdated considering the sources that we have investigated in this paper; this point of view is well represented by Philip Schaff (1819-1893) who wrote: "It proceeded from the state and from the emperors, who in this respect showed themselves the successors of the Pontifices Maximi, with their relation to the church reversed. The church, indeed, steadfastly adhered to the principle that, as such, she should employ only spiritual penalties, excommunication in extreme cases; as in fact Christ and the apostles expressly spurned and prohibited all carnal weapons, and would rather suffer and die than use violence. But, involved in the idea of Jewish theocracy and of a state church, she practically confounded in various ways the position of the law and that of the gospel, and in theory approved the application of forcible measures to heretics, and not rarely encouraged and urged the state to it; thus making herself at least indirectly responsible for the persecution. This is especially true of the Roman church in the times of her greatest power, in the middle age and down to the end of the sixteenth century; and by this course that church has made herself almost more offensive in the eyes of the world and of modern civilization than by her peculiar doctrines and usages" (Schaff 1870: 139 f.). See Herrmann 1980; Casavola 2003: 13: "è indubbio che temporalismo, mondanizzazione, giuridicismo hanno allontanato, nella Chiesa e nella storia della cristianità europea, religione e Vangelo". Going back to Augustine's time it is useful to recall Brown 1964: 114 who underscores "a profound change in the imagination of his [Augustine's] contemporaries. For the first time, the events of the Old Testament had become the true *gesta maiorum* of a large body of the Roman governing class. The emperor Theodosius might claim to be descended from Trajan; but he was more aware of his resemblance to King David. The contemporary relations of Church and State were only fully comprehensible in terms of the relations of Kings and Prophets, relations for which no precedent could be found in the actions of the Apostles [esp. August. Ep. 93, III, 9]. And with this, there came the inevitable undertone of harshness: it is perhaps no coincidence that the 'Zeal of Phineas', that grisly incident of righteous vio-

led the Church in the *Acts of the Apostles*.¹¹² In some way the situation responds to that in which Jesus affirms: “You have let go of the commands of God and are holding on to human traditions”.¹¹³

Human tradition, the traditional perspective of the *pólis*, linked intimately religion and politics. As a first consequence the Christian message was inserted in the Roman religious ideology, adding – of course – some features and some contents to the whole of beliefs, representations and values governing the vast and varied social group of the Romans. As a second consequence the sovereign has to govern over religious matters and is endowed by the right (and the duty) to impose his religious creed, which is coincident with the State-religion, to his subjects. *Cuius regio eius religio*.¹¹⁴ This principle has been established in the so called Peace of Augusta (1555), but was affirmed, theoretically justified and legally applied by the Christian emperor Justinian. In both cases the principle consolidates the political unity of the ‘State’, in the 16th century as well as in the 6th century, when Christianity had already lost its revolutionary essence, had been domesticated and transformed in the new suit of the imperial religious ideology.¹¹⁵

lence, is mentioned by Optatus in connection with the coercive measures of Count Macarius [Optatus, *De Schism. Don.* III, 5 (P.L. XI, 1013-14)] and also appears, in an almost contemporary fresco, of the newly discovered catacombs of the Via Latina [A. Ferrua, *Le pitture della nuova catacomba di Via Latina* (1960), tav. xcii, and 48-9]. It is in such subtle changes as these that we can trace the beginning of a Double Image of the Old Testament – at one and the same time the symbol of an outmoded dispensation and the ever-present precedent for an established religion, enforced by law. It is a Double Image which, from the time of Augustine to that of Spinoza will be very near the root of every controversy on religious tolerance”. See also Brown 1963: 299 f.

- 112 The deminishing relevance of the Holy Spirit in the Christian writings and in the Church's life during the 5th century and in the following centuries deserves a note. In the 4th century we recall the debate on the heresy (condemned in the First Council of Constantinople, AD 381) of the Pneumatomachi (also Macedonians, from their founder Macedonius, bishop of Constantinople deposed by Constantius); against this heresy were written the treatises on the true doctrine of the Holy Ghost by Basil of Caesarea and by Didymus the Blind, which pope Damasus had translated into Latin by Jerome. See Simonetti 1980a; Fantappiè 2011: 62: “In conseguenza di questa contrapposizione nella Modernità sembra delinearsi un duplice processo: da parte luterana la negazione della forma e la riduzione dell'essenza al mistero (la Chiesa invisibile); da parte cattolica la tendenziale riduzione dello Spirito alla Forma (la Chiesa visibile). ... Nella teologia cattolica si esaltano la visibilità esterna e le ‘note caratteristiche’ della Chiesa: gli uffici della gerarchia divengono l'espressione prevalente della sua manifestazione perché ad essi sono ricondotti i sacramenti, le forme del culto, la disciplina, i dogmi definiti e da credersi”; Pieri, Ruggiero 2018. Leo XIII (1878–1903), the first pope deprived of the secular power, dedicated to the Holy Spirit the encyclical *Divinum illud munus* (1897).
- 113 Mk 7.8.
- 114 About the principle see Stephani 1612: lib. I c. 7 n. 52: *ut cuius sit regio, hoc est ducatus, principatus, territorium seu ius territorii, eius etiam sit religio, hoc est ius episcopale seu iurisdictio spiritualis*. The first edition was published in 1599; Joachim Stephani “was debating the issue of the episcopal rights of princes” (von Friedeburg 2016: 143). See Lecler 1951; Lomonaco 2013: 31 ff.; Martín-Retortillo Baquer 2014.
- 115 There is an interesting continuity between Rome and Moscow, the third Rome; see Baccari 1994; Catalano, Siniscalco 2009. On this historical background we can consider the words by

In the end we can look back to the very beginning: Jesus. He was sentenced to death because he was the King of the Jews. The written tablet hanging over Jesus' head declared, as was Roman ordinary custom, the reason why he was sentenced to die on the cross: *Jesus Nazarenus Rex Iudaeorum*.¹¹⁶ It was a manipulation and a misunderstanding of Jesus' preaching about the Kingdom. It was the way the Jewish authorities used to influence Pontius Pilatus' decision, as it is written in Jn 19.12: "If you let this man go, you are no friend of Caesar. Anyone who claims to be a king opposes Caesar".¹¹⁷

I want to underscore the last sentence: "Anyone who claims to be a king opposes Caesar". In the way of thinking of that time the simultaneous presence of two different kingdoms was unconceivable: if Jesus was a king he was necessarily against the Roman emperor. The two kingdoms – God's and Caesar's – were overlapped: the traditional perspective prevailed, and it will prevail in the coming centuries, strengthened by the fact that Caesar will be a 'christian' king.

Lenin quoted in the opening of this paper (Lenin 1905). These ideas were rooted in Lenin's mind: see, for instance, on of his early writings: Lenin 1976; on the subject: Crinella 1995.

116 Mt 27.37, Mk 16.17, Lk 23.38, Jn 19.19.

117 See Jn 19.15: "«Shall I crucify your king?» Pilate asked. «We have no king but Caesar», the chief priests answered". See, also, the accusation against Jason, Paul and Silas in Acts 17.7: "They are all defying Caesar's decrees, saying that there is another king, one called Jesus".

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LAW MEETS RELIGION IN THE HIPPODROME OF CONSTANTINOPLE. SUNDAYS AND IMPERIAL BIRTHDAYS

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Abstract: The four emperors Theodosius, Valentinian II, Arcadius and Honorius, who allowed circus games on their birthdays even when they fell on a Sunday are represented on the base of the obelisk in the center of the hippodrome in Constantinople. This essay illustrates the interaction between law and religion with regard to the veneration of god and the emperors in the last decade of the fourth century, the period during which the obelisk was erected.

Keywords: Sunday Rest; Circus Games; Imperial Birthdays.

1. Celebrating imperial birthdays on the day of the Lord

In this contribution¹ I would like to focus on the interaction between law and religion with regard to the veneration of god and the emperors in the last decade of the fourth century especially on those Sundays falling on the birthday of the emperor.²

The Codex Theodosianus 2.8.20³ contains a short announcement in favor of celebrating imperial birthdays on a Sunday, *dies festi solis*, with public games. This first rule dates back to the year 392 and was reconfirmed seven years later by another constitution, to be found in the Codex Theodosianus in 2.8.23,⁴ referring to '*die dominico*'. The

1 Special thanks to Loulou Thomas for her practical suggestions on my English language use and Bastiaan van der Velden for his constructive advice.

2 See on the coexistence and conflict of law, ruler and religion Diefenbach 2002: 21-49; McLynn 2004: 235-270; McLynn 2010: 215-240.

3 CTh. 2.8.20. The same Augustuses (Emperors Valentinian, Theodosius, and Arcadius Augustuses) to Proculus, Prefect of the City. Contests in the circuses shall be prohibited on the festal Days of the Sun (Sundays), except on the birthdays of Our Clemency, in order that no concourse of people to the spectacles may divert men from the reverend mysteries of the Christian law. Given on the fifteenth day before the kalends of May at Constantinople in the year of the second consulship of Arcadius Augustus and the consulship of Rufinus on April 17th, 392. Taken from: Pharr 1952. Consul Flavius Rufinus (ca. 335 – 27th November 395) was from 392 to 395 the praetorian prefect of the East. With Arcadius he was in 392 the consul posterior. Rufinus was not only consul, but also guardian of the young Arcadius, the Emperor's son. Arcadius is the only emperor of both constitutions, who was probably present in Constantinople on imperial birthdays.

4 CTh. 2.8.23: *Idem AA. (Imp. Arcadius et Honorius AA.) ad Aurelianum praefectum praetorio. Die dominico, cui nomen ex ipsa reverentia inditum est, nec ludi teatrales nec equorum*

latter constitution had previously made the change from the day of the Sun to the day of the Lord. Both constitutions indicate that Sunday rest must be respected⁵ in the city of Constantinople, with the exception of Sundays which coincided with the celebration of imperial birthdays. A clear preference was given to the imperial festivity.

It happened frequently that an imperial birthday fell on a Sunday since there were Emperors and Caesars from the West and the East of the Empire who not only celebrated their birthdays but also their institutional anniversaries. All the imperial birthdays which fell on a Sunday revealed the competitive relation between the legal ruler and the church. From a legal perspective, taking into account the existing infrastructure of the city of Constantinople of that time, I will discuss constitutions addressed to the prefect of the city of Constantinople which deal with the celebration of imperial birthdays falling Sundays after the erection of the obelisk on the hippodrome.

The last decade of the fourth century is of utmost interest for public life in Constantinople. During this period major architectural changes had been carried out in the city center around the hippodrome, the byzantine Circus Maximus of Constantinople, and of great importance is the fact that some years earlier Christianity had become the state religion. In this last decade of the fourth century the emperors had to determine, establish and manifest their place and presence in the city of Constantinople.

When the above mentioned constitutions were promulgated, the emperor was no longer *pontifex maximus*⁶ (since 379), the chief high priest of the College of Pontiffs, because Christianity had become the leading religion and the emperor was not also the religious leader of the people. However, even then Sunday was still called '*dies solis*', day of the Sun, and only from the year 399 onwards the name

certamina nec quicquam, quod ad molliendos animos repertum est, spectaculorum in civitate aliqua celebretur. Natalis vero imperatorum, etiamsi die dominico incidit, celebretur. Dat. VI k. sept. Constantinopoli Theodoro v. c. cons. (399 Aug. 27th).

The same Augustuses to Aurelianus, Praetorian Prefect. On the Lord's Day, to which the name was given out of the very reverence for it, neither theatrical plays nor contests of horses nor any spectacles which were devised to effeminate⁶ the spirit shall be celebrated in any municipality. But indeed the birthdays of the Emperors shall be celebrated, even if they should fall on the Lord's Day. Given on the sixth day before the kalends of September at Constantinople in the year of the consulship of the Most Noble Theodorus. – August 27th, 399. Taken from Pharr 1952. Flavius Mallius Theodorus (circa 376-409) was consul together with the eunuch Eutropius. Before becoming consul, Theodorus had a long administrative career. Theodorus' life is well known thanks to *Claudian's Panegyricus dictus Manlio Theodoro consuli*. Augustine dedicated his book *De beata vita* to Theodorus.

5 Girardet 2007: 279-310.

6 Girardet 2018: 181.87.

'*dies dominicus*', day of the Lord, is primarily mentioned in the legal texts.⁷

In this contribution I aim to concentrate on the imperial birthdays falling on a Sunday in the city of Constantinople during the last decade of the fourth century.

2. Imperial physical and institutional birthdays

Emperor's birthdays need to be understood in the context of celebrating both physical and institutional birthdays of the emperors. It is important to keep in mind that the birthday and the day of inauguration of an Emperor were considered imperial birthdays, and that next to the two emperors also the birthdays of the Caesars were celebrated.

The Codex Theodosianus 2.8.19.4 offers a clear definition of imperial birthdays by stating in the year 389:

It is necessary for Our anniversaries also to be held in equal reverence, that is, both the day which brought forth the auspicious beginning of Our life and the day which produced the beginning of Our imperial power.⁸

3. Redefining the imperial presence in a Christian world

It remained an important question how to honor the Roman emperor in the Christian Roman Empire. In pre-Christian times, the Emperor's birthdays were important dates in the annual festivity calendar. Jubilees commemorating five or ten years merited intensive celebrations often combined with processions or the inaugurations of new buildings, preferably arches in Rome, like the one erected by Emperor Constantine on the occasion of his *decennalia* or the foundation of a complete new capital as was the case in Constantinople in 330 on celebrating 25 years since the inauguration of Constantine.

The emperors were in no way subordinate to the emerging Christian church. However they had to find their place within these changing patterns.⁹ The emperors had to redefine their place in a

7 CTh. 11.7.13 (386): *dies solis*, 'justly' *dominicus*; CTh. 15.5.2 (386): *dies solis*; CTh. 2.8.19 and Cl. 3.12.6 (389): *dies solis*; CTh. 2.8.20 (392): *dies festi solis*; CTh. 2.8.23 (399): *dies dominicus*; CTh. 2.8.25 (409): *dies dominica, vulgo solis*; CTh. 15.5.5 (425): *dominicus dies*.

8 Translation by Pharr 1952.

9 See for the religious ambivalence of Constantine Herrmann-Otto 2007: 13-15.

Christian world. New Christian norms had to be combined with traditions and customary festivities¹⁰ and as far as possible it was important to maintain the spectacles that were important to the people. The choices to be made for the celebration of the emperors' birthdays in the event that these days fell on a Sunday demonstrate the conflict of the desired veneration of the Lord on Sundays and the imperial veneration.

It is unknown for how many days the emperor's birthday festivities lasted at the end of the fourth century. From earlier sources it is known, that the celebrations lasted at least two days.¹¹ That would counting up to a minimum of sixteen days of celebration a year in Constantinople at the end of the fourth century.

An imperial birthday had a public character.¹² Moreover, the emperor remained the center of many rituals and ceremonies taken over from the pre-Christian time.

4. Breaking with the general rule

Since the year 321 rules define the silent character of Sundays.¹³ Constantine initiated the legal roots of Sunday laws.¹⁴ In 321 he was the first to make Sunday a free day for prayer for most people and encouraged good deeds. Sunday was the day of the Resurrection, according to the New Testament the weekly Eastern.¹⁵ Ulrico Agnati wrote a wonderful paper on the first two statutes ruling Sunday rest.¹⁶ Nevertheless, this day was referred to as the day of the sun in legal texts until the year 399, when it was called the day of the Lord, Codex Theodosianus 2.8.23. Several Emperors forbade by law games on Sunday. The archbishop of Constantinople John Chrysostom (c. 347-407) delivered a homily against games and theatre in July 399.¹⁷ The archbishop argues that not only games on Sunday but also on Christian high holidays like Good Friday are disrespectful. In this text John Chrysostom emphasizes the close distance between the Hippodrome in Constantinople and his church, distracting churchgoers.

10 Heutger 1999: 20 f.

11 See for further references Graf 2015: 103-238.

12 Kantirea 2013.

13 See Agnati 2015: 1-34.

14 Demandt, Engemann 2007; Bleckmann 2003; Brandt 2006; Claus 2007; Kraft 1974: 4; Wallraff 2001.

15 Mk 16.9: "When Jesus rose early on the first day of the week".

16 Agnati 2015.

17 Allen, Mayer 2000: 118-125.

He wanted to ban people who visit the games from church, refusing them the Eucharist. The Council of Carthage in the year 401 AD sought aid from the emperor concerning a ban on pagan entertainment offered on Sundays and feast days. It may thus, be concluded that such laws were probably never rigidly enforced.

The first constitution on the prohibition of circus games on Sundays – with the exception of imperial birthdays, was promulgated on April 17th in the year 392 in the city of Constantinople by Valentinian II, Theodosius and Arcadius.¹⁸ At that time Christianity was already the state religion, the city of Constantinople had celebrated its sixtieth birthday shortly before and had become a metropole. The second constitution was issued after the death of Valentinian II and Theodosius I and was enacted by the brothers Arcadius and Honorius, sons of Theodosius I on 27th August 399, some weeks after supplication by the archbishop of Constantinople John Chrysostom for Sunday rest.

In spite of these constitutions, it is important to stress that the imperial birthdays were not often celebrated in the presence of the emperor. Taking as a reference the years 392-399, the years of the above mentioned imperial constitutions, only one of the emperors was probably present in the city of Constantinople on his birthday. Since the travel itinerary of Theodosius is known, it may be deduced that he was not regularly present in the city, neither were the Western emperors Valentinian II and Honorius. The emperor's birthdays often would have been a day of veneration in his absence. The emperors spent most of their time travelling through the Roman Empire. By 380, Constantinople had not hosted an emperor for more than a few weeks at a time for almost twenty years. This situation changed slowly. In about the year 392 only the young Arcadius, the elder son of Theodosius was present in Constantinople.

5. Constantinople during the last decade of the fourth century

In the year 392 there were several important churches in the city, like the Hagia Irene and the Saint Apostles church. There was also an active religious life and from 392 onwards monasteries were built in the city. A mixed population with different backgrounds and religions populated the city. Theodosius, the main ruler of Constantinople at this time, was definitely not living a peaceful monk's life. After having ordered the slaughter of 7.000 inhabitants of the city of

¹⁸ The sequence of the names stated in the constitutions depends on their time on the throne of each emperor and represents the chronological order of reigning time.

Thessalonica in 390, emperor Theodosius was banned from receiving communion by the archbishop of Milan, Ambrose, until his repenting on Christmas day in 390.¹⁹ Thereafter, Theodosius enacted a series of constitutions in 391 and 392 which supported a very violent antipagan policy.²⁰ The law of the year 392 presented here is part of this series of constitutions and is addressed to Proculus the prefect of the city. This constitution was enacted on 17th April 392 together with his son Arcadius and Valentinian II, stating:

Contests in the circuses shall be prohibited on the festal Days of the Sun (Sundays), except on the birthdays of Our Clemency, in order that no concourse of people to the spectacles may divert men from the reverend mysteries of the Christian law.²¹

This text dates back some sixty years after the founding of the city of Constantinople, during a massive growth of the population and a growing number of Christians, both Arians and Catholics living in the town. In the fourth century the city grew to around 350.000 inhabitants.²² However, not all inhabitants were Christians. The city was initially not planned as a Christian second Rome. Many pagan rituals had been taken over in the course of the founding of the city, and Constantine transported many valuable statues and signs from pre-Christian times from all over the empire to be erected in Constantinople. During Theodosius' reign the Emperor took the lead transferring Christian relics to Constantinople.²³

The veneration of the Emperor remained of utmost importance. The circus games were the occasion for Emperors to interact – symbolically – with their subjects, and the citizens could articulate their approval or displeasure in regard to the Emperor.

Buildings that emphasized imperial power were erected close to the palace and the hippodrome and the churches in Constantinople were situated next to each other. The hippodrome, enlarged several times, was the place to meet, to be seen, to discuss and to fear the imperial power as executions have also been carried out there. In order to adapt the spectacle in the circus and hippodrome to Christian customs, emperor Constantine in 325 modified the games in

19 Amb. ep. 51; Doležal 2014: 89-107.

20 CTh. 16.10.10 (24th February 391), CTh. 16.10.11 (16th June 391), CTh. 16.10.12 (8th November 392).

21 Taken from Pharr 1952.

22 Chandler, Fox 1974.

23 McLynn 2019: 315-340.

Constantinople, forbidding gladiator fights.²⁴ In the year 389 games were forbidden on Sundays.²⁵ A constitution enacted three years later laid down the rule that circus games and other kinds of spectacles were none the less allowed on the birthdays of the emperors and thus revoked earlier rules on Sunday rest.

6. The four emperors: Valentinian II, Theodosius, Arcadius and Honorius

The question regarding which emperors wished their birthdays to be prominently celebrated with spectacles will be addressed now. All four emperors named in the two constitutions dealing with Sunday games were family members, belonging to the Theodosian dynasty. Most known is Theodosius (Cauca, Spain, 11th January 346 – Milan, 17th January 395) who was made Augustus on 19th January 379. He was the emperor who promulgated Christianity as a state religion. Emperor Theodosius summoned the First Council of Constantinople, the second ecumenical council of the Christian church in Constantinople in the year 381. In the constitution of the year 392 he is also the co-initiator, together with his elder son Arcadius and his nephew Valentinian II of the law allowing circus games on the emperor's birthdays.

Valentinian II (Augusta Treverorum, 371 – Vienne, 15th May 392) who was since 375 the emperor of the West, was proclaimed Augustus by the army on November 22nd after his father's death.²⁶ However, on 15th May 392 he was found dead in the palace in Vienna within a month after the promulgation of the constitution.²⁷ Consequently, the constitution would have had no further influence on his birthdays.

Honorius (Constantinople, 9th September 384, coronation as Augustus on 23th January 393 of the West – Ravenna, 15th August 423) was the younger son of Theodosius and a future emperor of the West.

Arcadius (Hispania, 1st January 377 – Constantinople, 1st May 408) was declared Augustus for the eastern Empire by his father Theodosius in January 383 at the age of five.

24 CTh. 15.12.1.

25 CTh. 2.8.19.

26 Amm. Marc. 30.10.4.

27 April 17th, 392.

7. The hippodrome

In the center of Constantinople palaces, churches, government buildings and a circus were constructed. Monuments were erected, or replaced by alternatives from other parts of the empire. In the center of the circus, in Constantinople called the hippodrome, stood from 390 onwards a beautiful Obelisk from Egypt as the centerpoint of the games, placed on the spina opposite the Emperors seat. The hippodrome was built close to the imperial palace which in turn was placed next to the important church Hagia Irene, where ten years earlier the First Council of Constantinople had taken place.

Religion and games were interconnected during this period. Races in Constantinople were opened by the emperor making the sign of the Cross, while the spectators welcomed him as God's representative and the different factions sang hymns.²⁸ A winning charioteer who moved forward to receive his prizes from the emperor after the race, would have been accompanied by his singing supporters who would have addressed the emperor:

We ask for equal share of your victory that comes from God, an equal share of your victory, Master, the faith of the kings prevails.²⁹

Eusebius describes the crown for victors in the games.³⁰ The hippodrome in Constantinople was the place where the emperor displayed his presence and obtained publicity.³¹ Following the races, victorious charioteers gave thanks at the nearest church.

8. The obelisk

The obelisk of Thutmose III (1490-1436 BC) is one of the two obelisks³² that came from the Egyptian temple of Karnak, taken from there by emperor Constantin II (337-361). One of the pair was erected in the Circus Maximus 357 in Rome and the other was left in Alexandria and later transported to Constantinople to be erected in the Hippodrome.

28 See Graf 2015.

29 Schrodtt 1981: 46.

30 Euseb. *hist. eccl.* 5.1.

31 Haussig 1959: 235.

32 Corringe 1885.

A sixth-century source places the raising of the obelisk in the year 390.³³ The obelisk was placed on a contemporary base.³⁴ All four sides of the base show members of the imperial house,³⁵ including the four emperors mentioned, being Valentinian II, Theodosius I, Arcadius and Honorius.

Above the Latin inscription facing the *kathisma* (imperial loge) on the Southeast side of the base of the obelisk, Theodosius can be seen holding a wreath in his right hand; he is flanked by his sons Arcadius and Honorius.³⁶ Their images faced the most important spectators.³⁷ This is where the imperial family and high officials would be seated. The inscription on the base would be in Latin,³⁸ in the language of law and administration of that time. This is the same language as that used in the Constitutions on Sunday rest that may be found in the Codex Theodosianus.

Four central figures are also displayed on the northwestern side, the largest is Theodosius, while on his left is the Western Emperor Valentinian II (19 years old in 390) and on the left, Arcadius and Honorius (then 13 and 6 years old).³⁹ These four emperors, of the above mentioned constitutions whose imperial birthdays were to be celebrated on Sundays are represented at the spot where their birthday games would take place. Present or not in the city, they were represented in stone and could be seen by the factions.

There are opinions that hold that it is difficult to identify clearly specific members of the imperial family, but that the scene depicts the embodiment of imperial majesty.⁴⁰ As emperors were so important to the city of Constantinople, I would not follow the hypothesis of showing imperial majesty without exactly showing specific members of the imperial family. All details and portrayed scenes are carefully arranged.

On the side of the base directed to the people and not to the *kathisma*, there is a second inscription, which is written in Greek, the language of daily life and the common people of the Eastern Roman Empire and the city of Constantinople.⁴¹

33 Marcellinus Comes (ed. Mommsen 1894): 37-108; Bruns 1935.

34 Bruns 1935.

35 Haussig 1959: 234 f.

36 Geysen 1998: 47-55.

37 Safran 1993: 419.

38 Safran 1993: 419.

39 See <https://www.thebyzantinelegacy.com/theodosius-obelisk>, retrieved on 5th April 2021.

40 Kiilerich 1993: 31-49.

41 For a detailed study on the base of the obelisk see Kiilerich 1998 and Safran 1993: 409-435. For photos of the obelisk see <https://www.livius.org/articles/place/constantinople-istanbul/>

Since Theodosius erected the obelisk and it is he who asked for the production of the bilingual base of the obelisk, I would support the view that he and his family can be seen on the base of the obelisk. All four emperors, which we know from the two Constitutions, 392 and 399, respectively, are present on the base. Theodosius is portrayed prominently and ranked by the younger generations. Valentinian II, Arcadius and Honorius next to him. It is obvious that these four would have liked to have celebrated their birthdays at this important place in the middle of city. Thus, when absent from the capital, these emperors are represented by their stone images during the spectacles on their birthdays.

9. The prefects of the city of Constantinople in 392 and 399

Next to the imperial family members, some other high officials are depicted on the base. From 359 Constantinople also had a prefect of the city, *praefectus urbi*, to whom several imperial constitutions were directed and who had been the head of Constantinople's city administration. The names of the prefects of the city may be found not only in the Codex Theodosianus and the Codex Justinianus but also on inscriptions, like the base of the obelisk at the hippodrome.

The prefect to whom the first constitution on imperial birthdays falling on a Sunday is addressed in 392, is Proculus,⁴² a very well-known prefect. Proculus became in 388 *praefectus urbis Constantinopolitanae*. His name can also be found on the lower base of the obelisk on the Hippodrome, though it was subject to *damnatio memoriae* and was erased from monuments to be reinstalled in later times.⁴³ Therefore, the name of the prefect Proculus has been eradicated from the base of the obelisk and later re-inscribed. This emendation must have occurred between 392, when Proculus⁴⁴ was removed from office, and 395, when his opponent fell from power. The first constitution of 392 was addressed to Proculus. The second constitution of 399 was addressed to prefect Aurelianus. Aurelianus was a politician, who became consul and later *praefectus urbi* in the city of Constantinople and in 399 praetorian prefect.

constantinople-photos/constantinople-hippodrome/constantinople-hippodrome-obelisk-of-theodosius/, retrieved on 5th April 2021.

42 Died in Constantinople, November 16th, 393.

43 Feissel 1991: 372.

44 Rebenich 1989: 153-165.

10. Findings

The obelisk was a new attraction at the hippodrome. Shortly, after the erection of the obelisk at around the year 390 with an imperial character and depicting members of the Theodosian family, some of the portrayed family members endorsed a constitution asking the *praefectus urbi*, Proculus, who was named by person for the process of erecting the obelisk, to allow circus games on their birthdays and inauguration days.

The constitutions in Codex Theodosianus on imperial birthdays falling on a Sunday in 2.8.20 and 2.8.23 direct our interest to a set of rulers and magistrates that can be seen in person or at least are represented in a symbolic way on the base of the obelisk on the hippodrome in Constantinople.

Many scholars agree that the Northeastern side of the base portrays the factions and the people of Constantinople, and the four emperors Theodosius, Valentinian II, Arcadius and Honorius.

The brothers Arcadius and Honorius reconfirm the decision of their father that on imperial birthdays public games shall take place. Both knew that they would be represented in person in the hippodrome looking towards the magistrates and members of the imperial family on the southeast side and looking to the factions on the northeast side, carved in stone for eternity. The spectator and interested legal historian will be fascinated by the scene today just like the spectators in the last decade of the fourth century.

The obelisk base was meant to be seen and was not only a public piece of art, but the portrayed figures on the base were also a representation of imperial power and absent or present the emperors participated in the games on their birthdays by way of their marble statue.

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LAW, POLITICS, AND RELIGION IN JUSTINIAN LEGISLATION

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Abstract: An analysis of the ideological, political and religious motives which brought to life Justinian legislation, in which Roman law and the Orthodox Catholic religion converge, helps to understand the reasons that led the Byzantine emperor to legitimize his imperial power using it as a powerful instrument of intolerance and discrimination towards those in opposition to him.

Keywords: Justinian; *Corpus iuris ciuilis*; Religion; Legislation; Roman Law.

1. Justinian as legislator

It is well known that when Justinian began to think about the enactment of a collection of laws written under his name, the Roman Empire had long been divided into two parts: the Western Roman Empire and the Eastern Roman Empire.

Already under emperor Honorius the barbarians had begun to rebel or to invade the western part of the Roman empire, which included the western provinces of the empire administered by its independent Imperial court. In AD 476, at the head of the Sciri and his Germanic allies, Odoacer lifted the weight of the Roman Western Empire from the weak shoulders of Romulus Augustulus, the child who sat on the throne in the western Imperial Court in Ravenna, and became King of Italy.

The Imperial Court survived in the eastern part.¹ When Justinian² succeeded his uncle Justin I on the imperial throne of Constantinople on 1st August 527, he began to cherish the dream of reuniting the Roman Empire under his rule, by recovering the territories lost in the last centuries.³ A second matter for Justinian was Christian unity.

1 On this period, see now Kruse 2019. On the origins on the Eastern Roman Empire, see Diehl 1920: 1-18.

2 On Justinian and his age, see the bibliography in Maas 2005b: 23.1; see also Bonini 1978.

3 Cf. Diehl 1920: 22: "Tout plein des souvenirs de la grandeur romaine, Justinien rêva de reconstituer l'empire romain tel qu'il était autrefois, de restaurer les droits imprescriptibles que Byzance, hérétique de Rome, gardait sur les royaumes barbares d'Occident, de rétablir l'unité du monde romain."

In connection with these two ideas, Justinian conceived a grandiose legislative project, that would forever remain linked to his name.

Although the Persian War forced him to postpone the reconquest of the western part of the Roman empire, already in his first years of reign he devoted himself to realize two important programmatic points: the fight against religious dissidents⁴ and the reform of the law.⁵ In order to give substance to the second of these points, he issued from AD 529 to 534 two editions of the Code⁶ (*Codex Iustinianus*),⁷ a collection of imperial constitutions, the Digest (*Digesta Iustiniani*, or *Pandectae*), which was a collection of passages from the works of classical Roman jurists, and an official textbook for the study of law, the Institutes (*Institutiones Iustiniani*). Those three parts of Justinian legislation, provided with the force of law, together with the new laws issued from AD 535 to 565, the so-called Novels (*Nouellae Iustiniani*), constituted a legislative monument, which from the Middle Ages is known under the name of *Corpus iuris civilis*. On it is still based the legal tradition of most of the European countries.⁸

From this point of view, Justinian's legislative activity is unprecedented in the past and is full of consequences for the following centuries.⁹ It represents a milestone in legal history, for it marks a tran-

4 An overview of Justinian's religious policy can be found in Maraval 2016: 117-135; 177-184; 317-337.

5 Cf. Raveggiani 2019: 46.

6 The first edition (*Nouus Codex Iustinianus*), promulgated in April 529, did not survive. We have only to fragmentary witnesses of it, both on papyrus from Egypt: P. Oxy. XV 1814 and P. Reinach Inv. 2219. The second edition (*Codex Iustinianus repetitae praelectionis*), which survives today, was promulgated in AD 534.

7 The new code had to carry Justinian's own name; cf. const. *Haec quae necessario* pr. (AD 528): *uno autem codice sub felici nostri nominis uocabulo componendo*; const. *Summa rei publicae* § 1 (AD 529): *in unum codicem felici nostro uocabulo nuncupandum*; const. *Deo auctore* § 2 (AD 530): *in uno uolumine nostro nomine praefulgente coadunato*; see also const. *Cordi* § 4 (AD 534): *memoratus Iustinianus codex*. After almost twelve centuries, although issued under the French Consulate on 21st March 1804, the civil code of the French (*Code civil des Français*) was soon named after Napoleon (*Code Napoléon*), who became emperor at the end of the same year. From Justinian to Napoleon the connection between law and power seems to express "the turning from conquest to social control and political organisation" (cf. Kelley 1991: 68). Justinian's attitude to give his name is considered by Procopius (*Anek.* 11.2) as one of the principal reasons that led him to carry out reforms and to issue laws, even if not necessary: ... τούς τε νόμους καὶ τῶν στρατιωτῶν τοὺς καταλόγους ταῦτο τοῦτο ἐποίησεν, οὐ τῶ δικαίῳ εἰκῶν οὐδὲ τῶ ξυμφόρῳ ἐς τοῦτο ἡγμένους, ἀλλ' ὅπως δὴ ἅπαντα νεώτερά τε καὶ αὐτοῦ ἐπώνυμα εἶη. ἦν δέ τι καὶ μεταβαλεῖν ἐν τῶ παρανομίᾳ ἠκίστα ἴσχυσεν, ἀλλὰ τοῦτω γε τὴν ἐπωνυμίαν τὴν αὐτοῦ ἔθετο [English translation by Dewing 1935: 129-131: "he treated the laws and the divisions of the army in the same way, not yielding to demands of justice nor influenced to this course by any public advantage, but simply that everything might be new and might bear the impress of his name."].

8 For the legacy of Roman law, see Stein 1999.

9 Cf. Archi 1981: 31 f.

sition from the Roman to the Medieval in the Mediterranean World: Justinian's age was "the last of the Roman centuries".¹⁰

According to Stein, Justinian legislation is

an immense work, more glorious than the victories of Belisarius and Narses and much more important than the splendours of Hagia Sophia, for it is not exaggerated to maintain that the *Corpus iuris civilis* exceeds in importance for the evolution of mankind all the books, whatever they are, except the Bible. In fact, it is through him, and thanks to him, that Rome bequeathed to posterity the best it had created, its law, of which many notions and applications have entered to such an extent in our minds and in our mores that, unless we are jurists, we are no longer aware of their origin.¹¹

2. Why did Justinian rearrange Roman law?

Justinian's appointment as emperor by his uncle Justin, who had adopted him, had not been without opposition from some members of the aristocracy.¹² In order to consolidate his power and to affirm his legitimacy after Justin's death, he realized that he needed to reaffirm the political ideology according to which imperial power represented divine power on earth. Like his predecessors on the throne of Constantinople, Justinian also understood well that in the eyes of his subjects his power had to appear as being assimilated to God and thus having his authority recognised as legitimated.

This ideology is derived from the treatises on the kingship of some Hellenistic political philosophers such as Ecphantus, Diotogenes and Stenidas,¹³ and welded with the Roman ideology, when Diocletian after AD 284 claimed that the emperors were descendants of Gods.¹⁴

10 Wickham 1998: 279.

11 Stein 1949: 402 f.: "Œuvre immense, plus glorieuse que les victoires de Bélisaire et de Narsès et bien plus importante que les splendeurs de Sainte-Sophie, car on n'exagère pas en soutenant que le *Corpus iuris civilis* dépasse en importance pour l'évolution du genre humain tous les livres, quels qu'ils soient, à l'exception de la Bible. En effet, c'est par lui, et grâce à lui, que Rome a légué à la postérité ce qu'elle avait créé de meilleur, son droit, dont bien des notions et des applications sont entrées à tel point dans notre esprit et dans nos mœurs que, à moins d'être juristes, nous n'avons plus conscience de leur origine."

12 Cf. Maraval 2016: 99 = Maraval 2017: 105.

13 See Centrone 2015: 411.

14 Cf. *Claudii Mamertini Panegyricus Maximiano Augusto dictus*, in *Panegyrici Latini II* [10], 3.2-4 [Baehrens 103]; ILS 629.

In July 336, Eusebius of Caesarea had reformulated this concept in Christian terms by bringing together Greek Philosophy and Christian theology into the so-called Christian Platonism.¹⁵ On the occasion of the Oration in praise of Emperor Constantine, the speech he delivered in AD 336¹⁶ to celebrate the Emperor's Thirtieth Jubilee, he affirmed that the emperor could take part in divine authority by reflecting in the earth the divine model as 'imitation of God' (μίμησις θεοῦ).¹⁷ When the emperor fights the enemies of the true religion he also imitates God in the fight against the evil demons.¹⁸ For this reason, only "who has formed his soul to royal virtues, according to the standard of the celestial Kingdom" may "deserve the imperial title".¹⁹

After Constantine, "the emperor was accepted and obeyed as a 'God-grounded-power' which was part of the nature of the universe and integral to its divine order".²⁰

In an anonymous dialogue *On political sciences* (Περὶ πολιτικῆς ἐπιστήμης) written in the era of Justinian²¹ and handed down in a Vatican manuscript (BAV, Vat. gr. 1298)²² the *basileía* (βασιλεία) is represented once again as an imitation of God. The emperor represents God on earth. He has to govern "with the custody of the laws and all the discipline of the state", like a father who benefits his children.²³

In the same period Agapetus, a deacon of the Great Church of God in Constantinople (that is Hagia Sophia), affirms in the *Exposition of Articles of Advice* (Ἐκθεσις κεφαλίων παραινετικῶν) he addressed to Justinian²⁴ the similarity between the earthly and divine Kingdoms. This work, which consists of 72 heads (or small chapters) of advice based on the writings of Isocrates and the Greek Fathers, contains the political theory of Byzantium. It can be regarded as one of the first examples of a literary genre which will continue to

15 Cf. Baynes 1933.

16 On the date of the delivering of this speech, see Drake 1975: 345-356.

17 Euseb. *Laud. Const.* 3.

18 Euseb. *Laud. Const.* 2; cf. Henry 1967: 281; Nicol 1988: 51 f.; De Giovanni 2007: 414 f.; Bell 2009: 60-62.

19 Euseb. *Laud. Const.* 5.2.

20 Barker 1957: 1.

21 On the dialogue, which includes six books, and on its Neoplatonic sources, see Barker 1957: 22 and 63-75; Pertusi 1968; Fotiou 1981: 533-547; O' Meara 2002: 49-62; Bell 2009: 49; Steiris 2013: 121-141.

22 On the history of the palimpsest, which became from the library of Fulvio Orsini (1529-1600) and in which Angelo Mai (1782-1854) discovered the dialogue on the political science (Mai 1827: 571 ff.), see Licandro 2017: 1-53.

23 *Dial.* 5.132-133.

24 On this work handed out by many manuscripts and published in Migne 1865: 1163-1186, see Henry 1967; Frohne 1985; Demandt 2002; Bell 2009: 27-49.

be practiced in future centuries, the *Fürstenspiegel* (or: mirror for princes).²⁵ In chapter 9 is said that:

The soul of the emperor, with its many cares, must be wiped clean like a mirror, so that it may always shine with the rays of God and learn from them how to judge in practical affairs. For nothing makes us see better what is necessary than always keeping our soul pure.²⁶

There is no doubt that “in the power of his rank” the emperor “is like God over all men. He has no one on earth who is higher than he” (chapter 21).²⁷

In chapter 37 we can read:

He who as attained great authority, let him imitate the giver of that authority according to his ability. For he bears in some way the image of God, who is above all, and through Him possesses rule over all, and in this he will best imitate God if he thinks nothing is to be preferred to mercy.²⁸

In chapter 27 is said:

Impose on yourself the necessity of keeping the laws, since you on earth no one able to compell you. You will thus display the majesty of the laws by revering them yourself above all others, and it will be clear to your subjects that acting unlawfully is not without danger.²⁹

Justinian rules over his own empire which has been handed over to him by the celestial majesty,³⁰ as he states in the very first words of

25 Barker 1957: 20 and 54; Blum 1981; Frohne 1985. Twenty editions of this work were printed in the 16th century and translated in English (for Marie of Scotland and Elizabeth I of England), Russian (for Ivan the Terrible), and French (for Charles IX of France).

26 English translation by Bell 2009: 103.

27 English translation by Bell 2009: 107.

28 English translation by Bell 2009: 112.

29 English translation by Bell 2009: 109.

30 Nou. 73 praef. 1 (AD 538): *Quia igitur imperium propterea Deus de caelo constituit* rell. [English translation by Scott 1932a: 275: “Therefore as God rules the Empire of Heaven etc.”]; Nou. 113.3 (AD 541): ... τὴν βασιλείαν θεοῦ δόντος [English translation by Scott 1932b: 37: “We have received from God the right of empire”].

the constitution *Deo auctore*, with which he publishes his *Digesta* on 15th December 533:

const. *Deo auctore* pr. = Cl. 1.17.1 pr. (AD 530): *Deo auctore nostrum gubernantes imperium, quod nobis a caeleste maiestate traditum est* rell.³¹

Even in the constitutions issued after the second edition of his Code, Justinian affirms that his power is of divine origin³² and he is second only to God in ruling the world.³³ The emperor portrayed himself as ‘animate law’ (νόμος ξμψυχος; *lex animata*)³⁴ sent by God to the men.³⁵

Nou. 105.2.4 (AD 536): ... Πάντων δὲ δὴ τῶν εἰρημένων ἡμῖν ἡ βασιλέως ἐξηρήσθω τύχη, ἧ γὰρ καὶ αὐτοῦς ὁ θεὸς τοὺς νόμους ὑπέθηκε νόμον αὐτῆν ξμψυχον καταπέμψας ἀνθρώποις κτλ.³⁶

3. The Romanity as an element of legitimacy

Justinian conceived also the Romanity as an element of legitimacy. In order to present himself as heir to the Roman imperial tradition to restore with a *restauratio imperii*, he “deeply felt his mission as a

- 31 English translation by Frier 2016: 267: “By the grace of God governing Our empire, which was entrusted to Us by heavenly majesty etc.”
- 32 Nou. 72 praef. (AD 538): ... *praecipue autem instrumenta minorum et quae circa eos est curatio res est studiosa eis qui proferendi leges a deo licentiam perceperunt, dicimus autem de eo qui imperat* rell. [English translation by Scott 1932a: 269: “Documents affecting the rights of minors, or which relate to the care of their property, should be specially taken into consideration by those to whom permission has been given by God to enact laws; We mean by this him who is invested with sovereignty”]; Nou. 113.1 pr. (AD 541): *Nos ..., quibus Deus et sancienti potestatem donavit* rell. [English translation by Scott 1932b: 36: “We (to whom God has given authority to issue orders) etc.”]; Nou. 137 praef. (AD 565): Εἰ τοὺς πολιτικούς νόμους, ὧν τὴν ἐξουσίαν ἡμῖν ὁ θεὸς κατὰ τὴν αὐτοῦ φιλανθρωπίαν ἐπίστευσε κτλ. [English translation by Scott 1932b: 152: “If, for the general welfare, We have taken measures to render the civil laws more effective, with whose execution, God, through His good will towards men, has entrusted Us etc.”].
- 33 Nou. 69.4.1 (AD 538): ... *deo solummodo et imperatore sequente deum haec gubernare* [English translation by Scott 1934a: 265: “only God, and after him the Emperor, is able to exercise control over these things.”].
- 34 This idea goes back to Plato, and not to Stoicism, as pointed out by Aalders 1969: 315-329; see also Ramelli 2006.
- 35 Cf. Steinwenter 1946; De Giovanni 2007: 413 ff.; Giuffrè 2007-2008: 239; Moretti 2012: 89; Lovato 2013: 397; Capozza 2018: 46.
- 36 English translation by Scott 1932b: 20: “The Emperor, however, is not subject to the rules which We have just formulated, for God has made the laws themselves subject to his control by giving him to men as an incarnate law etc.”

Roman sovereign and made every effort to restore the ancient power of the empire halved by the barbarian invasions".³⁷ Justinian presented himself as the restorer of the ancient Roman glory and of the territorial integrity of the Roman empire. Constantinople became the New Rome.³⁸ John Lydus writes that "to Rome Justinian restored what was Rome's".³⁹

The Roman tradition was still strong in the age of Justinian and he thought he was the heir of the political legacy of Roman law. Therefore, he "used legislation as both a medium to advertise his conception of the imperial office he inhabited and a means of exercising authority over the secular and the sacred, the public and the private".⁴⁰

In the first part of the constitution that in December 533 announced the publication of the Digest (*de confirmatione Digestorum*: about the confirmation of the Digest), Justinian presented his work as the culmination of a legislation that started from the foundation of the city by Romulus (*ab urbe condita*) up to his reign (*usque ad nostri imperii tempora*):

*const. Tanta pr. (533 AD): ... erat enim mirabile Romanam sanctionem ab urbe condita usque ad nostri imperii tempora, quae paene in mille et quadringentos annos concurrunt, intestinis proeliis uacillantem hocque et in imperiales constitutiones extendentem in unam reducere consonantiam, ut nihil neque contrarium neque idem neque simile in ea inueniatur et ne geminae leges pro rebus singulis positae usquam appareant rell.*⁴¹

Justinian legislation therefore represented the culmination of a 1400-year-old legal tradition. In the constitution *Deo auctore* of December 530, which announced the compilation of the Digest (*de*

37 Ravegnani 2019: 9.

38 On the consideration of Constantinople as the 'new Rome' (*noua Roma*; cf. const. *Deo auctore*, §10 [AD 530]; Cl. 8.14.7 [AD 532]; Nou. 70.1 [AD 538]; Nou. 131.2 [AD 545]), see now Bianchini 2019: 27-32.

39 Ioh. Lyd. *de mag.* 3.55: ... τῆ δὲ Ρώμῃ τὰ Ρώμης ἀπέσωσεν.

40 Pazdernik 2005: 187.

41 English translation by Watson 1985: liv: "Indeed, when Roman jurisprudence had lasted for nearly fourteen hundred years from the foundation of the city to the period of our own rule, wavering this way and that in strife within itself and spreading the same inconsistency into the imperial *constitutiones*, it was a marvelous feat to reduce it to a single harmonious whole, so that nothing should be found in it which was contradictory or identical or repetitious, and that two different laws on a particular matter should nowhere appear".

conceptione Digestorum: about the composition of the Digest), Justinian had declared he wanted to collect and correct the Roman law in its entirety:

const. Deo auctore §2 (AD 530): ... *cum ex paucis et tenuioribus releuati ad summam et plenissimam iuris emendationem peruenire properaremus et omnem Romanam sanctionem et colligere et emendare et tot auctorum dispersa uolumina uno codice indita ostendere, quod nemo neque sperare neque optare ausus est, res quidem nobis difficillima, immo magis impossibilis uidebatur* rell.⁴²

The emperor wanted to be the architect of a new legal order, in which the codified Roman law had “to be regarded as if it had come out of his imperial mouth itself”. He thought that who corrected the law was more praiseworthy even than he who originally found it.⁴³

Justinian’s legislative activity is also presented as a mixture of restauration and innovation.⁴⁴ It is a restauration to the better (*ad melius restaurare*), accompanied by the respect for antiquity (*reuerentia antiquitatis*). For this reason, every fragment included in the Digest had to be provided with the name of the Roman jurist who was his author.⁴⁵ In this statement can be seen a manifestation of the deference towards the past,⁴⁶ which in turn is an expression of the role recognized in the authority of the antiquity by recalling the old Roman glory.⁴⁷

The reference to the past as a function of legitimizing the imperial power is already found in the constitutions issued by Diocletian.⁴⁸ As Donatuti pointed out, the antiquity was the Roman one

42 English translation by Watson 1985: xlvi: “In our hast to extricate ourselves from minor and more trivial affairs and attain to a completely full revision of the law, and to collect and amend the whole set of Roman ordinances and present the diverse books of so many authors in a single volume (a thing which no one has dared to expect or to desire), the task appeared to us most difficult indeed impossible.”

43 Cf. Ladner 1975: 192.

44 Cf. Maas 1986: 28 f. On this ambivalence, in which the expression of an age full of contradictions can be seen, see Cameron 1994: 194.

45 *Const. Tanta* pr. (AD 533).

46 Cf. Donatuti 1953; Maas 1986: 18 f.; Noethlichs 2000: 121.

47 Nou. 24.1 (AD 535): *Haec considerantes nos, antiquitatem rursus cum maiori flore ad rem publicam reducentes et Romanorum nobilitantes nomen* rell. [English translation by Scott 1932a: 145: “Bearing these things in mind, and recalling with honor the ancient institutions of the Republic, as well as the dignity of the Roman name etc.”].

48 Donatuti 1953: 207 = Donatuti 1977: 829; Maas 1986: 18 f.

and could refer both to ancient juridical regulations and Roman law as a whole.⁴⁹

On one hand, in Justinian's time the call of the past is to be considered not as antiquarianism, but as a propaganda instrument to legitimize the emperor's position in the frame of the political conditions in Constantinople.⁵⁰ On the other hand, the renewal of the ancient ties with a tradition of fourteen centuries provided a legitimation to the present and served to bring about a reform without presenting it as an innovation which broke away from the glorious past. It was important for Justinian to be able to carry out his own legislative reforms without being accused of being an innovator who did not respect the past. By presenting himself as the legitimate heir of the Roman tradition, Justinian was in the right position to appear as the author of a legislation which came from the representative on earth of the divine authority to restore and to consolidate the Roman Empire.

Justinian thought he was supported in his work by God's help, which allowed him to succeed in an enterprise that his predecessors were not able to complete.⁵¹ Without the support of Divine Providence, in fact, human weakness would not be able to carry out this important task for the common good.⁵²

const. Tanta § 18 (AD 533): Sed quia diuinae quidem res perfectissimae sunt, humani uero iuris condicio semper in infinitum decurrit et nihil est in ea, quod stare perpetuo possit (multas etenim formas edere natura nouas depererat), non despe-

49 Donatuti 1977: 830-842.

50 Cf. Maas 1986: 19.

51 Cf. const. *Haec quae necessario pr.* (AD 528): *Haec, quae necessario corrigenda esse multis retro principibus uisa sunt, interea tamen nullus eorum hoc ad effectum ducere ausus est, in praesenti rebus donare communibus auxilio dei omnipotentis censuimus* rell. [English translation by Frier 2016: 3: "This material, which many past emperors have considered to be in urgent need of correction, though none of them, in the meantime, ventured to bring such a project to completion, We, with the aid of Almighty God, have now determined to provide for the common good etc."].

52 Cf. const. *Tanta pr.* (AD 533): *... namque hoc caelestis quidem prouidentiae peculiare fuit, humanae uero imbecillitati nullo modo possibile. nos itaque more solito ad immortalitatis respeximus praesidium et summo numine inuocato deum auctorem et totius operis praesulem fieri optauimus ... omnia igitur confecta sunt domino et deo nostro Ihesu Christo possibilitatem tam nobis quam nostris in hoc satellitibus praestante.* [English translation by Watson 1985: lv f.: "... Now for the Heavenly Providence this was certainly appropriate, but for human weakness in no way possible. We, therefore, in our accustomed manner, have resorted to the aid of the Immortal One and, invoking the Supreme Deity, have desired that God should become the author and patron of the whole work ... Everything was completed, therefore, our Lord and God Jesus Christ vouchsafing the capacity to us and to our subordinated in the task."].

*ramus quaedam postea emergi negotia, quae adhuc legum laqueis non sunt innodata. si quid igitur tale contigerit, Augustum imploretur remedium, quia ideo imperialem fortunam rebus humanis deus praeposuit, ut possit omniae quae nouiter contingunt et emendare et componere et modis et regulis competentibus tradere.*⁵³

In this perspective are also to be read the affirmations according to which the imperial laws, legitimized by the past and enacted thank to God's help, are destined to be perpetual and to last for the future:

*Nou. 1.1.4 (AD 535): ... Non enim his, qui sub nobis neque qui nunc solum sunt hominibus, sed omni et post haec currenti tempori legem ponimus rell.*⁵⁴

The idea that feeds Justinian's propaganda is that the divine origin of his legislation makes it fit to be in effect for eternity, as God is eternal. In one of his laws he manifests the will that it remain immutable and immortal, and that it be obeyed as long as humanity is on earth:

*Nou. 59.7 (AD 537): ... Et uolumus etiam illa tenere secundum hunc modum et esse per omnia inmutata et immortalia, hac sacra pragmatica lege per omnia tenente, donec sunt homines rell.*⁵⁵

4. The law as a weapon

In Justinian legislation it is therefore possible to find an ideological motivation based on a political theology. This ideological motivation

- 53 English translation by Watson 1985: lxi: "Now things divine are entirely perfect, but the character of human law is always to hasten onward, and there is nothing in it which can abide forever, since nature is eager to produce new forms. We therefore do not cease to expect that matters will henceforth arise that are not secured in legal bonds. Consequently, if any such case arises, let a remedy be sought from the Augustus, since in truth God has set the imperial function over human affairs, so that it should be able, whenever a new contingency arises, to correct and settle it and to subject it to suitable procedures and regulations."
- 54 English translation by Scott 1932a: 7: "For it is not for those alone who are subject to Our authority, but for all future time that We have established this law."
- 55 English translation by Scott 1932a: 243: "We desire that this Imperial pragmatic sanction shall be strictly observed, and that, in accordance with what We have prescribed, it shall remain unchanged and immortal, and be obeyed by all persons, as long as there are men upon the earth etc."

publicizes a monotheistic monarchy for a Christian Roman empire, in which the law is conceived as an instrument to make the empire on the earth an imitation of the Kingdom of Heaven.

In the proemium of the constitution *Imperatoriam maiestatem*, which introduces Justinian's Institutes, is said that:

*const. Imperatoriam maiestatem pr. (AD 533): Imperatoriam maiestatem non solum armis decoratam, sed etiam legibus oportet esse armatam, ut utrumque tempus et bellorum et pacis recte possit gubernari rell.*⁵⁶

In Justinian's view, therefore, the law is a weapon:⁵⁷ in his hands it becomes an instrument of "theocratic authoritarianism" and "intolerant Christianity".⁵⁸

This intolerance led him to conceive the State and its laws as instruments aimed at regulating the lives, the consciences, and the beliefs of all his subjects. According to Theophanes Confessor's Chronicle, pagan intellectuals were prosecuted.⁵⁹ From a passage of Malalas⁶⁰ we know that in AD 529 Justinian issued an ordinance (πρόσταξις) and sent it to Athens in order to forbid the teaching of pagan philosophy and astronomy.⁶¹ The consequence was the closure of the Platonic Academy in Athens, reconstituted by Plutarch of Athens at the beginning of the fifth century. Neoplatonic philosophers took refuge from Khosrow I in Persia and their assets were confiscated. After many centuries an illustrious tradition of classical culture

56 English translation by Moyle 1913: 1: "The imperial majesty should be armed with laws as well as glorified with arms, that there may be good government in times both of war and of peace etc."

57 Cf. Dannenbring 1972; De Giovanni 2007: 443 f., 457; Lovato 2013: 397; Varvaro 2018: 196.

58 Maraval 2016: 347 f. = Maraval 2017: 374; cf. Varvaro 2018: 196.

59 Cf. Pontani 2020: 374.

60 Malal. *Chron.* 18.47: ἐπὶ δὲ τῆς ὑπατείας τοῦ αὐτοῦ Δεκίου ὁ αὐτὸς βασιλεὺς θεσπίσας πρόσταξιν ἐπεμψεν ἐν Ἀθήναις, κελεύσας μηδὲνα διδάσκειν φιλοσοφίαν μήτε ἀστρονομίαν ἐξηγεῖσθαι κτλ. [English translation by Pontani 2020: 374.9: "During the consulship of the same Decius, the emperor issued a decree and sent it to Athens ordering that no one should teach philosophy nor interpret astronomy etc."].

61 We don't know if this provision is the one transmitted in Cl. 1.11.10.2 (AD 529): Πᾶν δὲ μάθημα παρὰ τῶν νοσοῦντων τὴν τῶν ἀνοσίων Ἑλλήνων μανίαν διδάσκεισθαι κωλύομεν, ὥστε μὴ κατὰ τοῦτο προσποιεῖσθαι αὐτοὺς παιδεύειν τοὺς εἰς αὐτοὺς ἀθλίως φοιτῶντας, ταῖς δὲ ἀληθείαις τὰς τῶν δῆθεν παιδευομένων διαφθεῖρειν ψυχάς [English translation by Pontani 2020: 374.11: "For every science, we forbid its teaching by those who are sick with the madness of the Hellenes, that they might not according to this rule pretend to teach those who miserably approach them and in fact destroy the souls of the persons supposedly studying with them"]. The identification of the decree of which speaks Malalas and the imperial constitution is not sure; cf. Beaucamp 2002: 21-35; Watts 2004: 168-182; Wildberg 2005: 331; Corcoran 2009: 199.

ended.⁶² Justinian's era can be also regarded as a period in which "the institutional commitment to the preservation and transmission of the classical heritage started to show the traces of a steady decline".⁶³

Through his legislation based on the nature (φύσις), which was always changing,⁶⁴ Justinian set out moral and social normality criteria, of which the emperor with his undisputed and indisputable authority guaranteed, indicating what is correct (ὀρθῶς), and what is not (οὐκ ὀρθῶς). These criteria marked a clear dichotomy on a normative level, not only in the moral and religious field, and drew the watershed between those who pursued what was correct and those who did not.

At the end of the opening title of the *Codex Iustinianus* we can read an *epistula* sent by Justinian to Pope John II, in which Justinian recalled the 'correct faith' (*recta fides*), an expression which also recurs in Greek (ὀρθὴ πίστις; ὀρθὴ δόξα) in his other imperial constitutions.⁶⁵ The correct faith was the orthodox one⁶⁶ and had to shine in the emperor (*in principe*), stating that true religion (*uera religio*) is not subject to decline:

Cl. 1.1.8.2 (AD 533): *Nihil est enim, quod lumine clariore prae-fulgeat, quam recta fides in principe: nihil est, quod ita nequeat occasui subiacere, quam uera religio. Nam cum auctorem uitae uel luminis utraque respiciant, recte et tenebras respuunt et nesciunt subiacere defectui.*⁶⁷

62 Cf. Pontani 2020: 374.

63 Pontani 2020: 374.

64 Nou. 84 praef. (AD 539): *Multis undique natura nouitatibus utens (dictum est iam in legibus hoc saepe prooemium, dicitur autem et iterum, donec illa quae sua sunt operatur) ad opus multarum nos pertrahit legum* rel. [English translation by Scott 1932a: 31: "Nature, everywhere inclined to the production of numerous innovations (this prelude has often been employed in legislation, but will be constantly repeated until the points to which it gives rise are finally settled), has induced Us to enact many laws etc."].

65 E.g. Cl. 1.1.5 pr. (AD 527): ὀρθὴ πίστις; Cl. 1.3.41 pr. (AD 528): ὀρθὴ πίστις; Cl. 1.5.16 pr. (probably AD 529): ὀρθὴ καὶ ἀληθινὴ πίστις; Cl. 1.5.18 pr. (probably AD 529): τὴν ὀρθόδοξον πίστιν; Cl. 1.5.20.1 (AD 530): ὀρθὴ δόξα; Cl. 1.5.20.5 (AD 530): ὀρθὴ πίστις; Nou. 129 praef. (AD 551): ὀρθὴ τῶν Χριστιανῶν πίστις.

66 Cf. Cl. 1.5.16.4 (probably AD 529): τῶν ὀρθοδόξων Χριστιανῶν δόγμα.

67 English translation by Frier 2016: 31-33: "For there is nothing that burns with a brighter light than correct faith in an emperor; there is nothing less subject to decline than true religion. For as both behold the author of life or light, they rightly both reject darkness and know not how to succumb to eclipse."

Orthodox Catholics were right, heretics were not. With a law the emperor defined officially who was excluded from the holy participation in the catholic Church and therefore had to be considered heretic from a juridical point of view (*haereticos iuste uocamos*).⁶⁸

In Justinian legislation heretics are portrayed by using a vocabulary that makes them appear as mad and insane (*furor; uesania* or *insania*; in Greek: *μανία*),⁶⁹ deranged (*φρενοβλαβή*),⁷⁰ ill or infected by a disease,⁷¹ destroyer of souls (*ψυχοφθόρος*).⁷² The massive use of these and other metaphors serves to evoke the topos of danger and threat. Legislative texts are constructed with a rhetorical technique that helps to build up an image of a public enemy who represent a great danger.⁷³ For this reason heretics are to be fought with the laws.

- 68 Nou. 109 praef. (AD 541): ... *Haereticos uero et illi dixerunt et nos dicimus eos qui diuersarum sunt haeresium: quibus coniungimus et connumeramus et qui Nestorii Iudaicam sequuntur uesaniam et Eutythianistas et Acephalos, qui Dioscori et Seueri mala secta languent Manichaei et Apollinaris renouantium impietatem, et ad haec omnes qui non sunt membrum sanctae dei catholicae et apostolicae ecclesiae, in qua omnes concorditer sanctissimi [episcopi et] totius orbis terrarum patriarchae, et Hesperiae Romae et huius regiae ciuitatis et Alexandriae et Theopoleos et Hierosolymorum, et omnes qui sub eis constituti sunt sanctissimi episcopi apostolicam praedicant fidem atque traditionem. Igitur sacram communionem in catholica ecclesia non percipientes ab eius deo amabilibus sacerdotibus haereticos iuste uocamus: nam licet nomen Christianorum sibimet imposuerint, uera tamen Christianorum se et fide et communione separant dei iudicio semet ipsos subdi cognoscentes.* [English translation by Scott 1932b: 28: "Our predecessors defined as heretics, and We also designate as such those who are the members of different heterodox sects, and among the latter We include persons who adopt the insane Hebrew doctrines of Nestorius the Eutythian, the Acephali, who endorse the evil dogmas of Dioscorus and Severus; those who renew the impiety of Manichæus and Apollinarius; as well as all such as are not affiliated with the Catholic and Apostolic Church of God, in which the most holy bishops, the patriarchs of the entire earth, of Italy, of Rome and of this Royal City, of Alexandria, Antioch, and Jerusalem, along with all the holy bishops subject to their authority, preach the true faith and ecclesiastical tradition. Hence We very properly call persons heretics who do not receive the holy sacraments from the reverend bishops in the Catholic Church; for although they may give themselves the name of Christians, still they are separated from the belief and communion of Christians, even when they acknowledge that they are subject to the judgment of God."].
- 69 E.g. Cl. 1.1.7.1 (AD 533): *μανία*; Cl. 1.5.15 (probably AD 529): *μανία*; Cl. 1.5.16.1 (probably AD 529): *μανία*; Cl. 1.5.20 pr. (AD 530): *μανία*; Cl. 1.5.21.1 (AD 531): *furor*; Cl. 1.11.10.2 (AD 529): *μανία*; Nou. 37.5 (AD 535): *furor*; Nou. 109 praef. (AD 541): *μανία / uesania*; Nou. 115.3.14 and 115.4.6 (AD 542): *μανία / furor*; Nou. 132 (AD 544): *μανία / uesania*; Nou. 144 (AD 544): *μανία / uesania*.
- 70 E.g. Cl. 1.1.5.3 (AD 527): *φρενοβλαβή*; Cl. 1.1.6.8 (AD 533): *φρενοβλαβή*.
- 71 E.g. Cl. 1.4.18.4 (probably AD 529): *οι νοσοῦντες*; Cl. 1.5.15 (probably AD 529): *οι κατασχέθεντες τῆ νόσφ*.
- 72 E.g. Cl. 1.1.5.3 (AD 527): *ψυχοφθόρος*; Cl. 1.1.6.9 (AD 533): *ψυχοφθόρος*.
- 73 The use of this technique to construct the image of an enemy goes back to the ancient times; see Reisigl 2012: 294 f., who underlines that "Außerhalb der genuin politischen Sphäre wird die rhetorische Konstruktion von F[eind] auch im religiösen Bereich greifbar, wo etwa Homilien eine wichtige Funktion dabei erfüllen, konfessionelle Gegnerschaft (z.B. «Irrgläubige» im Streit zwischen Protestantismus versus Katholizismus oder Christentum versus Judentum und Islam) und (angeblich) konfessionslose Gegnerschaft (z.B. «Heiden», «Ungläubige», «Cottlose») in den Rang von F[eind] zu erheben, zusätzlich zu den systemimmanenten metaphysischen Figuren, die als gefährliche göttliche Widersacher repräsentiert werden

Just a few examples will give us an idea of the way Justinian used the imperial power to discriminate and to punish anyone who did not conform to the observance of the only religion considered orthodox.⁷⁴ The emperor believed that the Catholic faith was the first and highest good for all men,⁷⁵ and for this reason every heterodox doctrine had to be eradicated.⁷⁶

Justinian thought that his most important and most urgent task was to save the souls of his subjects, as he clearly said in the opening lines of an imperial constitution probably enacted in AD 529:

Cl. 1.5.18 pr. (probably AD 529): Πάντων ποιούντων πρόνοιαν τῶν συμφερόντων τοῖς ἡμετέροις ὑπηκόοις ἐκείνου μάλιστα πάντων ὡς πρώτου καὶ τῶν ἄλλων ἀναγκαιοτάτου πεφροντίκαμεν τοῦ τὰς αὐτῶν σώζειν ψυχὰς διὰ τοῦ τὴν ὀρθόδοξον πίστιν ἅπαντας καθαρᾶ διανοίᾳ κτλ.⁷⁷

For the emperor not only his exhortations, but his edicts and laws could be the tools to use in order to correct the beliefs he himself indicated by law as false, and thus induce them to accept the orthodox faith, which was the only one to be able to save the souls of his subjects:

Cl. 1.5.18.1 (probably AD 529): Καὶ δὴ πλείστους εὐρόντες ἐν διαφόροις πλανωμένους αἰρέσεσι διὰ σπουδῆς ἐποησάμεθα παραινέσεσί τε ταῖς τὸν θεὸν θεραπεύουσας ἐπὶ τὴν ἀμείνω μεταστῆσαι γνώμην αὐτοῦς καὶ θεῖοις ἐδίκτοις, ἔτι δὲ καὶ νόμοις ἐπανορθῶσαι τὴν οὐκ ὀρθῶς

(z.B. «der Teufel» und «die Hexe»). Allerdings zeigt sich quer durch die Geschichte seit der Antike, daß religiöse und politische F[einde] in den rhetorischen Inszenierungen einander übergehen".

74 For other examples, see the imperial constitutions in the title 1.5 *De haereticis et Manichaeis et Samaritis* (about Heretics, Manichaeans, and Samaritans) of the *Codex Iustinianus*.

75 Cf. Amelotti 1983: 18 f.

76 Nou. 132 (AD 544): *Primum esse et maximum bonum omnibus hominibus credimus uerae et immaculatae Christianorum fidei rectam confessionem, ut per omnia haec roboretur et omnes orbis terrarum sanctissimi sacerdotes ad concordiam copulentur et consone immaculatam Christianorum confessionem praedicent et omnem occasionem quae ab haereticis inuenitur auferant: quod ostenditur et ex diuersis conscriptis a nobis libris et edictis rell.* [English translation by Scott 1932b: 132: "We believe that the true and immaculate Christian faith is the first and greatest benefit that men enjoy, that is should be strengthened in every respect, and that all the holy priests throughout the earth should unite to preach it, and should extirpate every kind of false doctrine, as is prescribed by Our laws and Our edicts etc."].

77 English translation by Frier 2016: 211: "Reflecting on all things beneficial to Our subjects, We consider saving their souls the foremost and most urgent above all the rest, whereby all sincerely observe the orthodox faith etc."

ἐμπεσοῦσαν ταῖς αὐτῶν διανοίαις προαίρεσιν, παρασκευάσαι τε τὴν ἀλεθῆ καὶ μόνην σωτηριώδη τῶν Χριστιανῶν πίστιν ἐπιγνῶναί τε καὶ πρесеβεύεν.⁷⁸

It is therefore not surprising that the a part of the text of the *Symbolum Nicaenum* (the so-called Nicene Creed) is reproduced with some variations – a kind of paraphrase that in an interpretative way completes its content⁷⁹ – in an imperial constitution issued in AD 527. This text was included by Justinian’s compilers in the opening title of the first book of *Codex Iustinianus*:⁸⁰

CI.1.1.5.1 (AD 527): Πιστεύοντες γὰρ εἰς πατέρα καὶ υἱὸν καὶ ἅγιον πνεῦμα μίαν οὐσίαν ἐν τρισὶν ὑποστάσεσι προσκυνοῦμεν, μίαν θεότητα, μίαν δύναμιν, τριάδα ὁμοούσιον. Ἐπ’ ἐσχάτων δὲ τῶν ἡμερῶν ὁμολογοῦμεν τὸν μονογενῆ υἱὸν τοῦ θεοῦ, τὸν ἐκ τοῦ θεοῦ θεόν, τὸν πρὸ αἰώνων καὶ ἀχρόνως ἐκ τοῦ πατρὸς γεννηθέντα, τὸν συναΐδιον τῷ πατρί, τὸν ἐξ οὗ τὰ πάντα καὶ δι’ οὗ τὰ πάντα, κατελθόντα ἐκ τῶν οὐρανῶν, σαρκωθῆναι ἐκ πνεύματος ἁγίου καὶ τῆς ἁγίας ἐνδόξου ἀειπαρθένου καὶ θεοτόκου Μαρίας, καὶ ἐνανθρωπήσαι σταυρόν τε ὑπομείναι, ταφῆναι τε καὶ ἀναστῆναι τῇ τρίτῃ ἡμέρᾳ· ἐνὸς καὶ τοῦ αὐτοῦ τὰ τε θαύματα καὶ τὰ πάθη, ἅπερ ἐκουσίως ὑπέμεινε σαρκί, γινώσκοντες.⁸¹

- 78 English translation by Frier 2016: 211: “And since We found that many had gone astray in various heresies, We earnestly sought to bring them to the better opinion with God-serving exhortations, to correct the false belief that has seized their minds with divine edicts and laws, and to induce them to accept and observe the true and only saving belief of Christians.”
- 79 Cf. Kinzig 2016: 635 f.: “Justinian stellt ... den Glauben an die Trinität fest, wobei dieser mit einem feierlichen πιστεύοντες ... eingeleitet wird, jener Formel, die die Konzilien nach Konstantinopel in ihren Definitionen nicht mehr verwendeten, um den mittlerweile anerkannten sakrosankten Charakter des Symbols von Konstantinopel nicht zu gefährden. Inhaltlich geht freilich Justinian über Konstantinopel insofern hinaus, als in jenem Symbol von der Wesenseinheit des Geistes keine Rede war und daher auch die Formel „eine Usie – drei Hypostasen“ keine Verwendung gefunden hatte. Stattdessen scheint er hier auf den Tomos der sogenannten Konstantinopler „Nachsynode“ von 382 zurückzugreifen, wo die Unterscheidung zwischen οὐσία als Bezeichnung für das göttliche Wesen und hypóstasis als Terminus für die göttlichen Personen erstmals synodal formuliert worden war. Mit anderen Worten wird – durchaus im Sinne Konstantinopels – das Bekenntnis von 381 von Justinian interpretierend *ergänzt*”.
- 80 For an analysis of the text of CI. 1.1.5 (AD 527) s. Lange 2012: 314–322; Kinzig 2016: 633–637.
- 81 English translation by Frier 2016: 20 f.: “Believing ... in the Father, the Son, and the Holy Spirit, We worship one substance in three persons, one deity, one power, a consubstantial Trinity. We confess the Only Begotten Son of God, God of God, begotten of the Father before the ages and without time, coeternal with the Father, from whom and through whom all things were made; who in the last days descended from Heaven and was made flesh through the Holy Spirit and Mary, the Holy, Glorious, Ever-Virgin Mother of God; became man and suffered on the cross, was buried and rose again on the third day. We recognize the miracles and sufferings of this one and the same, which He willingly suffered in the flesh.”

In Justinian's eyes, religious policy represented a priority and at the same time the foundation of all his legislation. The Rubric of the first title of the opening book of his Code is very significant: *De summa Trinitate et de fide catholica et ut nemo de ea publice contendere audeat* (About the High Trinity and the Catholic Faith, and providing that no one shall dare to discuss it publicly).⁸² It clearly shows not only a public declaration of faith, but also the blind and strict intolerance that accompanies it with the prohibition of discussing in public matters of faith, which are legally regulated and are not left to the conscience of individuals. Faith is no longer a divine gift, but a way to follow because it is imposed by the emperor with his laws.

This "strange hybrid form of legal and confessional text", which is a "peculiar mixture of legal, power and religious discourse",⁸³ is not the only one to be found in Justinian legislation,⁸⁴ for it can be traced back to the First Council of Nicaea in Constantine's age (AD 325).⁸⁵ It is already consolidated with Theodosius I the Great,⁸⁶ who issued the Edict of Thessalonica (known as *Cunctos populos*) in AD 380,⁸⁷ collocated by Justinian's compilers at the very beginning of the first book of his Code,⁸⁸ followed by another constitution of the following

82 Cf. Amelotti 1983: 20.

83 Kinzig 2016: 622: "Wir haben es hier mit einer merkwürdigen Hybridform aus Gesetzes- und Bekenntnistext zu tun, einer eigentümlichen Mischung aus Rechts-, Macht- und Glaubensdiskurs".

84 See Cl. 1.1.6 (AD 533), Cl. 1.1.7 (AD 533), Cl. 1.1.8 (AD 533), and also the *Edictum rectae fidei* (AD 551).

85 Cf. Kinzig 2016: 623 f.

86 Cf. Kinzig 2016: 621 f.

87 CTh. 16.1.1 (AD 380). The Edict of Thessalonica, addressed to the People of Constantinople (*ad populum urbis Constantinopolitanae*), was formally issued jointly by Theodosius I, emperor of the Eastern part of the Empire, Gratian, emperor of the Western part, and Gratian's co-ruler Valentinian II.

88 Cl. 1.1.1 (AD 380): [pr.] *Cunctos populos, quos clementiae nostrae regit temperamentum, in tali uoluntate religione uersari, quam diuinum Petrum apostolum tradidisse Romanis religio usque ad nunc ab ipso insinuata declarat quamque pontificem Damasum sequi clarer et Petrum Alexandriae episcopum uirum apostolicae sanctitatis, hoc est, ut secundum apostolicam disciplinam euangelicamque doctrinam patris et filii et spiritus sancti unam deitatem sub pari maiestate et sub pia trinitate credamus. [1] Hanc legem sequentes Christianorum catholicorum nomen iubemus amplecti, reliquos uero dementes uesanosque iudicantes haeretici dogmatis infamiam sustinere, diuina primum uindicta, post etiam motus nostri, quem ex caelesti arbitro sumpserimus, ultione plectendo* [English translation by Frier 2016: 15: "(pr.) We desire that all peoples who are governed by the moderation of Our Clemency shall practice that religion which was handed down by the divine Apostle Peter to the Romans, as shown by the religion introduced by him and transmitted down to this day – the religion which, it is clear, is now followed by the (Roman) Pontiff Damasus, and by Peter, Bishop of Alexandria, a man of apostolic sanctity; that is, according to apostolic learning and the teaching of the evangelists, we shall believe in one deity of the Father and the Son and the Holy Spirit, in equal majesty and in a pious Trinity. (1) We order all to obey this law to embrace the name of Catholic Christians, and all others, whom We deem mad and insane, to suffer the infamy of heretical doctrine; they shall be stricken, first, by divine vengeance and,

year, which imposed obedience to the Nicene Creed,⁸⁹ forbade heretics the entrance in all churches and their unlawful meetings in the cities.⁹⁰

In Justinian legislation the public and official profession of the Nicene Creed as a premise of an imperial constitution represented the ideological and at the same time the legal basis for launching anathemas against various heretical sects:

Cl. 1.1.5.3 (AD 527): Τούτων τοίνυν οὕτως ἐχόντων ἀναθεματίζομεν πᾶσαν αἵρεσιν, ἐξαιρέτως δὲ Νεστόριον τὸν ἀνθρωπολάτριν, τὸν διαιροῦντα τὸν ἕνα κύριον ἡμῶν Ἰησοῦν Χριστὸν τὸν υἱὸν τοῦ θεοῦ καὶ θεὸν ἡμῶν, καὶ μὴ ὁμολογοῦντα κυρίως καὶ κατὰ ἀλήθειαν τὴν ἁγίαν ἔνδοξον ἀειπάρθενον Μαρίαν θεοτόκον, ἀλλὰ ἄλλον μὲν τὸν ἐκ τοῦ πατρὸς θεὸν λόγον λέγοντα, ἄλλον δὲ τὸν ἐκ τῆς ἁγίας ἀειπαρθένου Μαρίας, χάριτι δὲ καὶ οἰκειώσει τῇ πρὸς τὸν θεὸν λόγον θεὸν αὐτὸν γεγενῆσθαι· οὐ μὴν ἀλλὰ καὶ εὐτυχέα τὸν φρενοβλαβῆ, τὸν φαντασίαν εἰσάγοντα ἀρνούμενόν τε τὴν ἐκ τῆς ἁγίας ἀειπαρθένου καὶ θεοτόκου Μαρίας ἀληθινὴν σάρκωσιν, τουτέστι τὴν ἡμετέραν σωτηρίαν, καὶ μὴ ὁμολογοῦντα κατὰ πάντα ὁμοούσιον τῷ πατρὶ κατὰ τὴν θεότητα καὶ ὁμοούσιον ἡμῖν τὸναυτὸν κατὰ τὴν ἀνθρωπότητα· τὸν αὐτὸν δὲ τρόπον καὶ Ἀπολλινάριον τὸν ψυχοφθόρον τὸν ἄνουν λέγοντα τὸν κύριον ἡμῶν Ἰησοῦν Χριστὸν τὸν υἱὸν τοῦ θεοῦ καὶ θεὸν ἡμῶν καὶ σύγχυσιν ἦτοι φυρμὸν εἰσάγοντα τῇ ἐνανθρωπήσει τοῦ μονογενοῦς υἱοῦ τοῦ θεοῦ, καὶ πάντας τοὺς τὰ αὐτῶν φρονησάντας ἠφρονοῦντας.⁹¹

second, also by the vengeance of Our wrath, which We shall take in accordance with the judgment of Heaven.”].

- 89 Cl. 1.1.2 pr. (AD 381): ... *unius et summi dei nomen ubique celebretur: Nicaenae fidei dudum a maioribus traditae et diuinae religionis testimonio atque adsertione firmatae obseruantia semper mansura teneatur* [English translation by Frier 2016: 17: “The name of the One and Supreme God shall be worshipped everywhere. The Nicene Creed, handed down to us long ago by our elders and strengthened by the testimony and affirmation of divine religion, shall be kept with enduring obedience”].
- 90 Cl. 1.1.2.2 (AD 381): *Qui uero isdem non inseruiunt, desinant affectatis dolis alienum uerae religionis nomen adsumere et suis apertis criminibus denotentur: ab omnium submoti ecclesiarum limine penitus arceantur, cum omnes hereticos illicitas agere intra oppida congregationes uetamus* rel. [English translation by Frier 2016: 17: “Those who do not conform thereto shall cease to usurp deceitfully the name of the true religion, which is not theirs, and shall be branded for their blatant crimes. They shall be removed and entirely barred from the threshold of all churches, for We forbid all heretics to hold unlawful meetings in towns etc.”]; cf. Cl. 1.4.14 (probably AD 527).
- 91 English translation by Frier 2016: 21: “Since the things are so, We anathematize every heresy, and especially Nestorius, the worshipper of man, who divides in two Our One Lord Jesus Christ, the Son of God and Our God, and denies that the Holy, Glorious, Ever-Virgin Mary was really and in truth the Mother of God, but claims that one person is God the Word, begotten of the Father, and another is the one born of the Holy, Ever-Virgin Mary, made God by the grace and affection of God the Word. And We further anathematize Eutyches the deranged, who introduces an apparition and denies the true incarnation, that is our salvation, through

Procopius remembers that Justinian sent numerous henchmen throughout the territory of the empire in order to persuade the heretics to abandon the faith inherited from their fathers.⁹² Many resisted bravely.⁹³ A lot of them were put to the sword; other committed suicide; most fled their homeland.⁹⁴

After their bannishment from Constantinople in AD 530,⁹⁵ the Montanists organized a resistance: in Phrygia, many of them closed themselves inside their sanctuaries, thus thinking of being able to prevent their destruction, but they were burnt together with the buildings.⁹⁶ With a similar law Justinian carried out further persecutions in Palestine against the Samaritans,⁹⁷ after ordering to tear down their synagogues.⁹⁸ This attitude of total religious intolerance was the cause of revolts against the emperor and of the death of one

Mary the Holy, Ever-Virgin Mother of God; and who does not confess that Christ is consubstantial with the Father in all regards according to His divine nature and consubstantial with us according to his human nature. Likewise, (We anathematize) Apollinarius the destroyer of souls, who claims that Our Lord Jesus Christ, the Son of God and Our God, did not have a mind, and who introduces confusion or rather chaos to the incarnation of the Only Begotten Son of God; and (We anathematize) all who have followed and now follow the doctrines of these men."

- 92 Procop. *Anek.* 11.21: Πολλοὶ δὲ εὐθὺς πανταχοσε περιόντες δόξης τῆς πατρίου τοὺς παραπίπτοντας ἠνάγκαζον μεταβάλλεσθαι. [English translation by Dewing 1935: 137: "And many straightway went everywhere from place to place and tried to compel such persons as they met to change from their ancestral faith."].
- 93 Procop. *Anek.* 11.22: ἄπερ ἐπεὶ ἀνθρώποις ἀγροϊκοῖς οὐχ ὅσα ἔδοξεν εἶναι, τοῖς ταῦτα ἐπαγγέλλουσιν ἀντιστατεῖν ἅπαντες ἔγνωσαν. [English translation by Dewing 1935: 137: "And since such action seemed unholy to the farmer class, they all resolved to make a stand against those who brought this message."].
- 94 Procop. *Anek.* 11.23: πολλοὶ μὲν οὖν πρὸς τῶν στρατιωτῶν διεφθείροντο, πολλοὶ δὲ καὶ σφᾶς αὐτοῦς διεχρήσαντο εὐσεβεῖν μάλιστα ὑπὸ ἀβελτερίας οἰόμενοι, καὶ αὐτῶν ὁ μὲν πλεῖστος ὄμιλος γῆς τῆς πατρῴας ἐξιστάμενοι ἔφευγον κτλ. [English translation by Dewing 1935: 137: "So, then, while many were being destroyed by the soldiers and many even made away with themselves, thinking in their folly that they were doing a most righteous thing, and while the majority of them, leaving their homelands, went into exile etc."].
- 95 See Cl. 1.5.20.3 (AD 530).
- 96 Procop. *Anek.* 11.23: ... Μοντανοὶ δὲ, οἳ ἐν Φρυγίᾳ κατόκηκοντο, σφᾶς αὐτοῦς ἐν ἱεροῖς τοῖς σφετέρους καθερίζαντες τούτους τε τοὺς νεῶς αὐτίκα ἐμπρήσαντες ξυνδιεφθάρησαν οὐδενὶ λόγῳ κτλ. [English translation by Dewing 1935: 137: "the Montani, whose home was in Phrygia, shutting themselves up in their own sanctuaries, immediately set their churches on fire, so that they were destroyed together with the buildings in senseless fashion etc."].
- 97 Procop. *Anek.* 11.24: Νόμου δὲ τοῦ τοιοῦτου καὶ ἀμφὶ τοῖς Σαμαρειταῖς αὐτίκα τεθέντος ταραχὴ ἄκριτος τὴν Παλαιστίνην κατέλαβεν. [English translation by Dewing 1935: 137: "And when a similar law was immediately passed touching the Samaritans also, an indiscriminate confusion swept through Palestine."].
- 98 Cl. 1.5.17 pr. (probably AD 529): Αἱ τῶν Σαμαρειτῶν συναγωγαὶ καθαίρονται καὶ, ἐὰν ἄλλας ἐπιχειρήσωσι ποιῆσαι, τιμωροῦνται [English translation by Frier 2016: 211: "The synagogues of the Samaritans shall be torn down; and if they attempt to build other, they shall be punished."]; cf. Winkler 1965.

hundred thousand people, so that no one was left to cultivate one of the better fields in the world.⁹⁹

In AD 535, the priests of the temple of Isis were arrested and the statues of the goddess were hammered by soldiers and replaced with crosses or sent to Constantinople.¹⁰⁰ A year later Severus of Antioch, a leading figure of the Monophysites, was condemned in the Home Synod that took place in Constantinople because of his religious tenets.¹⁰¹ In August, by an edict, Justinian ratified the synod and ordered that his books must be burnt (πυρί τε φλεγέσθω) in order to avoid the great risks for anybody who owned them.¹⁰² Already in AD 529 Justinian issued a constitution, which threatened penalties to anyone who did not burn the books that spread the doctrine of the Manichaeans.¹⁰³ According to Malalas, in AD 562 other pagan books were burnt with the pictures and the statues of the pagan gods.¹⁰⁴

99 Procop. *Anek.* 11.27-29: [27] οἱ δὲ γεωργοὶ ζῦμπαντες ἀθρόοι γεγενημένοι ὄπλα ἀνταίρειν βασιλεῖ ἔγνωσαν, βασιλέα σφίσι τῶν τινα ληστῶν προβεβλημένοι, Ἰουλιανὸν ὄνομα, Σαβάρου υἱόν. [28] Καὶ χρόνον μέντινα τοῖς στρατιώταις ἐς χεῖρας ἐλθόντες ἀντεῖχον, ἔπειτα δὲ ἡττηθέντες τῇ μάχῃ διεφθάρησαν ζῖν τῷ ἡγεμόνι. [29] Καὶ λέγονται μυριάδες ἀνθρώπων δέκα ἐν τῷ πόνῳ τούτῳ ἀπολωλέναι, καὶ χώρα ἡ πάσης γῆς ἀγαθὴ μάλιστα ἔρημος γεωργῶν ἀπ’ αὐτοῦ γέγονε. [English translation by Dewing 1935: 139: "(27) And all the farmers, having gathered in great numbers, decided to rise in arms against the Emperor, putting forward as their Emperor a certain brigand, Julian by name, son of Savarus. (28) And when they engaged with the soldiers, they held out for a time, but finally they were defeated in the battle and perished along with their leader. And it is said that one hundred thousand men perished in this struggle, and the land, which is the finest in the world, became in consequence destitute of farmers."].

100 Cf. Maraval 2016: 184 = Maraval 2017: 196.

101 Cf. Amelotti 1983: 38-40; Torrance 1998: 6; Allen, Hayward 2004: 29.

102 Nou. 42.1.2 (AD 536): ... μὴ δὲ τὰ Σεβήρω ῥηθέντα τε καὶ γραφέντα μενέτω παρὰ τινι Χριστιανῶ, ἀλλ’ ἔστω βέβηλα καὶ ἀλόγρια τῆς καθολικῆς ἐκκλησίας, πυρί τε φλεγέσθω παρὰ τῶν κεκτημένων, εἰ μὴ βούλονται κινδυνεύειν οἱ ταῦτα ἔχοντες κτλ. [English translation by Scott 1932a: 201: "no Christian shall have in his possession either the lectures or the writings of Severus, which are considered profane and contrary to the doctrines of the Catholic Church, and their possessors shall be required to burn them, if they do not desire to expose themselves to great risks etc."].

103 Cl. 1.5.16.3 (probably AD 529): ... εἴ τις ἔχων βιβλία τῇ πανταχόθεν ἀσεβεῖ τῶν Μανιχαίων πλάνῃ προσήκοντα μὴ ταῦτα δηλὰ ποιήσιν, ἐφ’ ᾧ καταφλεχθῆναι καὶ παντελῶς ἐξ ἀνθρώπων ἀφανῆ γενέσθαι, ἢ καὶ καθ’ ἰανούσιν πρόφασιν εὐρεθεῖα παρ’ αὐτῷ τὰ τοιαῦτα βιβλία ὁμοίως καὶ αὐτὸν ποινήν ὑποστῆναι τὴν προσήκουσαν. [English translation by Frier 2016: 209: "if anyone has books in any way relating to the impious error of the Manichaeans and fails to disclose them to be burned and completely removed from the sight of men, or if such books are found in his possession on any pretext whatsoever, he shall likewise suffer the appropriate punishment."].

104 Malal. *Chron.* 18.136: συσχεθέντες Ἕλληνες περβεωμίσθησαν καὶ τὰ βιβλία αὐτῶν κατεκαύθη ἐν τῷ Κυνηγίῳ καὶ εἰκόνες τῶν μυσερῶν θεῶν αὐτῶν καὶ ἀγάλματα [English translation by Pontani 2020: 374.10: "Hellenes were arrested and paraded around and their books were burnt in the Kynegion, and so were the pictures and statues of their loathsome gods"].

5. Some final words on Justinian legislation

It would be a mistake to consider Justinian legislation exclusively as a moment of development of the legal culture in Europe without adequately taking into account the political events such as the religious and ideological frame in which it was conceived.

It has been written that Justinian “is not a thinker, but a politician who uses theology”:¹⁰⁵ for him “theology becomes law, and both are at the service of imperial power.”¹⁰⁶ We must not forget, however, that behind the Emperor Justinian there is a man: a man thirsty for power, which allows him to achieve by any means the dream of a universal empire under his control. It is no coincidence that his reign was characterized by a series of wars, even on several fronts at the same time.¹⁰⁷

The byzantine emperor was the one who more than any other in the history of Roman law incorporated into his legislation the religious precepts of the Catholic faith,¹⁰⁸ thus giving them effect on a normative level. His codification of the writings of the non-Christian classical Roman jurists and of the imperial constitutions is the fruit of a work presented as made by divine inspiration, with God’s aid, and promulgated in the name of Jesus Christ, as is clear from the prologues of the introductory constitutions issued *in nomine Domini Dei nostri Ihesu Christi*¹⁰⁹ (in the name of Our Lord God Jesus Christ).

Justinian represented eminently both the imperial idea and the Christian idea, and for this reason “his name has become immortal in history”.¹¹⁰ In the Divine Comedy by Dante Alighieri Justinian earned a place in Paradise thanks to his legislative work. The byzantine emperor is remembered as the one who eliminated “the too

105 Amelotti 1983: 62: “egli non è un pensatore, bensì un politico che si serve della teologia.”

106 Amelotti 1983: 63: “Per Giustiniano la teologia si fa diritto, e l’una e l’altro sono al servizio del potere imperiale.”

107 On the wars during the reign of Justinian, see Rubin 1960: 245-273; Rubin 1995: 16-58 and 73-200.

108 Cf. Bueno Delgado 2015.

109 See the prologues of the const. *Imperatoriam maiestatem* (AD 533), which promulgated the *Institutiones Iustiniani*, of the const. *Tanta* (AD 533), which promulgated the *Digesta Iustiniani*, and of the const. *Cordi nobis* (AD 534), which promulgated the *Codex repetitae praelectionis*. Similar headings open the text of other imperial constitutions issued by Justinian, such as Cl. 1.27.1 (AD 534); Cl. 1.27.2 (AD 534); Nou. 17 (AD 535); Nou. 42 (AD 536); Nou. 43 (AD 537); Nou. 86 (AD 539); Nou. 134 (AD 556); Nou. 137 (AD 565); Nou. 139 (*sine die et consule*); Nou. 150 (AD 563).

110 Diehl 1920: 22: “Ce paysan de Macédoine a été le représentant éminent de deux grandes idées: l’idée impériale, l’idée chrétienne; et, parce qu’il a eu ces deux idées, son nom demeure immortel dans l’histoire”.

much and the vain from the laws."¹¹¹ When Raphael portrayed Justinian in a fresco of the *Stanza della segnatura* in the Vatican palaces as the Christian emperor who handed over Roman law to the Middle Ages and to the High Renaissance, he certainly contributed to create an image that is the result of distortions and that does not take into account a series of aspects that instead have to be considered.

Even if in his legislation Justinian presents himself as an instrument in the hands of God, it is possible to think that, in reality, the emperor used religion as an instrument for the legitimation and the exercise of his autocratic power.

Perhaps the most characteristic feature of his period of reign found an echo, in its essence, in the fragment of an unfinished historical comedy, *Eunuch und Kaiser*, by the Swiss author and dramatist Friedrich Dürrenmatt: with Justinian the founding principle of the State becoming an irrational element.¹¹²

In Justinian legislation we can see a paradigm of the way in which legislation can become a weapon in the service of a dogma.

In legal history we can also find other similar paradigms in different places and different historical periods closer in time to us. Acquiring awareness of them could be a useful task not only on a historiographical level. It can help to better reflecting retrospect on the consequences that can occur when the points of intersection between politics, ideology, religion, and law the religious fanaticism takes over and imposes a unique dogma as the founding criterion of government.

111 *Par. VI. 9-11*: "Cesare fui e son Iustiniano, / che, per voler del primo amor ch'i' sento, / d'entro le leggi trassi il troppo e 'l vano" ["Caesar I was, Justinian I am, who pared excess and ineffectiveness from the Law, at the wish of the First Love I now feel"].

112 Cf. Carlà 2011: 29: "Il principio fondativo dello Stato diviene ... un dogma, un atto di fede, dunque un elemento completamente irrazionale, benché apparentemente giustificabile su base razionale, il frutto di un salto dall'induzione alla deduzione, dalla ragione alla fede".

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UMMAH WĀḤIDAH: RELIGIOSITY, POLITICAL INCLUSION, AND THE LEGACY OF THE SAHIFAH AL-MADINA (622 C.E.)

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Abstract: This paper focuses on the notion of religiosity of the *ummaḥ of believers*, within a capital legal document of the history of Islam, which is the *Sahifah al-Madina* of 622 C.E. (the Charter of Medina). More specifically, it aims at reading the Charter under the light of today's call, in order to draw a notion of 'political inclusion' (of religious minorities) in harmony not only with the early Islamic tradition but also with these recent attempts of interreligious dialogue. For this reason, the paper, firstly, tries to highlight the religious and political meanings of the Charter for Muḥammad and his contemporaries; besides it aims demonstrating that under Islamic law agreements between different religious groups are morally and religiously valuable, and, thus to strive for concluding them is beneficial for the entire community; lastly, the paper tries to extract from the Charter some legal principles regulating relationships between the *ummaḥ* and minority groups, so to draw a new interpretation suitable for the contemporary and globalized Muslim society.

Keywords: *Ummaḥ*; Charter of Madina; Political Inclusion; Contemporary Reading; History of Islamic Law; Religiosity.

1. Introduction

In history, there are many periods in which it is possible to discover complicated avenues of mutuality between religions, when borders and lines between them were blurred and consistently redrawn. Thus, a historical interpretation is not only necessary to understand the meanings of deeds, events, and documents for original religious communities but to help us to extract from the past new meanings to share with other religious denominations in the present. This paper seeks to examine the *Sahifah al-Madina* (Charter of Medina) of 622 C.E.¹ in the light of a modern-day perspective,² in order to draw a notion of religiosity as a common ground of theories concerning

1 For the problem of the exact date of the Constitution, Watt 1956: 227 ff. See also Rubin 1985: 18. For the problem of authenticity, Serjeant 1964: 4; Serjeant 1978: 2; Lecker 2005: 40.

2 Between 2003: 103.

the political inclusion of different religious groups in the contemporary multi-religious democracies. Pursuing this goal, this paper will first highlight the religious meanings of the Charter of Medina for Muḥammad and his contemporaries; in addition, it aims to demonstrate that, under Islamic law, agreements are religiously valuable, and, thus, striving for their conclusion is beneficial; lastly, the paper tries to extract from the Charter some trans-historical messages to draw a new interpretation suitable for the contemporary, globalized Muslim society.

2. Understanding the Charter of Medina: The Tribal Society, the Customary Law, and the Role of the Prophet in Yathrib / Medina

A lasting controversy exists among scholars and concerns the cultural landscape of Islamic religion at its origins. In essence, there is an opposition between authors who give relevance to the cities of Arabia and authors who give relevance to nomad life.³ However, the historical solution of this controversy is not important here,⁴ rather what is important is to underscore that Islam originated in a tribal society, and any attempt to contextualize it must take this fact as a starting point.⁵

Specifically, the population of Arabia was made up of Bedouins divided into two groups: in one, urban tribes who lived in the cities; in the other, nomadic tribes who inhabited the desert.

As a city, Mecca was a trade center with modest relations with southern Arabia, Byzantine Syria, and Iraq. For this reason, many foreigners lived there and worked in the local market, where goods from Syria met those from Yemen (slaves included).⁶ Mecca was also the center of the worship of the *ka'aba*, a building originally without a roof which served as a chest for the sacred 'Black Stone'. This shrine hosted the main cult of the Banu Quraysh tribe that, at the time of the Prophet, ruled the city. Yathrib (later renamed as Medina) was the main city in an oasis, whose main activity was the cultivation of palms; moreover, it was the seat of an important Jewish community divided into many tribes – some autonomous, with some other peo-

3 Berque 1978; Macdonald 2015: 54.

4 On the general characteristics of pre-Islamic Arabia, Hillenbrand 2016; Vercellin 2002: 85; al-Tabari 1987.

5 Musavi Lari 2008: 98 f.; Crone 2015: 237.

6 Crone 2015: 217 f.

ple as clients of the native Arabs. Lastly, the city of Ṭā'if in Arabia and near Mecca was a location which conferred a reputation by association and created business opportunities.

When it comes to nomadic life, another nice portrait of the Bedouins of the desert is offered by the scholar Henri Lammens, who, in his book,⁷ presented their main social and cultural characters, beginning with their 'individualism'. This quality was central in Bedouin culture because it allowed them to live in the desert, within their families and to quarrel with neighbors for the ownership of water wells and a few pastures. Lammens makes note of additional characteristics of nomadic peoples, such as their hospitality, tenacity, courage, anarchy, and sense of tribal kinship.

Hospitality was universally considered a prime virtue by the Bedouins, who feared – in the case of its absence – the negative consequences of revenge and feud.

The value of tenacity was well expressed in the exalted virtue of *ṣabr*, which generally translated is the word for 'patience'. Yet, this translation does not fully convey all the characteristics of this virtue, among them the ability to fight without hesitation against one's adversities, enemies, climate, environment, a losing battle. Actually, "*ṣabr* is not passive endurance, but active defiance of danger, especially in battle".⁸

The value of courage was expressed in favor of fighting the enemy, not in open battlefield, but by means of cunning and stratagems. Moreover, the Bedouin culture did not particularly esteem the virtue of the 'unknown soldier', prone to combat and dying anonymously alongside his companion and in the trenches. Military virtue was best expressed in the gesture of blatant courage, the kind of courage that deserved elegies by women and poets after the soldier's death.⁹

To describe the character of anarchy, Lammens quotes a verse of the Bible that describes Ishmael (Arabic *Ismā'īl*), the ancestor of the Arab tribes: "And he will be a wild man; his hand will be against every man, and every man's hand against him; and he shall dwell in the presence of all his brethren (Gen 16:12)." This

7 Lammens 1929: 8 ff.

8 Bravmann 1972: 15.

9 See, for some heroic motives in early Arabic literature, Bravmann 1972: 39 ff.

description expresses the idea that the men of this kinship were not able to transcend the rule of clans. The centrality of sectarianism has prevented the Arabs from appreciating the idea of a wider collectivity and has been the reason for long-lasting conflicts between tribes and groups. This anarchy was only mitigated by the relationship of consanguinity between tribes. More exactly, the duty of loyalty between various groups, clans, and tribes was, in accordance with the conception of all social relationships in the old Arab perspective, an obligation which came from consanguine relationships, which often existed only in the remote past and sometimes were only fictitious.¹⁰

The traits of an aggressive and individualistic character were considered well suited for leaders, even though they could have been mediated by other characteristics. At the same time, tribalism expressed the greatest limit and gave authority to the head of the clan. Therefore, the *sayyid* or *shaikh / shaykh*, the head of the group, was nonetheless considered a *primus inter pares* that could govern only and as long as he was holding the consent of the group.

There were religions in Arabia before Islam, which, however, did not admit human and idolatrous representation. Among the most important pagan divinities, there were three goddesses, *al-Lāt*, *al-'Uzzā* (both associated with Aphrodite) and *al-Manāt* (a goddess of destiny). The deities were represented through monoliths, or through constructions, often in connection to water sources for ablutions and trees, on which were hung offerings of votive weapons, gifts from visitors and fragments of clothing. Usually such an area was considered *ḥaram* (sanctum or sanctuary) and was fenced off, to protect humans, animals, and plants dwelling inside. These sacred fences were uninhabited for a large part of the year, then they housed periodic gatherings, such as those at the beginning of spring or autumn. Probably, the Meccan ritual of the *hajj* (pilgrimage) with its *mawāqif* (ritual stops) was a remnant of the religion of Abraham, the builder of the *al-ka'ba*.¹¹ At the time of Muḥammad, these religions persisted even though Allah was beginning to be considered as the major deity (*Allāh akbar*).

In this context, status law was generally linked to the tribal kinship:

10 Bravmann 1972: 77.

11 Kung 2004: 66.

Given that any concept related to criminal law was missing, an individual had no legal protection outside the bond to his tribe (*‘aṣabīyya*);

The existence of feuds always was a characteristic of the social organization of Bedouin tribes, not the result of momentary crisis situations and, until very recent times, such was the condition of the Arab Bedouin tribes.¹²

The group was responsible for the actions of its members (by means of feuds, mitigated by the price of blood, known as *dīya*).¹³

Family law was based on promiscuity, as well, because cohabiting relationships with slaves were commonplace. It is not yet correct to speak of polygamy, nor of marriage, in tribal law. Indeed, according to the customs of the group, the patrilineal kinship was flanked by matrilineal systems in which a woman could have relationships with multiple men at different times. Moreover, time-stipulated marriage (*mut‘ah*) was frequent.

As far as commerce and trade are concerned, there were two types of legal regulations: those of commercial cities, which involved more advanced regulations, such as contracts, partnerships, and interest loans, and those of nomadic Bedouins, who mainly functioned under customary law. Regarding controversies between individuals and groups, an authoritative system was lacking in both non-nomadic Arab and Bedouin pre-Islamic society. In the event of disputes, it was possible to go before an arbiter (*ḥakam*, which has the secondary meaning of ‘wise’). An arbiter had to be accepted by both parties, and the choice was based mostly on his personal abilities, his reputation, his family, or his supernatural abilities (*kāhin*: soothsayer, fortune teller). If he accepted the assignment, the parties had to pay a deposit (goods / hostages) to guarantee that they would follow his decision.¹⁴

The Prophet Muḥammad was born into this type of society in Mecca in 570 and received the first revelation in 610. After that, he

12 Kennett 1925; Serjeant 1964: 8, who re-reads the Charter of Medina in the light of some connections with contemporary Arabian tribal law and documents, because close similarities between the two in their content and style.

13 The formulation of the paragraph 21 of the Charter of Medina contains textual evidence of the fact that the procedure applied in cases of talio derives directly from pre-Islamic customary law: this type of procedure has become the official attitude in the Muslim community of Medina, see for this Bravmann 1972: 328.

14 For a cursory introduction to Islamic Law, Schacht 1964.

bore a role as a prophet and started to disseminate and develop Islam as a new monotheistic religion in Mecca. However, his predicament in Mecca was limited only to his closest relatives and companions, until he left that city to migrate to Yathrib for several motivating reasons. On Muḥammad's side, he was persecuted by the Quraysh, the major merchant tribe in Mecca as well as Muḥammad's tribe, who perceived him and his teachings as a serious threat for their community; on Yathrib's side, the population of this city, composed of various religious groups, suffered a crisis of being in a never-ending conflict with each other. Thus, the recognition of the leadership of Muḥammad was probably linked to the great need to identify an authority to fill the vacuum of power and to limit the condition of lawlessness that reigned in the peninsula.¹⁵ According to the *sīra* – the tradition of the life of the Prophet Muḥammad was already a political activist already at Mecca,¹⁶ and, in such terms, he offered himself and brought his message to the Yathribis. More precisely, Muḥammad was summoned to Yathrib to serve as a neutral arbiter and to put an end to communal fights given that the city was already divided by hatred and resentment. The conflicts between the Yathribis' sects were linked both to issues related to the urban settlement of the various groups and to problems originating from the feuds that would be mediated by customary law. When Muḥammad came to Yathrib, this same tribality was a characteristic of the Jewish community of the city. R.B. Serjeant described this phenomenon in the following way:

Even before the dominance of Aws and Khazraj the Jews were not all of identical social standings, for some Jewish tribes had honour, wealth, and power (*sharaf, tharwah, 'izz*) over the others. Though 13 Jewish tribes are mentioned at this period, the Prophet in his day apparently took direct political action only against three. Possibly the other Jewish tribes had direct protection agreements with the Arab tribes through their *sayyids* and *naqibs*, ..., and had been politically inactive, or they may have been affiliated or assimilated to the three larger Jewish tribes. The Aghānī makes it clear that whatever position the Jews had held in former times, they had lost status and their power to defend themselves had diminished ...

15 Crone 2015: 235 ff.

16 Waardenburg 2003: 89 f.

and by the immediately pre-Islamic era they were under the protection Arab tribes.¹⁷

Moreover, Jewish groups of Yathrib were also harassed by their pagan neighbors, with the result that they recognized in Muḥammad an authority that could put an end to their condition of insecurity. In fact, Muḥammad had already decided to counteract tribal fragmentation before his arrival at Yathrib. He tried to establish a united community, even at his own expense through denouncing of his Meccan polytheistic ancestors. In opposing his own tribe, the Quraysh, Muḥammad stated many times that God was incompatible with the tribal divisions and tribal divinities that each group worshipped. This particular form of incompatibility emerged from the fact that God was both an ancestral divinity and one God. Allah was the one and only deity of Abraham, the ancestor of the Arabs, subsequent Arab communities and tribes were formed around him. Therefore, only around Allah, and Allah alone, could the unity of the Arabs be restored. From this perspective, all false deities which supported and nourished the fragmentation among the various tribes of the Arabs should have been sanctioned. But taking everything in account, Muḥammad was much more than just an arbitrator of disputes. Indeed, the reason for his success in Yathrib was linked to the fact that he presented himself as the founder of an inclusive religious community, and, at the same time, an enemy of those who did not want to join in this type of endeavor.¹⁸ By and large, the Charter of Medina established a roadmap for maintaining peaceful coexistence, rights and responsibilities, and internal autonomy for different tribes and religions, and the process for the nonviolent resolution of disputes with Muḥammad as the supreme arbiter.

3. Remarkable Legislation and Terms of the Charter of Medina: A Contemporary Legal Interpretation

In his insightful paper, Saïd Amir Arjomand analyzed the Charter by means of a sociolegal method and divided the traditional text into three deeds.¹⁹ Arjomand's division is useful for highlighting the most remarkable legislation of the Charter of Medina for a contemporary reader, one interested in its interpretation in the light of human

17 Serjeant 1964: 3; Lecker 2005.

18 Crone 2015: 242 f.

19 Arjomand 2009: 558 ff.

rights perspective. For this reason, the terms and the provisions discussed below will follow his numbering.

According to this author, the objective of the agreement was to settle religious conflicts and divisions that afflicted the tribal and segmented society of the Arabian Peninsula. Therefore, the structure of the declaration is made by subsequent deeds and includes the institution of a brotherhood among the *muhājirūn*²⁰ from the Quraysh and the *anṣār*²¹ in Medina. Moreover, it includes two security pacts between them and some Jewish clans of Medina. Thus, in Arjomand's interpretation, the first deed establishes a new unified community in Medina. This deed is supplemented by a settlement of Muḥammad, whose aim was to include a whole set of new Jewish clans into the community under the protection of God through a bond of religious empathy. A second supplement was amended by the later adhesion of the clan of Banu Qurayza (art. 24 in his numbering).

Analyzing the text, the key-point is the interpretation of the term *ummah*, which ordinarily means 'community'. It should be noted that there is a controversy among scholars, as to whether the meaning of the term changed after the life of Muḥammad due to his authority and influence. According to some, after Muḥammad, this word became synonymous with 'Muslim community'. According to others, the meaning of *ummah* did not change, remaining that of a 'religious community', including the *dhimmī* in the social contract. To this end, Ulrica Martensson writes:

While Arjomand perceives the concept of *ummah* to be the main link between the Medina Constitution and the Qur'an, I suggest *kitāb* in the contractual sense is an equally important conceptual link. Moreover, where Arjomand argues, similarly to Donner, that the concept of *ummah* changed after the Prophet's death to become coterminous with a religious community (the Muslim *ummah*, the Christian *ummah*, etc.), I would hold that its meaning never changed within Islamic law and administration because the Islamic *ummah* re-

20 Lindstedt 2015: 67 ff.

21 It should be noted that this epithet of the Prophet's followers from Medina (meaning 'helpers') and its grade of esteem must be related with the fact that already as early as in pre-Islamic times the Arabs aspired to the high ideal to be *anṣār* of a man of outstanding qualities, cf. Bravmann 1972: 68. Moreover, there is a close connection between the word *anṣār* and other words having the same root, like *naṣr* 'victory' or the adjective / name *maṣṣūr* 'victorious, the one being helped'. The explanation derives from the idea that victory is a result of the help (rendered by the gods).

mained a political community which included ahl al-dhim-mah in its social contract.²²

This linguistic nuance is not without importance, as it is relevant in regard to the legal nature of the Charter. In our opinion, the final aim of the agreement was to create a confederate community of the clans grounded on their faith in a single God and on the value of religious solidarity. It is not a casualty that the Charter directly addressed community and tribes,²³ not individuals. The pillar is art. 15, in which we find the constitutive foundation of the system of religious pluralism. This article grants the Jewish clans protection of the law and religious tolerance (extended by article 16 to the Jewish clan of Thaqlaba and its clients). Regarding this stipulation, Arjomand writes:

The article marks the institution of religious pluralism in Islam, which later developed into the recognition of “those to whom we have given the book” (Q. 2:121; 6:21, 114; 13:36, etc.), or more frequently, the “peoples of the book” (Q. 2:63, 65; 5:69-70; 22:18, etc.) under the protection (*dhimmah*) of God. Religious pluralism in Medina was endorsed in the Quran: «There is no compulsion in religion».²⁴

It should be noted that religious pluralism is, indubitably, a fundamental interest of this process of creation of a new political community, where unification can be obtained through series of brotherhood or allegiance pacts. Once unified, the *ummah* can be considered a confederation of clans that explicitly recognizes the religious tolerance of Jewish clans and their internal autonomy. Furthermore, this pluralist system seems to have its foundation in the quality of religiosity of its members, rather than in the institution of religions. The quality of being religious²⁵ – that particular kind of human experience represented by the believers of many verses of the Quran – more than a specific religion – as a set of beliefs and institutions – is the key of inclusion in this conception of unity. Only those who share this characteristic are partners deign of entering

22 Martensson 2014: 129 ff.

23 Yildirim 2009: 444; see also Embong 2018: 396-414.

24 Arjomand 2009: 568.

25 Dewey 1967.

into a written contract (*kitāb, ṣaḥīfah*),²⁶ and, obviously, this quality is evaluated on the basis of monotheism (see Q. 24:55, for example). To support this statement, it is necessary to employ three arguments:

1) In the Quranic revelation, religiosity unites the Peoples of the Book under the paramount principle of the unity of God: “Say: ‘O People of the Book, come to a word (which is) fair between us and you, (to wit) that we serve no one but God, that we associate nothing with Him, and that none of us take others as Lords beside God (Q. 3:64)”. This vision is reflected in the meaning of the term *ummah* in the Charter, in light of the Quran.²⁷ In the Charter, this term first appears in the in article 1, which deals with the Muslims of Quraysh and Yathrib and with those who joined and strove together with them, that is to say, the Jews. Concerning all these groups, it reads: “*innahum ummah wāḥidah min dūn al-nās*” (they are one *ummah*, to the exclusion of all other people). But, when looking for clues in the Quran to the meaning of this article, it is not merely the term *ummah* that must be traced, but rather the locution: *ummah wāḥidah*. This phrase occurs in the Quran no less than nine times. In all cases and with no exception, it denotes people united by a common religious orientation, in contrast to people divided by different kinds of faith.²⁸ The conclusion with respect to article 1 of the Charter is, therefore, inescapable. This article declares that the Muslims of Quraysh and Yathrib, as well as the Jews, constitute one unity, sharing the same religious attitude, thus being distinct from all the rest of the people who adhere to other kinds of faith. Unity is intended to be based not only on common sacred territory or religious law but also on common religiosity.²⁹ Moreover, in another passage of the Quran, religiosity even entails a relationship of brotherhood, so that “The believers are brothers” (*innamā 'l-mu'minūna ikhwah*, Q. 49:10) and similarly, another verse of the Quran declares that different religious peoples become brothers, specifically, in ‘religion’ (*fa-ikhwānukum fī'l-dīn*), in case of conversion, if they perform *salat* and pay *zakat* (Q. 9:11).

Another linguistic element supports the relevance of mere religiosity as a requirement for being part of the contract. This linguistic

26 More precisely, the term ‘*ṣaḥīfah*’ is the word employed in the Charter to refer to itself. See Serjeant 1964: 5.

27 Denny 1977: 44 and 52.

28 Needless to say, that the incipit of the *Nostra Aetate* Declaration clearly resembles this notion: “All men form but one community. This is so because all stem from the one stock which God created to people the entire earth, and also because all share in a common destiny, namely God”.

29 Rubin 1985: 13.

element is given by the frequency of usage of the terms *mū'min* / Muslim in the text of the Charter. It is worth noting that the generic term *mū'min* (believer) is present 24 times, whereas the specific term 'Muslim' is present only 3 times. This frequency approximately respects the proportion to be found in the Quran.³⁰ This is due to the fact that the early followers of Muḥammad were called starkly *mu'minūn*, which means generically 'believers', without the exigency of any other denominational connotation; whereas Muslim was, in the same period, 'one who heroically defies death'.³¹ The first identifiable evidence of the usage of the word *muslimūn* in the sense of adherents of Islam is from 741 C.E.³² In other words, during the initial stage of Islam the requirement for being part of the *ummaḥ* was simply to have faith, to be religious, to be a 'believer'. In addition, the notion of *mu'min* was also suited for expressing the very idea of the protection of Allah and his messenger: "Thus both God and the Prophet afford security to their *mu'minūn*, to those who seek shelter with them, i.e., feel secure under their protection".³³ In the same vein, where 'religion' is expressly considered in the Charter, the word 'Muslim' is used in contradistinction to 'Jews', whereas the word *mu'minūn* is not employed as a contrast to 'Jews' but instead includes them, such as it is done in written form in art. 15: "*wa inna Yahūd banī 'Awf ummaḥ m'a al-mu'minīn*" (the Jews of Banu 'Awf are a community along with the believers).³⁴

2) The second argument comes from the interpretation of the regime of legal autonomy for the tribes involved in the agreement. The same article 15 continues: *li-Yahudi dīnuhum wa li-l-Muslimīna dīnuhum* (Jews having their religion [*dīn*] and the Muslims their religion), granting protection, tolerance and, overall, respect to the laws of the different religious communities. As Watt puts it:

There is some justification for thinking that at some period during the first year or so at Medina (not necessarily in the first months) Muḥammad contemplated a religious and po-

30 Denny 1977: 43. Maybe it is not a casualty that the word *kāfir*, which is quite the opposite of *mu'min*, comes from the root *kafara* (k-f-r) that can mean 'to declare oneself dissociated from something', see Serjeant 1964: 12, footnote 1. On the same word, see the detailed explanation of Bravmann 1972: 76-79.

31 On the meaning of both terms, at the early stage, Bravmann 1972: 8 ff. and 26 ff.

32 Lindstedt 2015: 67.

33 Bravmann 1972: 29.

34 Emon 2001-2002: 110.

litical arrangement which would give a measure of unity but would not demand from the Jews any renunciation of their faith or acceptance of Muḥammad as a prophet with a message for them ...³⁵

As regards this specific factor in the Charter of Medina, Uri Rubin affirms:

Being recognized as *mu'minūn*,³⁶ keep to their own *dīn*, stipulation of article 25 [15 in Arjomand's numbers], which must now be examined: *li-Yahudi dīnuhum wa li-l-Muslimīna dīnuhum*. ... the latter clause seems to convey the idea that the *dīn*, i.e., religion, of both parties has equal merit so that each party has the right to go on adhering to its own *dīn*. ... It is clear now that within the *ummah wāḥidah* which separated all monotheistic groups of Medina from other people, the Jews were given the position of “*ummah* of believers”, thus being distinguished from all other monotheistic (Muslim) members of the *ummah wāḥidah*. Their recognition as believers provided them with the privilege to stick to their own Jewish *dīn* while enjoying complete protection.³⁷

In addition, we would like to underline that the word *dīn* in Arabic means religion and this term is used to identify Islam among the religions of humanity (*inna dīna Muḥammadin khayr al-adīyan*). Needless to say, religion also entailed a specific law to be applied to the faithful.³⁸ Yet, the Arabic root has other two meanings:

A verbal noun exists for translating the idea of ‘judging, passing judgment, passing sentence’; and along with this, ‘judgment, verdict’;

There is the verbal noun of a verb ‘to conduct oneself, to observe certain practices, to follow traditional usage, to conform’; and hence ‘conformity, property, obedience’, and also ‘usages, customs, standard behavior’.³⁹

35 Watt 1956: 200.

36 Active participle of the verb *‘āmana*.

37 Rubin 1985: 16.

38 Serjeant 1964: 13.

39 Smith 1991: 101 f. See also the entry ‘*dīn*’ in Baalbaki, Baalbaki 2014.

Thus, the Arabic word clearly refers to the idea of religious law as well as ‘the perceptivity that lies in every man’, understood as a cognitive quality,⁴⁰ so that the *dīn* is exactly that faculty that requires individuals to judge facts according to religious categories. In other words, religion – when defined as a set of rules and beliefs – and religiosity – defined as that particular kind of human experience that conduct people’s behavior and judgments – encompass one other.

3) The third element that can support our statement, according to which religiosity counts more than religion in defining the boundaries of the community, comes from art. 29, according to which in the Yathrib’s territory shall be established a sanctuary for all the people of the Charter. It is important to clarify that the meaning of ‘sanctuary’, at the time of the Prophet, was different from the contemporary one. Denny articulates it succinctly for us here:

[This immunity] has linked it to the traditional Arabian pattern of establishing sanctuaries (*haram* in the ancient usage and *hawtah* in contemporary South Arabia), which he calls “sacred enclaves” centering in the cult of a local god. A *haram* or *hawtah* is a secure locality, established by a holy person or family, together with the agreement of the surrounding tribes, to respect it as a safe place where diverse factions may meet and mingle, conduct business, settle disputes, and so on, with all factions pledged to defend it and preserve its sanctity and neutrality. Murder, for example, is the greatest of offences within the enclave, particularly if it is intertribal.⁴¹

In other words, an effect of the establishment of the *ḥaram* (sanctuary) would also guarantee a status of personal inviolability within that territory to all the religious members of the *ummah*, despite the previous relationships of hostility grounded on kinship and tribal feuds. With respect to this point, the Charter was totally consistent with the Quran, where there is a clear condemnation of tribal relationships when they clash with religious ones, as in the Quran, 3:103:

And hold firmly to the rope of Allah all together and do not become divided. And remember the favor of Allah upon you –

40 Smith 1991: 287.61.

41 Denny 1977: 45. See also Crone 2015: 180 ff.

when you were enemies and He brought your hearts together and you became, by His favor, brothers. And you were on the edge of a pit of the Fire, and He saved you from it. Thus does Allah make clear to you His verses that you may be guided.

This statement against kinship's allegiances is also present in the Sunnah of the Prophet. In a hadith, Muḥammad clearly explains his opinion about the *'aṣabīyyah*, the spirit of tribal partisanship:

Jubayr b. Mut'im reported the Messenger of Allah (May peace be upon him) as saying: *Laysa minnā man d'aā ila 'aṣabīyyah, wa laysa minnā man qātala 'ala 'aṣabīyyah, wa laysa minnā man māt 'ala 'aṣabīyyah* (Whoever advocates *al-'aṣabīyyah* is not one of us, and he is not of us who⁴² kills in the cause of *al-'aṣabīyyah*; and he is not of us who dies in the cause of *al-'aṣabīyyah*).⁴³

Literally, *'aṣabah* are male relations in the male line in the family or tribe, and Islam recognizes people's loyalty to their clans and tribes. Yet, Islam differentiates between two different types of loyalty: there is a 'blind loyalty', which is *al-'aṣabīyyah*, and a 'positive loyalty', which is *al-nuṣrah*. Therefore, Islam is against 'blind loyalty' because it usually leads to discrimination, racism, and may even lead to disloyalty which will threaten the internal security of the state.

In conclusion, it should be clear that the document of Medina was neither a constitution in the modern sense – because it did not have the nature of a social contract between equals, nor a constitution of the *khilāfah islāmīyyah* (Islamic Caliphate) – because the Prophet was not interested in determining a governmental system.⁴⁴ In fact, it seems to actually have been a treaty addressing the relationship between religious people of different religions.⁴⁵ Insofar as art. 25 of the Charter implied that the contracting parties were bound to mutual support against any attack on Yathrib, the real goal of the treaty was to establish a new order to preserve security, autonomy, and religious respect between the groups. To put it in another way, the principal aim of the agreement was to establish a confeder-

42 Berween 2003: 107.

43 *Sunan* of Abi Dāwūd 5121, grade *ḍa'īf*. On the relevance of *'aṣabīyyah* in the present, see Fabietti 2002: 79 ff.

44 Romdhoni 2013: 17 ff.

45 Emon 2001-2002: 129.

ation where the tie of religiosity would have supplanted the tie of kinship, which was preponderant at that time of the Prophet and was the origin of enduring conflicts and feuds in the Arabian peninsula.⁴⁶

4. The Charter of Medina as a Paradigm of a Peace Treaty and Its Legacy within the Theory of Citizenship

One of the main components of early Islam's foreign policy was to seek peace and stability. It is not a coincidence that soon after the Medina Charter, Muslim historians mention other examples of treaties (*mu'āhadāt*) having the same contents and pursuing very similar goals. Its pattern of security agreement was simply extended to include other and still more tribes in the Arabian Peninsula.⁴⁷ Al-Ṭabarī records the Covenant of 'Umar, a document apparently addressed to the people of the city of Jerusalem, which was conquered in the year 636 CE. In turn, this document states:

This is the assurance of safety (*amān*) which the servant of God 'Umar, the Commander of the Faithful, has granted to the people of Jerusalem. He has given them an assurance of safety for themselves, for their property, their churches, their crosses, the sick and the healthy of the city, and for all the rituals that belong to their religion. Their churches will not be inhabited [by Muslims] and will not be destroyed. Neither they, nor the land on which they stand, nor their crosses, nor their property will be damaged. They will not be forcibly converted ... The people of Jerusalem must pay the poll tax like the people of [other] cities, and they must expel the Byzantines and the robbers ...⁴⁸

According to al-Ṭabarī, these conditions, respecting Christian practices and places of worship, were also given to other towns throughout Palestine. Regarding the Armenian front, there are many references to treaties made with Jewish and Christian, as well as Zoroastrian, inhabitants of the region.

46 Serjeant 1964: 12, who says: "... by my understanding of it, we have here a treaty which, in effect, forms a tribal confederation from a number of tribes more or less independent of one another. It is entirely political, not religious, for it simply provides the structure of political unity-in fact, with a slight alteration of names it could be the very type of agreement Arabian tribes conclude today".

47 Serjeant 1964: 15.

48 See for a critical reading, Morrow 2013.

From our point of view, the legal nature of the Charter of Medina is the reason of its importance nowadays. Clearly, the contemporary evaluation must consider the historical context:

Medina confronted two contending discourses, that of rights and that of might. The first was a discourse affirming the might and right of the wealthy and dominant. This discourse was sustained by tribal logic, caused Medina's conflict-ridden sociopolitical dynamics, and undermined the dignity and prosperity of Medinans. The second relates to the rise of a powerful doctrinal discourse of rights in Islam, which affirms the rights of peoples across religious, social, racial, ethnic, and gender divides.⁴⁹

However, the practice and the example of the Prophet, his authority, and his political goals support the idea that, under Islamic law, agreements were religiously valuable, and, therefore, striving for their conclusion was beneficial. Moreover, the Charter of Medina has been considered the religious paradigm of international peace treaties (*mu'āhadāt*), thus highlighting that there was a public interest to sign a peace agreement with non-Muslim parties, when they were inclined to do so. This public interest position has its foundation in the Quran itself and encourages Muslims to make peace with others, as much as possible: "But if they incline to peace, you also incline to it, and (put your) trust in Allah. Indeed, He is the All-Hearer, the All-Knower (Q. 8:61)".

Ladeeb A. Bsoul, who has written a book about the notion of *mu'āhadah* in Islamic law, states:

This verse validates *muwāda'ah* in circumstances where non-Muslims are inclined to propose peace. However, jurists argue that if a *muwāda'ah* serves the interests of Muslims, it is permissible for them to take the initiative in cases where it is required or advantageous.⁵⁰

If we accept the idea of the Charter as a peace treaty, we can also understand the activity of Muḥammad in Medina as a diplomat or, more accurately, an 'ideal diplomat'. Muḥammad was known as an arbiter in Mecca when he arrived in Yathrib. There, acting as a dip-

49 Diab 2018: 232.

50 Bsoul 2010: 61 and Bsoul 2008: 107 ff.

lomat, he offered to negotiate an agreement between the different tribes in which justice was the central goal by means of a written document which articulated the rights and obligations of peoples living in Medina. In turn, Allah was represented as a god of struggle and combat, one with the qualities of a leader and general. His care for his believers was expressed in terms of the care a patriarch takes of his kin. His power, on the one hand, and his benevolence, on the other, were stressed in his maintenance of justice for all the *mu'minūn*.⁵¹ In other words, facing the conflicts of Yathrib, Muḥammad tried to solve the problems by mediating between the clans, who, in turn, negotiated and deliberated a solution.⁵² In doing so, he applied a method of persuasion and not coercion. The Prophet attempted to win the loyalty of non-Muslims by granting a due respect and freedom of worship, which also meant their self-government, taking into account their capability and will to be part of a peace agreement in Medina. Muḥammad used the treaty as an operational form of justice. In doing so, he divided factions and problems into more manageable issues, chose the fundamental principles to apply, designed a matrix of reciprocal obligations, and connected the provisions with the local tribal laws for their enforcement and execution. It should be noted that a treaty is always the result of a process in which different sequential phases are drafting, negotiation, acceptance, execution, and management. Many articles of the Medina declaration contain evidence of the process because they are evidence of the negotiation, deliberation, and execution of the agreement. For example, it is possible to localize the bulk of the agreement in some basic positions that are offered to all the parties involved in the negotiation; specifically, these include a) equal right to life, b) freedom of worship and religious self-government, c) civic equality, and d) fair justice.

a) Many articles protect the life of different peoples or, to be more specific, declare the sanctity of life.⁵³ This principle is the synthesis of a number of articles that establish limits and sanctions for blood-vengeance, preserve the security of the people of Medina, declare *haram* the territory of the city, and protect the life of strangers and pilgrims within the area.

51 See, for this striking image, Waardenburg 2002: 35.

52 Diab 2018: 219 ff.

53 In the Quran and the Sunna, the word 'nafs' ('self', but also 'soul') refers to the subject protected by the right to life and has been used in general terms without any distinction and particularization.

b) The freedom of worship and the principle of self-government are declared by art. 15, permitting the application of different religious laws for different religious groups.

c) The same article is also evidence of the equal standing of all the parties of the agreement, Jews included. This article is not only the declaration of the previous principles of freedom of worship and legal pluralism, but also a mirror image of the terms of the first part of the agreement – that addresses only Muslims – between the *ansār* and the *muhajirūn*.⁵⁴ The regulating scheme is the same for the two parts, and it is apparent that the signatories are treated as equals in this way.

d) Finally, the closing article 30 is dedicated to the overarching principle of rule of law and fair justice by the supreme arbitration of Muḥammad. As noted by Rasha Diab, this provision:

sheds light on this mechanism in relation to dispute resolution: «If any dispute or controversy likely to cause trouble should arise it must be referred to God and to Muḥammad, the Apostle of God. God accepts what is nearest to piety and goodness in this document.» This article, in addition to giving precedence to the autonomy of communities, identifies another central resource / authority that can help realize these communities' right to justice. Only when they fail to resolve their own conflicts are they supported by such central authority, namely divine law and their chosen arbiter, Muḥammad, to resolve conflicts.⁵⁵

Also in this case, it is necessary to recall the spirit of the times. In deciding to be the final arbiter, Muḥammad affirms that there is a divine law which is supreme over the human regulations but also recognizes the necessity of tribal regulations and, to some extent, the dependence on them. That is to say, Muḥammad is the political authority of a fragmented community which aims toward peace and security, but he knows that there is no state or government (*dawlah*) that can enforce the new rules. Therefore, he operates as an authority that can sponsor the realization of rights or regulate punitive measures for rights violators / withholders, by using the power

54 Diab 2018: 235.

55 Diab 2018: 242.

of the tribes. In turn, the Charter of Medina is a code of conduct that permits different communities to enforce legal regulations.⁵⁶ In accordance with all those basic principles, the text provides secondary and complementary articles regulating the relational matrix of alliance (*ḥilf*), brotherhood (*ikhā'*), and friendship (*wudd*) still existing between the tribes along with some financial reciprocal obligations, solidarity rules, and political allegiances.⁵⁷

5. Conclusions

Religious principles sometimes share meanings in common with other faiths because of the unity of the religious experience. As noted in the introduction, the historical interpretation is necessary not only for understanding the meanings of religious phenomena according to the original faith and the faithful community, but also for extracting new meanings from it to share with other religious denominations in different time periods. This interreligious and trans-historical interpretation 'creates' new cultural values to be applied in the present. The Charter of Medina is a legal source that permits such a trans-historical interpretation. Even though history teaches us that, unfortunately, the situation changed with the victory over Mecca and with a subsequent break with the Jews.⁵⁸ Nevertheless, it is intriguing to suppose that religiosity, brotherhood, and tolerance were the pillars of the political unity of early Islam and marked its subsequent international system of diplomacy. The present interpretation of the Charter of Medina highlights what principles it contained that may foster a new theory of contractual citizenship in the present day.

The first principle is that, since its origins, the Islamic legal tradition has developed a casuistic system of law without the exigency of establishing general theories of legal institutions. In this system, the Charter was not a constitution per se but a paradigm for peace agreements to establish a confederation of autonomous groups. The goal was to prevent tribes from waging war against each other because of kinship relations. There is little doubt that similar goals are totally acceptable in the contemporary international legal system.⁵⁹

The second principle is that, in many respects, 'religiosity' seems to be a more universalizing concept that is grounded in the human nature of individuals, faith, cultural habits, and rights, that is to say, in their

56 Diab 2018: 239.

57 Rubin 1985: 8.

58 Faizer 1996.

59 Tourme Jouannet 2013: 64 ff. See also, An-Na'im 1987: 1-18.

religious experience. Religiosity is a primordial phenomenon that comprises the feelings, acts, and experiences of individual people. From a global perspective, which is not religiously neutral, nor concerned with legal formalism, but rather, polycentric, and complex, 'religiosity' is a factor that guides individuals when they act as private legal actors of global law, the selection of whose global legal instruments and remedies are best for achieving their religious goals. This does not mean that religions are useless or inconsistent, rather their regulatory power resides not only in their institutional shapes, codes, hierarchies, community organization, and laws but also in their own symbolic appeal, unofficial saints, separate constitutive narratives, different jurisdictional concepts and conflict resolution norms, cross-border affiliations, transnational solidarity, and international mobilization capacity. It is not a coincidence that religious leaders have, of late, increasingly sustained the idea of human dignity as a direct and concrete regulatory power.

The third principle is that legal agreements are religiously valuable, hence striving for their conclusion is beneficial. For example, even though Islamic law has had many applications of pacts, agreements, covenants, sales, treaties, constitutions, and declarations, a philosophical and unified theory of contract has been lacking. As far as the Islamic legal tradition is concerned, it has many words and concepts related to the idea of the conclusion of an agreement, such as *mīthāq*, *bay'ah*, *'aqd*, *kitāb*, *mu'āhadah*, *dustūr*, and so on. In public law, it still requires extensive studies if Islam has generated a theory of social contract, and the foundation of the theory of social contract in Islamic sources seems to be a matter of contemporary debate amongst scholars. In this light, in theorizing the forms of inclusive citizenship, some Muslim scholars think that religious minorities should not be treated like *dhimmī*, but like *mu'āhids* – people with whom the state has a treaty of political alliance. Such a position should have the effect of rendering them equals of the majority of Muslims. In the same vein, an institutional policy of contextualized agreements between the government and Muslim communities could be an acceptable strategy of citizenship's implementation for many Muslim minorities living and settling in the West today.⁶⁰

60 For the Italian case-study, see Anello 2016, Anello 2019, and Anello 2020.

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L'IDEOLOGIA RELIGIOSA NELL'EDITTO DI ESPULSIONE DEGLI EBREI DALLA SICILIA

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Abstract: In this paper I propose some reflections about the edict of expulsion of Jews from Sicily which is not so well known. I namely focus on those aspects which aim at explaining and justifying the terrible act of expulsion. A deep analysis of the document singles out a negative ideology about Jews, typical of that historic moment, as well as the religious-political attempt of turning the expulsion into a necessary defense. The protection of the Christian society and the defense of religious and identity based values are used as main reason for sending away Jews. By highlighting the need for expulsion, a strategy which is a kind of manipulation is implemented, and I think that today it is interesting to pay attention to these mechanisms since they are still put in place. I quote wide parts of the edict in order both to make them known to a wider public and because they are more explanatory and clear of any other comment.

Keywords: Jews; Sicily; Edict of expulsion of Jews from Sicily.

Nel mondo medievale, nella società cristiana vincitrice, mentre per i pagani non c'era spazio e dovevano necessariamente convertirsi, la sostanziale accettazione degli ebrei era il risultato di un complesso processo giuridico e teologico di definizione dell'ebreo e del suo posto nel mondo cristiano. In Italia, come è noto, prevaleva la tradizione della legge romana che, anche con le gravi limitazioni dei codici teodosiano e giustiniano, considerava gli ebrei cittadini dell'impero. Tale *status* giuridico derivava dalla fusione di questa tradizione giuridica con la tradizione teologica della Chiesa.¹ In una definizione di Federico II, nel 1234, gli ebrei venivano indicati come *servi nostrae camerae*: il loro stato giuridico era così caratterizzato dalla diretta dipendenza dal potere statale. Con l'emergere delle monarchie nazionali² questo rapporto di possesso da parte della monarchia e dei più

1 Foa 2004: 6.

2 È stato messo in rilievo come l'espulsione dalla Spagna e dai suoi domini del 1492 sia legata alla consapevolezza del fallimento della politica conversionistica e rappresenti il tentativo di salvarne i risultati conseguiti fino a quel momento con il taglio definitivo del cordone ombelicale che ancora legava ebrei pubblici e *conversos*. Cfr. Foa 2004: 111. Maurice Kriegel lega il fenomeno delle espulsioni da Inghilterra, Francia e da altre monarchie in formazione con quello del processo di centralizzazione. In quest'ottica, le espulsioni diventano un problema collegato ai processi di modernizzazione, di creazione statale e al generale progetto centra-

alti feudatari va definendosi e la libertà di movimento degli ebrei si riduce sempre più, mentre la pressione finanziaria su di loro aumenta fino ad arrivare a vere e proprie forme di espropriazione.

Si parla spesso delle espulsioni degli ebrei dalla Spagna, dal Portogallo, dall'Inghilterra, ma poco di quella dalla Sicilia. Allo stesso modo, non molti conoscono la lunga e appassionante storia della presenza ebraica nell'isola. Le comunità ebraiche erano disseminate in tutta la regione ed erano molto numerose: al momento dell'espulsione gli ebrei costituivano il cinque per cento della popolazione siciliana. Come ha ampiamente mostrato una vasta bibliografia, durante il medioevo vi erano più ebrei in Sicilia che in tutto il resto di Italia.³ Inoltre, essi risiedevano nell'isola da tempi immemorabili e, dunque, si sentivano profondamente legati a questa terra.

Tale millenaria presenza fu bruscamente interrotta quando nel marzo del 1492 i sovrani di Spagna, Isabella di Castiglia e Ferdinando d'Aragona, emanarono diversi editti per l'espulsione degli ebrei dai loro domini e, fra questi, ci fu anche quello destinato alla Sicilia. È molto strano che la storiografia ufficiale abbia dato così poco spazio a una pagina tanto drammatica della storia siciliana e come mai degli ebrei, che abitarono l'isola dal primo secolo dell'era volgare fino al quindicesimo secolo, siano rimasti così pochi segni. Sebbene le tracce archeologiche ritrovate siano scarse, esistono importanti testimonianze contenute nei diari di viaggiatori che descrivono minuziosamente le comunità ebraiche sparse nell'isola e molti documenti di archivio. Tali preziosi documenti attestano la massiccia presenza degli ebrei e raccontano della loro vita sociale, culturale, religiosa e delle loro attività economiche. Degno di nota il lavoro dell'illustre studioso israeliano Shlomo Simonsohn, che, analizzando tali documenti, ha dedicato ben diciotto volumi alla storia degli ebrei siciliani.⁴ Questi dati, la durata temporale e la consistenza numerica della presenza ebraica in Sicilia, sono importanti perché danno modo di comprendere meglio la drammaticità dell'espulsione: non fu espulsa una piccola comunità, né una popolazione che da poco tempo abitava l'isola. Al contrario, tra gli ebrei e la Sicilia vi era uno stretto legame tanto che si sentivano profondamente siciliani, come annota

lizzatore. Nella persona del re si esprimeva l'unità della nazione; da qui l'identificazione tra religione del sovrano e religione del popolo; si trattava, in sostanza, di rendere concreto il principio dell'*ubi unus dominus ibi una religio*. Cfr. Kriegel 1978: 49-90.

3 Gli ebrei erano in Sicilia dall'epoca romana, la loro presenza è documentata a partire dal 590, grazie alle lettere di papa Gregorio Magno. La bibliografia sulla presenza ebraica in Sicilia è ormai molto ampia; ricordo soltanto: Bressan 2001; Bucaria 1996; Bucaria 1998; Bucaria 2002; Ben-Sasson 1991; Goitein 1967; Kriegel 1978; Lagumina 1990; Milano 1992; Renda 1993; Scandaliato 2006; Simonsohn 1997-2010; Simonsohn 2011; Strauss 1992; Zeldes 2003.

4 Simonsohn 1997-2011.

Francesco Renda: “Che gli ebrei fossero così numerosi e così integrati nella situazione ambientale isolana al punto da apparire, se non proprio essere, dei siciliani o dei semisiciliani era conseguenza della più che millenaria stabilità della loro residenza nell’isola”.⁵ Gli ebrei che, nel momento della cacciata, non vollero recidere questo legame rimasero nell’isola convertendosi.⁶ Il decreto reale fu applicato con estrema durezza, agli ebrei si davano due alternative: abbandonare la Sicilia con tutti i loro averi o abiurare la propria fede, convertirsi al cristianesimo e conferire all'erario la metà dei loro beni. Alcuni scelsero di restare e, convertendosi, entrarono di diritto a far parte della comunità cristiana anche se molti di loro, in segreto, rimasero di fede ebraica e continuarono a professare di nascosto e per lungo tempo la religione dei loro antenati (i cosiddetti marrani). Coloro che non si convertirono dovettero lasciare la Sicilia il 12 gennaio 1493.⁷ Al momento di partire l'ebreo doveva avere alienato integralmente i propri beni e regolato ogni pendenza economica con i cristiani e con l'erario.

Da parte siciliana non mancarono le voci di dissenso verso questa decisione reale. Poco dopo la proclamazione dell'editto per la Sicilia, il diciotto giugno 1492, gli alti ufficiali del regno e, alcuni giorni più tardi, la città di Palermo chiedevano al re di riconsiderare la situazione delle comunità ebraiche siciliane, molto diversa da quella spagnola, come veniva sottolineato nelle suppliche dirette al sovrano. I dissensi e le voci di protesta siciliani valsero poco o nulla: il re accettò solo di concedere una dilazione di alcuni mesi considerate le difficoltà burocratiche per ottenere che tutte le comunità versassero la somma stabilita all'erario statale.

Sotto il profilo giuridico, gli ebrei siciliani erano servi *Regiae camerae*, non dipendevano né dalla nobiltà feudale, né dalle magistrature cittadine, né dalla chiesa, ma solo dalla legge e dall'autorità del sovrano. Il termine 'servitù' presupponeva il corrispettivo di 'proprietà'. E, in senso giuridico proprio, il servo della Camera regia era anche 'peculio', proprietà del regio erario.⁸ Così leggiamo nell'editto di espulsione siciliano: “E atteso che tutti i corpi degli ebrei, che vi-

5 Renda 1993: 42.

6 Zeldes 2003.

7 L'Istituto Siciliano di Studi Ebraici (ISSE), da anni, organizza, in data dodici gennaio, una giornata di studi dedicata alla memoria della cacciata degli ebrei dalla Sicilia presso l'Archivio comunale di Palermo, dove è conservato, tra i molti documenti che riguardano gli ebrei siciliani, l'originale siciliano dell'editto di espulsione degli ebrei dalla Sicilia.

8 Renda 1993: 46. È interessante notare che la formula con cui la servitù veniva definita dall'Impero, *servi camerae*, può essere collegata alla definizione ecclesiastica e di matrice teologica della 'perpetua servitù'. Foa 2004: 264.

vono e risiedono nel nostro regno, sono nostra proprietà, e di essi per nostra real potenza e suprema e imperativa potestà possiamo decidere e disporre a nostra volontà".⁹

Tale condizione giuridica ebbe un peso determinante nella legittimazione del provvedimento di espulsione. Non solo in Sicilia ma in tutta Europa, l'ebreo godeva di una condizione di semilibertà, era ovunque un servo del re e da quella condizione servile poteva ad ogni momento riscattarsi – e di conseguenza acquistare la piena libertà e uguaglianza col cristiano – convertendosi al cristianesimo. Finché rimaneva fedele alla legge mosaica – secondo l'insegnamento di sant'Agostino fatto proprio da vari pontefici ma non sempre condiviso da altri prelati e religiosi come pure non sempre praticato dalla curia romana – l'ebreo doveva essere considerato dal cristiano come testimonia della fede, una prova evidente della verità cristiana.

Osserva Francesco Renda:

testimoni della fede, testimoni della verità del cristianesimo, testimoni della storicità di Cristo e della sua avvenuta crocifissione, testimoni del trionfo della chiesa sulla sinagoga, difesi e protetti in attesa del riconoscimento del loro errore, come peroravano sant'Agostino e san Tommaso, ma anche tenuti a rimanere obbligati, dovendo essi vivere in modo conforme alla loro errata fede, gli ebrei di Sicilia erano dunque sotto la custodia del re, che, nel soddisfare le ragioni della chiesa, dei figli di Israele si serviva come forza di riserva economica e finanziaria.¹⁰

È complicato descrivere i rapporti tra mondo ebraico e cristiano senza cadere in superficiali semplificazioni ed occorre essere vigili verso una storiografia che vede i due mondi in netta contrapposizione ponendo come alternativa quella tra chiusura ed apertura, tra l'identità e l'assimilazione, tra la convivenza rosea e la storia persecutoria.¹¹ Inoltre, come vedremo, da un lato la chiesa accetta la presenza dell'ebreo, dall'altro ne veicola un'immagine del tutto negativa.

A partire dalle Crociate si crea una pressione popolare contro gli ebrei destinata a generare massacri, attacchi, persecuzioni e si sviluppa un intreccio tra la propaganda religiosa di un cristianesimo in

9 Renda 1993: 179. Tutte le citazioni dell'editto siciliano presenti in questo contributo sono tratte dalla traduzione italiana che si trova nel volume già menzionato: Renda 1993: 178-180.

10 Renda 1993: 49.

11 Foa 2004: xiv.

espansione e le politiche dei principi e dei signori laici. Lo stereotipo antiebraico prende sempre più forza dopo l'undicesimo secolo, alimentandosi dell'accusa, rivolta agli ebrei, di profanare le ostie consacrate e di uccidere ritualmente bambini cristiani. Queste due accuse hanno la stessa struttura e veicolano lo stesso messaggio: la ripetizione rituale da parte degli ebrei dell'uccisione di Cristo.¹² A metà del Trecento, mentre dilagava la peste in Europa, gli ebrei sono tacciati della terribile accusa di diffondere la peste e di avvelenare i pozzi.

Scrivono Anna Foa:

Il parallelo tra i pogrom del 1348 in Germania e quelli del 1096 può essere indicativo di un processo di trasformazione dello stereotipo. Nell'XI secolo, gli ebrei erano stati attaccati come deicidi e massacrati come uccisori di Cristo ... ma avevano avuto la scelta tra la conversione o la morte. Nel 1348 gli ebrei erano massacrati per restaurare un ordine violato – la violazione aveva scatenato il morbo – e non furono posti davanti alla scelta della conversione ... Il male da loro rappresentato non poteva in realtà essere cancellato nemmeno dal battesimo.¹³

A proposito dell'omicidio rituale mi pare utile ricordare l'episodio di Fulda, in Germania, che offrì la possibilità della prima pubblica presa di posizione teorica di un'autorità statale su questo problema. Nel 1235 trentaquattro ebrei furono bruciati perché incriminati di aver ucciso dei bambini cristiani allo scopo di utilizzarne ritualmente il sangue. L'imperatore Federico II convocò in Germania un gruppo di ebrei convertiti perché rispondessero, sulla base della loro conoscenza dei testi ebraici, della realtà dell'accusa e questi risposero che sia la Bibbia che il Talmud avevano in orrore il sangue, considerato impuro. Federico dichiarò ufficialmente falsa l'imputazione.¹⁴ Nonostante ciò, questa stessa accusa, che ha una lunga storia ed una vasta utilizzazione politica, si riprodurrà ancora ripetutamente e ricorre spesso tra le accuse che precedono le espulsioni, come, ad esempio,

12 Foa 2004: 15. L'insieme di pregiudizi nutriti nell'Europa cristiana nei confronti del popolo ebraico e alcuni stereotipi elaborati dall'antigiudaismo furono ripresi e rielaborati, soprattutto dal moderno antisemitismo, a livello di persuasione e di propaganda. Basti pensare allo stereotipo dell'ebreo accumulatore e prestatore di denaro e alle raffigurazioni fisiognomiche dell'ebreo, a volte con tratti diabolici (Gardenal 2001: 123).

13 Foa 2004: 14.

14 Foa 2004: 17.

in Spagna.¹⁵ Così, l'immagine dell'ebreo intento nell'omicidio rituale affiancò quella dell'ebreo volto a vendicarsi dei cristiani avvelenandoli in massa durante la Morte Nera.

Entrambe le accuse favorirono lo sviluppo del mito dell'ebreo nemico della società cristiana e che fosse quindi necessario combatterlo ed eliminarlo per conservare la salute fisica e spirituale della società e dello stato.¹⁶ L'ebreo viene sempre più emarginato, a cominciare proprio dal punto di vista legale, e ciò determinava un aggravarsi della sua condizione di 'diverso'.¹⁷ Come osserva Anna Foa, il simbolismo, questa carica di significanza di cui l'ebreo è stato rivestito, fu, almeno fino all'età moderna, opera della religione cristiana. Così la Chiesa, che pure era stata in grado di elaborare una teoria della presenza ebraica tale da garantirla e renderla stabile, ha anche fornito gli strumenti culturali e simbolici per trasformare questa presenza in un'oscura minaccia contro cui era necessario scendere in guerra.¹⁸

Gianna Gardenal sottolinea che: "dopo l'anno Mille l'associazione mentale demonio-giudei è ormai consolidata"¹⁹ e, commentando un passo delle *Cronache dell'Anno Mille* di Rodolfo il Glabro, asserisce: "ne esce ormai una figura del giudeo perfido e miscredente, malvagio consigliere dei cristiani, alleato del diavolo e da lui dotato di arti magiche: egli possiede certo anche l'abilità di guarire un paziente malato ma spesso ne approfitta per eliminare un cristiano o per condurlo alla perdizione".²⁰ Ed ancora: "l'ebreo si colloca sempre di più in una 'tipologia' che lo accosta al regno del 'male'. Vi è un 'mago' che aiuta Teofilo a scegliere la dannazione; vi è un 'perfido giudeo' dell'orazione del venerdì santo; vi è il seguace dell'Anticristo, personaggio minaccioso che turbava le fantasie dei cristiani e che altro non era se non l'opposto del Cristo".²¹

La posizione ufficiale della Chiesa, espressa nei documenti pontifici, era in generale di sostanziale tolleranza, sempre e comunque stante però che l'ebreo, persistendo nel suo errore di negare la verità del cristianesimo, doveva esser tenuto in stato di minorità civile e

15 Anna Foa sottolinea che anche l'espulsione degli ebrei dalla Spagna fu preceduta da un clamoroso processo per omicidio rituale. Foa 2004: 20.

16 Foa 2004: 19.

17 Gardenal 2001: 53.

18 Foa 2004: 20.

19 Gardenal 2001: 153.

20 Gardenal 2001: 154.

21 Gardenal 2001: 175. Come è noto anche nella letteratura cristiana la polemica antiebraica trova ampio spazio. Tale tipo di polemica diviene un genere letterario e nell'Occidente medievale di tali testi, sermoni, trattati, circolavano migliaia di manoscritti.

di sottomissione sociale e politica. Veniva quindi riconosciuta e consentita, ossia tollerata, la convivenza tra l'ebreo e il cristiano, ma era negata in linea di principio l'uguaglianza tra l'uno e l'altro. In ogni parte del mondo cristiano, il primo doveva stare sempre sopra e il secondo sempre sotto. Per questo, la pur consentita presenza ebraica frammista alla popolazione cristiana era sempre soggetta a limitazioni, vincoli e prescrizioni e, inoltre, è l'obbligo di indossare un segno distintivo sulla propria persona o di apporlo nei propri negozi o sedi di attività.

Così asserisce Francesco Renda:

La condizione più umiliante tuttavia era l'obbligo della rotella, un costume medioevale, confermato dal Concilio Lateranense nel 1215, ancora in Sicilia rispettato quale segno di distinzione della diversità razziale e religiosa, ma anche quale marchio visibile della sua condizione inferiore, l'ebreo doveva sempre portare, e di fatto portava, come prescritto, salvo eccezionali esenzioni di volta in volta concesse, la rotella rossa nella misura di un sigillo regio di prima grandezza ben visibile sulle vesti (l'uomo un palmo più in basso della barba, la donna sulla manica destra all'altezza del gomito ...); similmente, era obbligato a rendere riconoscibile con analoga insegna tonda di panno rosso la sua bottega o il suo negozio o la sede di qualunque altra sua attività professionale.²²

Se la scala dei valori è mantenuta, cioè se l'inferiorità dell'ebreo è riconosciuta, la Chiesa non viola la sua libertà religiosa e lo protegge. Non l'odio verso l'ebreo ma l'amore della Chiesa, cioè la preoccupazione per il destino del popolo cristiano, è il principio cui si ispira la politica ecclesiastica. Domenicani e Francescani, partecipi dell'attività inquisitoriale, cercarono di allargarne la giurisdizione fino a comprendervi gli ebrei. La strada fu quella della creazione di una sorta di nuova eresia, quella dei giudaizzanti, categoria sotto cui furono compresi i convertiti forzatamente che cercavano di tornare all'ebraismo o che mantenevano un legame segreto con esso.²³ Queste le parole del testo:

22 Renda 1993: 63.

23 Foa 2004: 28.

Poiché i giudei per loro propria colpa sono sottomessi a perpetua servitù e sono servi e prigionieri nostri, e se sono ammessi e tollerati è per la nostra pietà e grazia, e se disconoscono ciò e si mostrano ingrati non vivendo quietamente, è di conseguenza cosa molto giusta che perdano la detta nostra grazia, e che senza di essa siano da noi trattati come eretici e fautori della detta eresia e apostasia. Per il quale delitto, pur se commesso da alcuni di un collegio o una università, è consequenziale che tale università e collegio siano distrutti e annientati, e la parte minore per la maggiore e l'un per l'altro siano puniti.²⁴

In questo brano, con molta chiarezza, viene sottolineato che la 'perpetua servitù' è strettamente connessa alla loro colpa e vivendo in modo non quieto meritano di essere trattati come eretici ed apostati. Si evidenzia, inoltre, che sono 'ammessi e tollerati' per pietà e grazia dei cristiani. Non solo si accentuano le 'colpe' del malvagio popolo ma si costruiscono delle argomentazioni che servono a giustificare la reazione punitiva del sovrano.

Questo tema sarà rielaborato infinite volte nella storia dei rapporti tra la Chiesa e gli ebrei.²⁵ Il mondo cristiano per sentirsi a posto con la propria coscienza ha finemente elaborato un pensiero che rimarca la propria bontà e giustizia contro la malvagità e ingiustizia degli ebrei: l'amore e la misericordia cristiana li protegge, ma tale protezione non è da loro meritata.

Scrive Francesco Renda:

Secondo la chiesa, l'ebreo era colpevole non solo di aver voluto la condanna a morte di Gesù Cristo figlio di Dio, ma anche di non averne voluto e di continuare a non volerne riconoscere la divinità. Per tale aspetto, non si mancava mai di sottolineare come l'ebreo deicida fosse peggiore del più malvagio delinquente del mondo. Di qui la sua condanna alla perpetua servitù, anche giustificata dal fatto che con l'avvento di Gesù Cristo gli ebrei come gruppo etnico avevano perduto la sovranità ed erano quindi tenuti a vivere in istato di perenne avvilimento.²⁶

24 Renda 1993: 179.

25 Foa 2004: 23.

26 Renda 1993: 45.

È importante notare come le parole dell'editto richiamino quelle della nota Bolla Papale del 1555, nella quale viene messo in risalto che gli ebrei per loro colpa sono in schiavitù eterna, che non meritano né la protezione dell'amore cristiano né di essere tollerati in seno alla loro società. Ecco le parole iniziali della *Cum nimis absurdum*, con cui viene istituito il ghetto di Roma:

Poiché è assurdo e sconveniente al massimo grado che gli ebrei, che per loro colpa sono stati condannati da Dio alla schiavitù eterna, possano, con la scusa di essere protetti dall'amore cristiano e tollerati nella loro coabitazione in mezzo a noi.²⁷

In modo analogo, nelle prediche antiebraiche si accentua la loro colpa e la loro infinita malvagità: gli ebrei portano una macchia perenne. La loro ostinazione li fa persistere nell'errore, non hanno riconosciuto il messia e continuano a non riconoscere la verità, perché per loro natura sono ciechi. Dall'editto emerge chiaramente l'ideologia del *perfidus Judaeus* che dominava nell'Europa del tempo e la 'perfidia giudaica' andava sempre e in ogni caso umiliata e mortificata.²⁸

Nel preambolo dell'editto la prima accusa che viene rivolta agli ebrei è di sollecitare i cristiani ad abbandonare la loro fede per abbracciare l'ebraismo.²⁹ Tale idea che l'ebreo pratici proselitismo, storicamente totalmente infondata, si basa sulla visione dell'ebreo come colui che porta scompiglio e che induce in errore.

Così si esprime l'editto:

... dai padri inquisitori della eresia e apostasia siamo informati che sono stati trovati molti e diversi cristiani, i quali sono passati o tornati ai riti giudaici e stanno e vivono nella legge e superstizione giudaica, seguendone le cerimonie, osservandone le norme fino all'abominevole circoncisione, bestemmiando il santo nome di Gesù Cristo nostro signore e redentore, allon-

27 Foa 2004: 23 s.

28 È interessante ricordare che le otto *Omelie* contro i giudei di Giovanni Crisostomo, contenenti i capi d'accusa già delineati da Tertulliano e da Ambrogio, che andranno a formare l'armamentario antiggiudaico lungo parecchi secoli, in realtà sono indirizzate contro i giudaizzanti. In esse vengono descritte le nefandezze, i vizi, i peccati dei giudei, questi vengono concepiti come simbolo stesso del male e le sinagoghe come dimore di Satana. Foa 2004: 23; Gardenal 2001: 55 s.

29 Foa 2004: 111.

tanandosi dalla dottrina evangelica, dalla sua santissima legge e dal suo veritiero culto; e che della detta eresia e apostasia sono stati causa i giudei e le giudee nei nostri regni e signorie abitanti e dimoranti per mezzo della conversazione e comunicazione che con i detti cristiani tenevano e continuano a tenere; ... i giudei li inducevano e li attraevano alla detta legge mosaica, insegnando loro i suoi precetti e le sue cerimonie, e facendone rispettare il sabato e la pasqua e le feste giudaiche. In conseguenza di ciò, i detti padri inquisitori di alcune nostre città e terre, per nostra volontà e col nostro permesso hanno cacciato i giudei, maschi e femmine, che in quelle città e terre abitavano, reputando che, perché i cristiani fossero distolti dal giudaizzare e rimanessero nella santa fede cattolica costretti e abituati, non poteva in altra maniera essere provveduto; e il venerabile padre priore di Santa Croce, generale inquisitore ... persuadendoci che, per estirpare del tutto la detta eresia e apostasia dei nostri regni e signorie, cacciassimo in perpetuo e per sempre i detti giudei e giudee, dicendo che eccettuata la detta espulsione, tale lebbra così contagiosa non era possibile rimediare.³⁰

La connessione tra ebrei e lebbrosi, come è noto, ha una lunga storia. L'accusa di indurre in errore è a volte accompagnata a quella di essere portatori di lebbra o di altre malattie contagiose; spesso viene effettuato un parallelo tra il contagio delle malattie e il contagio delle idee erranee.

Illuminante, a tal proposito, come Anna Foa descrive l'accentuazione negativa dello stereotipo, l'insistenza su una sorta di naturale malvagità dell'ebreo, che è fonte di perturbamento dell'ordine naturale, di contaminazione del mondo cristiano:

Questo delle contaminazione è un concetto antico, formulato già da una parte della tradizione ecclesiastica, individuabile fin in alcuni testi di Paolo ... ma è indubbio che nel corso dei secoli, dalla prima formulazione paolina in poi, in questo concetto di contaminazione si sia verificato uno slittamento semantico impercettibile ma fondamentale, per cui dalla contaminazione provocata dall'errore si passò a significare la contaminazione provocata dalla persona di colui che erra.³¹

30 Renda 1993: 178.

31 Foa 2004: 14 s.

Quando la peste si diffondeva in Europa, una grande ondata di violenza si scatenò contro gli ebrei che vivevano nei paesi cristiani: in Germania si verificarono molti massacri;³² nel 1290 gli ebrei furono cacciati dall'Inghilterra, nel 1306 dalla Francia, mentre in Spagna subirono attacchi ed erano oppressi dalle prediche dei Domenicani che tentavano di convertirli al cattolicesimo. Nel quarantennio 1450-1492, anche la condizione ebraica siciliana divenne difficile; ad aggravare la situazione furono soprattutto le martellanti predicazioni dei frati degli Ordini Francescano e Domenicano, che spesso andavano oltre i dettami della chiesa di Roma e infiammavano gli animi contro il 'perfido ebreo'.

Nel 1474 si ebbero gli eccidi di Modica e di Noto. A Modica, il 15 agosto, festa dell'assunzione in cielo della Vergine Maria, furono massacrati 360 ebrei. Se si tiene presente tutto ciò, diviene comprensibile perché gli studiosi sostengano che l'editto non giunse del tutto inaspettato. L'ideologia imperante del *perfidus Judaeus* e i massacri appena ricordati costituiscono il sentiero che conduce all'atto finale: la cacciata. Sebbene questa non fosse voluta e decisa dai locali trovò anche in Sicilia terreno fertile.

Così ricorda magistralmente Renda:

L'espulsione non fu deliberata né preparata né voluta dalle autorità locali, che del resto non ne avevano il potere, bensì da re Ferdinando ... L'espulsione degli ebrei dalla Sicilia, anche se decisa a Granada senza che le autorità siciliane ne fossero state preventivamente consultate o informate, non poteva essere un provvedimento estraneo alla realtà isolana ... Secondo la mentalità del tempo, gli ebrei erano ovunque considerati più o meno "agenti del diavolo" e "fonte di pericolo" per la fede cristiana, dai quali liberarsi non appena possibile. A sua volta, l'odio antiebraico spinto al parossismo era un dato non solo spagnolo, ma anche europeo, e come tale largamente diffuso in ogni parte d'Italia, compresa la Sicilia.³³

Con questi sprezzanti toni si esprime l'editto:

Tutti i corpi degli ebrei, che vivono e risiedono nei nostri regni, sono nostra proprietà, e di essi per nostra real potenza e

32 Foa 2004: 3 s.

33 Renda 1993: 80.

suprema imperativa potestà possiamo decidere e disporre a nostra volontà, usando tali nostri poteri per questa tanto urgente necessaria causa presente, confermandoci con il detto padre priore inquisitore generale, favorendo il santo officio della detta inquisizione, e per la sua autorità cattolicamente disponendo di nostra volontà e consentimento che il detto padre con le sue lettere provveda sopra la detta espulsione generale in favore della fede e per tanto beneficio delle anime e dei corpi e per il bene dei cristiani sudditi nostri, con questo editto da valere in perpetuo e irrevocabilmente ordiniamo di cacciare e cacciamo da tutti i nostri regni e domini occidentali e orientali tutti i detti giudei e giudee, grandi e piccoli ... i quali giudei e giudee devono e sono tenuti a uscire e andar via da tutti i detti nostri regni e domini entro tre mesi da calcolare immediatamente dal giorno della pubblicazione del presente; di modo che, passato il detto tempo, nessun giudeo ... possa stare in alcuna parte dei nostri regni e domini, né potrà tornare in essi ... pena la morte e la confisca dei beni in favore della nostra camera e fisco ... e nella stessa pena incorrerà qualsivoglia persona di qualsivoglia stato e condizione che, dopo il tempo prescritto, accoglierà, terrà o riceverà nei nostri regni e domini o in parti di essi giudeo o giudea di qualsivoglia età; e coloro che tal cosa faranno, commetteranno delitto di ricettatori e fautori di eretici.³⁴

Come espresso in questo passo, l'espulsione è messa in atto per preservare il bene delle anime e dei corpi dei cristiani. D'altra parte il desiderio di potenziare ed esaltare la "santa fede cattolica" è la motivazione principale per la quale si devono "estirpare" gli ebrei. Così leggiamo testualmente:

Noi che principalmente desideriamo che nel nostro tempo la santa fede cattolica sia potenziata ed esaltata e che la eretica pravità dai nostri regni e domini sia del tutto estirpata ... ricevute maggiori informazioni della detta diabolica e perfida induzione e soggezione dei detti giudei, del che la nostra real coscienza è veridicamente informata e certificata, troviamo la natura e condizione dei giudei per la loro affettata cecità e grande ostinazione essere premurosa e sollecita e anche pre-

34 Renda 1993: 179.

suntuosa a sovvertire i cristiani, e astuta e molto scaltra per attrarli alla sua perfidia giudaica.³⁵

Tra le varie colpe di cui gli ebrei sono accusati non va dimenticato l'attaccamento al denaro, l'avidità, il loro 'perverso vivere', nel quale rientra anche la pratica dell'usura. Riguardo a quest'ultima, osserva acutamente Gianna Gardenal:

Per l'intervento degli ordini mendicanti si accende nel Quattrocento una violenta polemica contro l'usura, con un richiamo continuo all'osservanza in materia delle norme canoniche; si colpiscono certamente tutti gli usurai ma, poiché un po' alla volta "usurai" era diventato sinonimo di "ebreo", i rappresentanti degli Ordini si scagliano soprattutto contro i giudei ...³⁶

Gli ebrei non si sono macchiati soltanto di due colpe fondamentali, cioè aver commesso il deicidio e aver rifiutato Cristo; da queste discendono poi, come corollari, ulteriori propensioni peccaminose, quali la tendenza criminale che si estrinseca attraverso l'omicidio di bambini o con l'esercizio della professione medica a danno dei cristiani, con la violazione dell'ostia e soprattutto con la violenza esercitata tramite l'usura, o ancora, addirittura, attraverso imputazioni più fantasiose come l'avvelenamento dei pozzi e la diffusione della peste. I perfidi, i tenaci infedeli non sono più dunque soltanto i nemici di una religione, ma agiscono nella realtà quotidiana, nella prassi, inquinando in tal modo la società dei cristiani ... L'ebreo depaupera il cristiano di ogni suo bene e agisce nella società provocando ovunque danni. Egli è l'elemento negativo in ogni ambito sociale, economico, culturale, religioso.³⁷

Anche a proposito della pratica dell'usura le parole dell'editto sono dure ed aspre e i termini utilizzati esprimono ripetutamente il disprezzo e l'astio:

E a questo aggiungendo il loro inquieto e perverso vivere, troviamo che i detti giudei per mezzo di gravissime e insop-

35 Renda 1993: 179.

36 Gardenal 2001: 275.

37 Gardenal 2001: 330 s.

portabili usure divorano e inghiottono i beni e le sostanze dei cristiani, esercitando con nequizia e senza pietà la pravità usuraia contro i detti cristiani pubblicamente e manifestamente come contro nemici ... Noi pertanto, conformemente alla loro perfidia e in conseguenza dei detti atti tanto nefasti e detestabili dai medesimi commessi, accertato che per la loro ostinata infedeltà essi sono incorreggibili, fosse lecito e permesso punirli di grandi e gravissime pene. Ciò nondimeno, abbiamo deliberato di dar loro la pena dell'espulsione, e benché sia minore di quella che meriterebbero, reputiamo che essa sia sufficiente a provvedere alla salute dell'anima dei cristiani ... perché la loro salvezza consiste nel separarli dalla pratica convivenza e comunicazione con i giudei e le giudee, la quale in tutto il tempo passato ha causato la detta eresia e apostasia e l'impoverimento della economia dei cristiani ... dunque devono essere cacciati e allontanati, perché togliendo la occasione di errare è tolto l'errore.³⁸

Notiamo la modalità argomentativa: in conseguenza ai loro atti nefasti e detestabili e per la loro incorreggibilità è 'lecito e permesso' punirli con la pena dell'espulsione, che, comunque è una pena minore rispetto a ciò che meriterebbero. Di nuovo si mette in risalto che la punizione è conseguenza necessaria del loro modo di fare e di essere: ostinati, incorreggibili, ciechi, diabolici. Interessante notare le due pregnanti espressioni: 'salute dell'anima' e 'salvezza'. Viene rimarcata con forza la misericordia sia nei confronti dei cristiani, che vengono protetti, che nei confronti dei giudei ai quali spetterebbe una pena superiore di quella che ricevono.

Analizzando attentamente questo passo si comprende come viene delineato il nesso tra perverso vivere, pratica dell'usura, perfidia, mancanza di pietà. Viene messo in risalto che la convivenza con i giudei porta all'eresia e all'impoverimento economico. L'accusa della contaminazione, come accennato, è sempre presente lungo il corso dei secoli, espressa con malattie fisiche, quali la peste o la lebbra, o con tratti non fisici ma ideologici. Questi elementi, che costituiscono i motivi principali delle accuse, hanno un forte legame tra loro e per questo si ritrovano negli editti di espulsione, come nelle bolle papali che instaurano i ghetti, come nei manuali dell'Inquisitore.

L'ebreo è il 'diverso' per eccellenza, è un essere abietto, è un essere intermedio tra il diabolico e l'animalesco, come spesso illustrato

38 Renda 1993: 179. Sulla limitata pratica dell'usura in Sicilia cfr. Renda 1993: 15.

anche nell'arte medievale cristiana. Le immagini giocano un ruolo fondamentale nel veicolare le idee, e come osserva Bernhard Blumenkranz, mai come nel Medioevo le parole si sono fatte immagini.³⁹ L'artista medievale spesso esprime iconograficamente in modo sorprendente gli argomenti della polemica antiebraica e in generale l'avversione nei confronti dell'ebreo.

Annota Bernhard Blumenkranz:

L'espressione artistica di tale ostilità è doppiamente grave: in primo luogo per i suoi effetti durevoli, dato che la parola del predicatore risuona solo un breve istante, mentre l'immagine resta; in secondo luogo, per l'intensità dell'effetto prodotto, in quanto ciò che nella parola si può esprimere con sfumature, soppesando i pro e i contro, giustificando e spiegando, nelle immagini si presenta condensato insieme, riassunto in un'affermazione perentoria.⁴⁰

Per i suoi tratti distintivi l'ebreo deve essere tenuto ben lontano, separato (nel ghetto) o meglio ancora cacciato via (l'espulsione), come recita l'editto: "togliendo l'occasione di errare è tolto l'errore". Gianna Gardenal, ripercorrendo lo sviluppo dell'antigiudaismo teologico e ideologico dei primi combattenti per la fede, osserva:

una svolta precisa la si ritrova durante l'undicesimo e nel dodicesimo secolo quando l'ebreo viene percepito come elemento attivo nella società, attraverso i commerci e l'usura; poi soltanto attraverso l'usura. Questi elementi di carattere essenzialmente economico sono comunque sempre camuffati da un riferimento a un principio teologico, a un'ideologia del trascendente che spesso maschera diffidenza, perplessi-

39 Blumenkranz 2003: 166. La rappresentazione dell'ebreo corrisponde a uno stereotipo che cambia nel tempo e nei luoghi. Non esiste solo la caricatura con le note deformazioni ed esagerazioni. Blumenkranz insiste sulla differenza tra la caratterizzazione dell'ebreo nelle opere anteriori alla prima Crociata e quelle del periodo successivo. Ricorda l'importanza dei segni distintivi nell'abbigliamento: il cappello a punta o la rotella di panno cucita nell'abito, i tratti somatici, quali il naso pronunciato o adunco, il naso ricurvo, caratteristico del 'profilo ebraico' che diviene sempre più frequente. I temi della polemica antiebraica e in generale l'ostilità nei riguardi dell'ebreo sono esplicitamente espressi iconograficamente. Solo per fare un esempio l'attributo negativo della cecità – gli ebrei sono ciechi perché non vedono, non riconoscono, il Messia – viene raffigurato nella 'benda che acceca' che ricorre quasi sempre nelle rappresentazioni della Sinagoga personificata.

40 Blumenkranz 2003: 167.

tà, paura di fronte a un'identità diversa mai lucidamente individuata.⁴¹

Aviandomi alla conclusione, mi preme evidenziare come nell'editto si trovino delle colpe da addossare all'ebreo per cui la cacciata diviene una 'sorta di difesa'. Allo stesso modo, in altri momenti storici ed in diversi contesti, discriminare gli ebrei è concepito, da un punto di vista giuridico, come 'legittima difesa'. In ogni caso, l'idea che sempre si sottintende è che l'ebreo è un nemico e conseguentemente difendersi da lui è un dovere. Per quanto riguarda l'espulsione, inoltre, si rimarca la giustizia dell'atto (della cacciata) che è mostrata come conseguenza necessaria della ingiustizia dei giudei, delle loro innumerevoli colpe.⁴²

Poiché l'espulsione era una infrazione delle leggi fondamentali di ogni buona società cristiana – come avrebbero potuto i sovrani cristiani cacciare gli ebrei dai loro stati se non erano colpevoli di crimini? – e violazione dei principi stessi del cristianesimo, primo tra tutti l'amore del prossimo, dovevano essere incluse nel decreto delle risposte alle possibili obiezioni. Nel corso della storia purtroppo tali meccanismi si reiterano e ideologia, religione e politica si aggrovigliano tra loro. Credo, inoltre, che sentirsi in possesso di una verità unica ed assoluta tolga la capacità di comprendere l'altro, di accettare una verità diversa da quella che si professa e di comprendere realmente un punto di vista diverso dal nostro.

Come scrive Gianna Gardenal: "Convinta, o quantomeno decisa, nell'affermare che la verità fosse una, cioè quella da lei posseduta, la chiesa non poteva non trovare nel giudaismo una sorta di anticristianesimo".⁴³

Estremismo e demagogia scaturiscono dalla paura e si nutrono di arbitrarie semplificazioni, inducono al pregiudizio e all'odio nei confronti del diverso, spronano alla perenne ricerca di nemici veri o immaginari. Anche così è stato, nel 1493, nei confronti degli ebrei siciliani.

41 Gardenal 2001: 330 s.

42 Voglio sottolineare che siamo di fronte allo stesso meccanismo visto sopra, secondo il quale la perpetua schiavitù era conseguenza necessaria delle loro colpe.

43 Gardenal 2001: 163.

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CHRISTENDOM'S ASHES. GROTIUS' *OCCUPATIO BELLICA* AND THE THIRTY YEARS' WAR

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Abstract: In this essay the author looks at the sources Hugo Grotius employed to forge his concept of military occupation in his 1642 edition of *De iure belli ac pacis*. This is a contribution on the theme of the reception of the Church Fathers, as it focuses on the use Grotius made of Cyril of Alexandria's *Contra Iulianum* within a broader discussion on *ius ad bellum* and *ius in bello*, with particular reference to the main trends of scholarly production on the Thirty Years' War.

Keywords: Reception of Cyril of Alexandria; Hugo Grotius; *ius ad bellum*; *ius in bello*; Thirty Years' War.

1. Introduction

Examining the issue of *occupatio bellica* amounts to opening a veritable historiographic 'Pandora's box'. Vast, complex research fields flow into one another – at times genuinely heterogeneous disciplines – and extend over dizzying diachronic expanses. Narrowing the focus to solely the period of the Thirty Years' War is not much help. A short overview of this historical event would necessarily neglect many of its essential features.¹ Thoroughly examining all aspects of it would require knowledge of at least 14 European languages. Furthermore, an exhaustive analysis of archival material would take more than a lifetime, in addition to the critical assessment of all published or soon-to-be-published sources, amounting to millions of pages. This reality is reflected in its boundless amount of critical literature: on the

* I am deeply in debt with Silke-Petra Bergjan and Alberto Clerici for their generous advice on previous versions of this essay. I also wish to thank Dr. Astrid C. Balsem for her precious assistance with the manuscript of Grotius' scrapbook and for letting me work with the wonderful exemplars of *De iure belli ac pacis* held at the Amsterdam University Library.

1 This was possibly an additional reason that David Parrott and Peter Wilson decided not to provide English-speaking scholarship with a review (as Kaiser 2018 and Gantet 2014 did, and even Gantet 2019 did for the most part), but rather a discussion forum with Sigrun Haude, Christoph Kampmann, Gunner Lind, Mario Rizzo, and Anuschka Tischer on the avoidability / inevitability of the War, the international ramifications (including all extenuating circumstances) of the events, experiences of the War, and open research questions. See Parrott, Wilson 2018.

Peace of Westphalia alone, the bibliography counted more than 4,000 titles in 1994, as attested to in the 475-pages tome edited by Heinz Duchhardt.² And if we were to focus solely on a single author, such as Hugo Grotius, we would need to employ theological, philosophical and juridical know-how capable of spanning from antiquity to the post-Grotian tradition and be able to grasp its respective historiographic output. Indeed, in recent decades, the journal *Grotiana* has provided a clear idea of the extent of this output.

Nonetheless, one can note precisely this tendency to tackle the vast complexity of the above-mentioned historical period, especially through the works of Grotius. It is with this in mind, together with the hope to find a benevolent audience, that the present work might be welcomed. Let us consider studies carried out in the last forty years on Grotius in the field of international law and international relations. In particular, in Italian juridical scholarship,³ we recognize how the attention of scholars has, at times, been guided – and not always with equivalent rigor or value – by issues emancipated from the historical framework of the early 17th century.⁴ More generally, we find Grotius employed in discussions over matters of the Cold War in the 1980s⁵ and the Persian Gulf crisis,⁶ and scholars turn to him when examining the war in the Middle East and the fight against terrorism.⁷ In short, if we view Grotius and his thoughts as a litmus test for a historical period, then perhaps there is space for further considerations in the present work. He may be used to measure the significance of celebrations – of a scientific nature – of the fourth centenary of the defenestration of Prague. This event, which is both historical and historiographic, legitimizes my extemporaneous treatment in a backdrop that is possible to trace. If this is true, then these ideas may

- 2 See Duchhardt 1996. There are also 75 pages of annotated bibliography solely on Saxony-Anhalt (present-day): Meumann 2007.
- 3 With the only main exception being Carlo Focarelli, as far as I know (for his realistic-constructivistic perspective, see Focarelli 2021).
- 4 Several important exceptions to this trend must at least be mentioned. Of course, scholars such as Feenstra 1984 and Feenstra 1996, Lesaffer 2004, Tuck 1999, Straumann 2007: 89-127 and afterwards, within a broader discussion, Straumann 2015, Vadi 2020. The latter two endeavored to locate Grotius within the historical framework of his time.
- 5 See Willems 1981 and Stuyt 1985.
- 6 See Gill 1989.
- 7 See Scharf 2013. In addition, on this particular issue, see: Bring, Broström 2005: 118-140; O'Driscoll 2006, O'Driscoll 2007, O'Driscoll 2019; Lang 2008; Weeks 2010; Butler 2012: 27-30; Westra 2012: 24-34; see also the volume edited by Hashmi 2012: 207-218 (essay by John Kelsay); Glanville 2013; Sterio 2014.

also be employed to find significance in a broader, more systematic research to be elaborated elsewhere.⁸

In this essay, I will return to the issue of *occupatio bellica*, despite it having been thoroughly examined by authoritative scholars from a variety of perspectives in recent decades.⁹ It is common knowledge that *De iure belli ac pacis* was instrumental in Gustavus Adolphus' choice not only to land in Pomerania but to drive on deep into imperial territory until the gates of Munich. Indeed, we know that Gustavus Adolphus of Sweden had read *De iure belli ac pacis* with deep admiration, as attested to by the letters to Grotius of Jérôme Bignon of March 5th 1632 and of Nicolaes van Reigersberch of March 19th 1635 as well as to the letter Grotius himself addresses to his brother-in-law on December 19th 1637.¹⁰ Beyond the Swedish landing in Pomerania – a situation entirely comprehensible and explicable with the category of *ius ad bellum* – once Sweden had decided to remain, and above all occupy imperial territory over an extended period of time and space, a juridical framework which theoretically should have recalled the dynamics of *ius in bello* suddenly turned into that of *ius ad bellum*. In this light, re-examining Grotius as theologians and jurists, investigating his sources and their circulation in the intellectual circles of his time might also explain particular dynamics of the political-wartime events of the age.¹¹

8 See Dainese 2022 (in print).

9 The reference text for this work are Lesaffer 2005, which is relevant especially for the evaluation of the Roman legacy in 16th-17th century writers, and Meumann, Rogge 2006 (in particular, essays by Steiger, and Meumann, although useful considerations are also found in other studies – although with different perspectives – such as Carl 2016 and Kaiser 2009). However, as I shall express forthwith, in examining Grotius in the service of Sweden, it is necessary to consider studies beyond those on Pomerania (see Burkhardt 2010 and, for an overview, Wilson 2010: 168-196, 425-434, 685-691 and Piirimäe 2014), including research in the field of 'regional history' (for a definition of this historiographic category, see Kaiser 2018: 757-771), Berg 2011 and Leo 2017 (essentially source editions).

10 See Nellen 2014: 472-473 and Müller 2009: 518. See also Meumann 2006: 267.

11 In addition, we may add the wish to retrace certain concepts that modern political scientists have inherited from Grotius: they could be reassessed and circumstantiated in the age in which such notions were elaborated. For this, it is useful to recall that the arguments used to by several twentieth-century political thinkers to legitimize the possibility of an 'absolute' war against an 'absolute' enemy are rooted in Grotius. In particular, Carl Schmitt's *Der Nomos der Erde* and *Der Begriff des Politischen* (cf. Schmitt 1950 and Schmitt 2018) and his idea of 'state of exception' (see Mancuso 2007, who also interprets Grotius in the backdrop of contemporary historical events, see also Silvestrini 2010: 45-47). There is a link between (at least) sovereignty and *ius ad bellum*, which in scholarship has to do with Weber's idea of the state as the monopoly of *Gewalt* – an idea springing, according to Schmitt, from Grotius' concept of *bellum solemne* outlined in his *De iure belli ac pacis* (see Mancuso 2007: 43; on Weber's paradigm and its limits see von Friedeburg 2016: 3).

2. Between the 5th Century Alexandria and the 16th Century Hungary. 'Strange case' of Cyril

The issue of *occupatio bellica*¹² reintroduces an aspect of Grotius that has been underestimated. This is not due to lack of study (which is, on the contrary, considerable) but for reasons linked to a *Quellenforschung* concerning the circulation and diffusion of sources for which the current state of the art requires updating.¹³ Regarding Grotius' use of this concept, two features stand out. The first concerns the relationship between Grotius' notion of military occupation as it is dealt with in *De iure belli ac pacis* and the concept of booty, or spoils, which he had examined in an earlier work of a very different nature, *De iure praedae commentarius*. While it was generally held that during military occupation people and property were at the occupier's disposal exclusively for a fixed time (which expired upon surrender),¹⁴ Grotius, consistent with the tradition of Roman Law, saw *occupatio bellica* as the appropriation of *res nullius*¹⁵ and entirely analogous to *praeda*. This similarity between two distinct and distant moments in Grotius' work should not come as a great surprise; some years ago, Stefanie Ertz pointed out that "interferences between theological arguments, biblical hermeneutics and the semantics of subjective natural rights are ... to be considered as an important counterpart to the reorganization of the principles of natural law ... that took place in between the redaction of *De iure*

12 Cfr Steiger 2006 especially.

13 On this issue, of course, Haggemacher 1983 is essential (and still up-to-date). To this regard, it is useful to recall that, according to him, scholars have mostly studied and interpreted Grotius' doctrine. Nevertheless, when we speak of *ius in bello* – as is the case when we take into account *occupatio bellica* – "plutôt que de ... prendre pour de la pratique médiévale quelques formules augustinienes et scolastiques agrémentées de souvenirs pauliniens et vétértestamentaires, il conviendrait ... d'étudier ... le conduits effectives des belligérants et les attitudes qui y ont prédisé". Immediately afterwards, he closes by stating: "ce don't nous puvons nous dispenser ici, puisque notre étude se limite à la doctrine" (Haggemacher 1983: 599 f.).

14 Even in classical doctrine (see the just mentioned D. 41.1.3), occupation's *dominium* is never without condition: "donec nostra custodia coercetur. Cum vero evaserit custodiam nostram et in naturalem libertatem se receperit, nostrum esse desinit et rursus occupantis fit."

15 *De iure belli ac pacis* 3.6.9: "dicimus gentibus placuisse ut res hostium hostibus essent non alio loco quam quo sunt res nullius ... At res quae nullius sunt fiunt quidem capientium, sed tam eorum qui per alios quam qui per se capiunt." On this issue see Lesaffer 2005. Grotius' position in this respect belongs to a tradition of a reception of jurists' doctrine of the classical period (Gaius in particular, see Gai 2.66-69; in terms of Grotius' actual source D. 41.1.3-6 as well as 41.2.1.1 – with special reference to D. 41.1.5.7 and 41.1.7 pr.) by the 16th century Thomistic writers – such as Francisco Vitoria and his pupil Domingo de Soto – who had to deal with the appropriation of land belonging to the Indians and non-Europeans in general (and notably with a more radical view than Vitoria's).

praedae commentarius and *De iure belli ac pacis*.¹⁶ Consequently, it should not be over-emphasized. That being said, it is worth taking into account for the development of this reasoning.

The second relevant feature concerning Grotius' notion of *occupatio bellica* regards the hints of absoluteness that he uses to describe the *imperium* over persons and property within occupied territories in case of a *bellum solemne*. Signs of this can be found from the very incipit of *De iure belli ac pacis* 3.6.2:

Caeterum iure gentium non tantum is qui ex iusta causa bellum gerit, sed et qui vis in bello solenni et sine fine modoque dominus¹⁷ fit eorum quae hosti eripit, eo sensu nimirum ut a gentibus omnibus et ipse et qui ab eo titulum habent in possessione rerum talium tuendi sint.

However, Grotius goes further in detail. If certain conditions exist, the exceptions to the law of nations imposed by what Grotius sees as internal justice (*iustitia interna*) of natural law are suspended.¹⁸ In particular, these exceptions were intended to safeguard the innocent (*De iure belli ac pacis* 3.11.8), children, women, the elderly (*De iure belli ac pacis* 3.11.9), persons of letters and the religious (*De iure belli ac pacis* 3.11.10), farmers (*De iure belli ac pacis* 3.11.11), merchants and artisans (*De iure belli ac pacis* 3.11.12), prisoners of war (*De iure belli ac pacis* 3.11.13 and 3.14), and those who surrender conditionally (*De iure belli ac pacis* 3.11.13) or unconditionally (*De iure belli ac pacis* 3.11.15) – but all in all, we find that Grotius reflects upon this on several occasions between *De iure belli ac pacis* 3.11 and 3.15.¹⁹ According to what Grotius would call 'internal justice', all of these categories of persons must not be considered enemies. That being

16 See Ertz 2016: 64. I have referred to Ertz's study to recall more recent historiography, but it is a well-established issue (see Haggemacher 1983: 9-11).

17 The concept of *dominium*, as understood by Grotius, dates back to Gaius (see Straumann 2015: 154), who Grotius must have known through the *Corpus iuris civilis* (esp. D. 41.1). As such, and this is quite clear from the passage quoted above, *dominium* "denotes full legal power over a corporeal thing, the right of the owner to use it, to take proceeds therefrom, and to dispose of it freely." (Berger 1991: 441). According to Grotius, *dominium* over enemies and of their possession, which to him is *res nullius*, is acquired through *occupatio*. Grotius tends to call *imperium* the *dominium* when it is the case of public jurisdiction (see Lesaffer 2005), but this is not the main point. Instead, it concerns the contractual feature of *occupatio* (which distinguishes *De iure belli ac pacis* and *De iure praedae commentarius*, see Straumann 2015: 186) and its validity within European (and intra-Christian) borders (see Straumann 2015: 132 and 234).

18 Tooke 1965: 217-219.

19 As for diplomatic inviolability, which is a rather technical issue, see Focarelli 2014: 223 f.

said, and this is precisely the point I would like to spell out, Grotius seems to somehow – if not contradict himself,²⁰ at least – eschew this rule elsewhere. Indeed, under another perspective, it is legitimate to kill “all persons who are in the enemy’s territory [*omnes etiamqui intra fines sunt hostiles*]”, because “injury may be feared from such persons also [*ab illis quoque damnum metui potest*].”²¹ Since they are a potential danger, any action taken against the conquered is legitimate.²²

This sense of absoluteness on the specific and technical issue of military occupation, implicit in Grotius – which he likely would have considered a legacy of the *ius gentium* that he indirectly witnessed – is relatively rare or at least subdued in the juridical tradition on intra-Christian conflicts to which Grotius himself returns.²³ However, an important exception can be made for the treatises that consider war in response to agitation and revolt. In these cases, rebels are stripped of all rights, even that of being considered enemies in its legal definition.²⁴ But the issue of *occupatio* is less connected to principle and much more technical, especially in terms of the right of property in wartime circumstances. To find an (almost) contemporary impression of absolute *imperium* over those conquered (that is, without distinguishing between stable but temporary possession

20 *De iure belli ac pacis* 2.20.12, and Tooke 1965: 212.

21 See *De iure belli ac pacis* 3.4.6.

22 See Steiger 2006: 228 f., and Tooke 1965: 217 f. In this regard, note in past centuries that Grotius was often read against the backdrop of ‘Grotianism’ and thus primarily a precursor of natural law, modern political thought, and international law. If we consider the *Prolegomena of De iure belli ac pacis*, this is certainly true. That being said, it is also for this reason, for the so-called *infinita licentia in hostem*, that the most criticized author would be Samuel von Pufendorf (rather than the ‘reasonable’ Grotius). More recently, however, we tend to consider Grotius as a fundamental turning point who, as such, is primarily linked to the legacy of his own past. On this see also Roelofsen 1990.

23 Steiger 2006: 228-237, and Tooke 1965: 181-194, and 211-213 (and Westberg 2018: 274-277). It is true that, according to Tommaso De Vio “in a proper war, authorized by the prince, one can enjoy the full rights of war and seize the goods and persons of the enemy” (Tooke 1965: 300), but authors such as Vitoria – who on one side “gave up the traditional ban on intentional killing of the innocent”, on the other – held that “guiltless persons may not be killed to avoid future danger, it being intolerable that anyone should be killed for a fault that has yet to take place” (Tooke 1965: 185). The same notion is essentially found in Belli and Gentili (Tooke 1965: 193).

24 See Quaglioni 2013: 142. In fact, in such writings any theory of just war tends to be negated, which is definitely not the case in Grotius. Less specifically, a similar ‘Machiavellian’ view is all but *hapax* in Grotius (as Tuck 1999: 95 recalls, after all, “*De iure Belli ac Pacis* reminded his audience that he was still an enthusiast for war around the globe. He was indeed a most improbable figure to be the tutelary deity of the Peace Palace at The Hague”). He might also be considered in his dealing with the law of battles (which is very close to the view of Ayala among many others). In his conception of war as a hazard, the un-Machiavellian Grotius paradoxically cites Machiavelli’s statement that “one must deploy all of one’s forces”, as “if Christians were obliged to use their own military efforts, then they were obliged to use all of their military efforts” even to the extent of legitimizing the killing of “as many as possible” (see Whitman 2012: 90).

and total, absolute possession of goods and people), we must look to a *corpus* of writing that has been underestimated and in need of further study:²⁵ military treatise writing, specifically those written on commanders. This literary genre – whose roots are found in the backdrop of the wars against the Turks in the 16th and 17th century – provides hints on certain features of the hermeneutic horizon that can be used to reinterpret Grotius within his historical framework. If this analogy is valid, it will be possible to see in what form and to what degree the juridical elaboration of that age is rooted in the logic of the so-called Christendom regime.²⁶

Allow me to illustrate a specific case that gives an idea not of the 'source' of Grotius but rather of the general set of issues with which Grotius had to deal. More specifically, and within a truly vast amount of literature produced at the time, I refer specifically to Giorgio Basta, who operated on the Hungarian front throughout the Long War against the Turks (1593-1606). Taking into account Basta, it is clear that I will not appeal to war treatises on intra-Christian conflicts. Instead, I would turn to prior historical contexts which, additionally, must be located across the imaginary borders of Christendom. However, Basta (with his writings) is a significant figure for the understanding of Hugo Grotius' time. Indeed, we must consider that the protagonists of the Thirty Years' War – such as Schlick, Marra-das, Rambaldo Collalto and Ernesto Montecuccoli, and many others – fought under Basta, who was the author of several successful treatises on military arts. In one, *Il maestro di campo generale* (1601), the military captain is depicted according to the rules of the coeval war catechisms as a pious soldier incarnating the myth of Constantine the Great – a crucial figure for Grotius' treatment of the right of booty, as we shall see. It is in writings such as these, far more than in contemporary juridical or canon law treatises, that the distinction

25 Meaning war literature, as will be shown. For a construction of the bibliographic repertoire of sources, see especially Ilari 2011 and Fantoni, Sabbadini 2001 for the Italian context, see also: D'Ayala 1854, Pohler 1887-1899, Jähns 1889, Cockle 1957, which, despite its title, does not only consider English military bibliography, and Cockle 1924, Hale 1977, Espino López 2001: 545-591. Lists of these kinds of works can also be found at <https://earlymodernenglishmilitarybooks.com>. Analysis of the most recent critical literature, which is beyond the current scope, provides an interesting fact: the lengthy anglophone tradition intersects in several areas with that of the German-speaking one specific to the period of the Thirty Years' War. This is also due to the fact that the attention of scholars of military treatises in the Early Modern Age have passed through the historiographic seasons linked to the fate of the paradigm of the Military Revolution, with the exception of certain authors who already possessed a wealth of personal scholarship (see Roberts 1956 and Clark 1958: 73-75 and Rogers 1995 for a discussion).

26 For a quick overview on this concept, see Alberigo 2005.

between booty-*praeda* and temporary occupation is less important, since, as Basta says,

Reca una battaglia con essa la conseguenza tale che chi vi rimane vincitore diviene anche padrone di gran tratto di paese:²⁷ bisogna perciò che vi consideri molto bene innanzi che porvi la mano. Sopra di questo soggetto sono stati da diversi buoni scrittori et soldati date molte istruzioni et io parimente ne ho detto alle occasioni il parer mio nella Fiandra et nella Francia, ne' quai luoghi ... gran varietà di cose si sono presentate ... Ma è mio pensiero adesso, che io mi trovo alle frontiere dell'Ungheria, di mostrare come possa un esperto prudente et valoroso maestro di campo generale combattere co' Turchi.²⁸

Basta saw the understanding of “past errors” and “how one should behave in full military campaign against such a strong enemy”, and the “fear of God” – which emerges from the very first pages of the treatise that spells out the *conditio sine qua non* of any military action – as the premise for victory. This victory is described as absolute and not limited by time or other conditions. Basta explicitly states that the ‘victor’ also literally becomes the ‘owner’ of the conquered land.²⁹

An in-depth examination of the diffusion of Basta's treatise and his person goes beyond the scope of this essay. First and foremost, there is a strong need to update the state of the art of this literature. We are dealing with sources long seen as the main reference for a previous scholarship that emphasized the role of the military elite in the construction of the modern State.³⁰ Furthermore, given that my analysis focuses solely on the historical relevance of a literary text, it would be *ignoratio elenchi* to claim with certainty that Grotius had indeed read this text. For my purposes, it is useful as a document,

27 We may observe how close this sounds to Gentili's ‘victoris acquisitio universalis’ (*De iure belli* 3.5), which is definitely softened by Grotius' *iustitia interna*.

28 G. Basta, *Il maestro di campo generale, Delle battaglie*. 1. Here the English translation: “A battle brings as consequence that whomever emerges as victor also becomes owner / master of the land on which it is fought. It is therefore necessary to reflect well before undertaking war operations. Many writers and soldiers have written a great deal about this, and I have also dealt with it, giving my personal opinion concerning the operations in Flanders and in France, places for which the casuistry is highly varied. But now that I find myself on the Hungarian front, I wish to show how a skilled, careful, and valiant condottiere may fight against the Turks.”

29 See also Poncet's Mazarin (Poncet 2018: 13-136).

30 Cfr. Dainese 2022.

a set of intangible data that represents the spirit of an age which serves primarily to introduce the actual analysis of *Quellenforschung* that I shall carry out.

That being said, returning to *De iure belli ac pacis* 3.11-15 (the passage where Grotius examines several exceptions to the law of nations) we note that it opens and closes with two occurrences of the term 'glory' which deserves greater reflection. This section opens with a quotation from Cicero's *De officiis*: ("Cicero de Officiis primo³¹ conservandos eos dicit qui non crudeles in bello, non immanes fuerunt: ... bella quibus imperii gloria proposita est, minus acerbe gerenda esse")³² and closes with a quote from Augustine ("Reges non imperium sibi sed populis suis gloriam quaerebant, contentique victoria imperio abstinebant, quo nos retrahit quantum potest Augustinus cum ait 'Videant tamen ne forte non pertineat ad viros bonos gaudere de imperii latitudine' qui et hoc addit: 'Felicitas maior est vicinum habere concordem, quam vicinum malum subiugare bellantem'").³³

The first noteworthy element is that the frame of meaning here is a discussion on both *ius in bello* and *ius ad bellum*. If, as I mentioned, Grotius tends to depart from what he considers a cardinal principle of natural law regarding the discipline of military occupation examined in *De iure belli ac pacis* 3.11-15, then these two occurrences of 'glory' that open and close this section of the third book of *De iure belli ac pacis* show us that he differs to a certain extent from his contemporaries and forerunners. An initial benchmark that something is unusual can be glimpsed in its opening quote from Cicero. Without overemphasizing this fact – to avoid, in turn, oversimplification – it is useful to remember that, while here Grotius clearly turns to Cicero as a source for the notion of just behavior in war, within the just war tradition of thought Cicero is widely employed as a theorist of *ius ad bellum*. Many writers used to look at Cicero – notably at the passage from *De officiis* 1.11 – in the framework of the reception of Roman *ius fetiale*.³⁴ Before Grotius – as well as Grotius himself elsewhere³⁵ – both Pierino Belli and Alberico Gentili merged this exact passage with the classic analogy between duel and war.³⁶ And if the

31 Cic. *off.* 1.11.35.

32 *De iure belli ac pacis* 3.11.6.2.

33 *De iure belli ac pacis* 3.15.2.2. See Aug. *civ.* 4.15.

34 On this, see also Straumann 2015: 143-146 and 188 f.

35 See also *De iure belli ac pacis* 1.2.1-2.

36 See Ilari 1981: 117-119. This passage had and has been used before and after Grotius within a deep-rooted tradition spanning from John of Legnano to Vico and hereinafter up to XIX century philosophers.

use of the sources has already shown how³⁷ and when³⁸ Vico would diverge from Belli, Gentili and Grotius, an examination of the sources Grotius quotes will help better understand a few specific features of his proposal.³⁹

Sure enough, the closing quotation is of even greater interest. Grotius continues to employ Augustine⁴⁰ – as tradition often did, from *Decretum Gratiani*⁴¹ followed by Aquinas⁴² until the theorists of the 16th century who used them as their foundation – as an *au-toritas* on the *ius in bello*.⁴³ That being said, we have the impression that Grotius intended to make a distinction between two types of war: one carried out for the glory of the people and another for the *imperium*. The latter is understood as an act of *subiugatio* of the enemy, which is precisely what Grotius himself advocates when he legitimates the derogation of *iustitia interna*. Suppose we interpret Grotius' cynical attitude in theorizing the execution of *inermes* not as a behavior to enact during war but as a type of war itself. In that case, his position loses that apparently contradictory aspect that appears at an initial, superficial reading. It is necessary to see its reasoning as a discourse on *ius in bello* when dealing with *iustitia interna*. At the same time, Grotius must be viewed as switching to an argument for *iusta causa* of moving war (therefore on *ius ad bellum*) when he derogates to *iustitia interna*. If this is indeed the case, we must hold that Grotius distances himself from the Augustinian tradition somewhere; that is, from the Augustine of the “quo nos quantum potest retrahit.”

Grotius does not significantly depart from Augustine in his *De iure belli ac pacis*, at least in its first edition. In reality, there is no trace of it in any of the editions from 1631, 1632, or 1642.⁴⁴ However, the 1642 edition contains traces of a reworking of the contents of chapter XV in the form of final annotations (*annotata ad caput XV*), which date back from 1635 to 1642. In terms of Augustine's ex-

37 In the sense of the “radicale estremizzazione del rapporto fra sovranità e diritto di guerra” of which Ilari speaks when discussing Vico's *De uno universi iuris principio et fine uno* 63 (see Ilari 1981: 117).

38 “Belli, Gentili e Grozio accostavano questa comune struttura della guerra e dei duelli al famoso passo del *de officiis* (1, 11, 34)” (Ilari 1981: 119).

39 A proposal that – and I say it as I referred to Ilari 1981 – heads in the direction laid out by Quagliani 2010.

40 See also Schwager 2012: 610.

41 See D. C. 23.

42 See *Summa, Secunda Secundae*, q. 40 and 64-66.

43 See Lavenia 2017: 42. Additionally, Aquinas discusses the safeguarding of the *inermes*, which is precisely the case of Grotius, see *De iure belli ac pacis* 3.11-15, especially 3.11.

44 For the first edition of *De iure belli ac pacis* see Nellen 2012: 9. See also Osler 2016.

pression “gaudere de imperii latitudine”, on page 539 Grotius states: “Vide Cyrillum libro V contra Iulianum reges Hebraeos hoc nomine laudantem, quod suis contenti essent finibus.” Manuscript III C4 held in Amsterdam’s university library has the personal notes of the patristic readings made by Grotius during the 1630s. It shows that Grotius read (or reread) Cyril in 1635, just before his *relectio* of Augustine. Cyril was broadly employed during the Early Modern Age and specifically during Grotius’ time. In fact, in Paris in the 1630s, Jean-Baptiste Aubert was preparing the *editio princeps* of the Greek text of Cyril’s work, whose sixth volume would be *Contra Iulianum*.⁴⁵ In this regard, it is worth noting that in a letter Grotius wrote to Fabri de Peiresc⁴⁶ dated 25th November of the same year – and in response to de Peiresc’s praise of 10th April for his services rendered in favor of the military alliance between France and Sweden – Grotius includes Cyril’s *Contra Iulianum* amongst the apologetic works *christianae fidei defensores*, alongside Origen’s *Contra Celsum*.⁴⁷

Grotius’ scrapbook is fascinating as a tangible witness to his working method. Within it he highlighted the passages and issues he considered noteworthy. Specifically, in terms of the *Contra Iulianum*, we know that he dedicated significant attention to it. He read it – in 1635, i.e., three years before Aubert’s *editio princeps* – both in Latin and in Greek,⁴⁸ likely first in Oecolampadius’ Latin translation from 1528 and later from a Greek text which is likely a manuscript working copy that Aubert had prepared in view of his edition.⁴⁹

45 The starting point is the two volumes of Backus 1997 (see especially the essays by Manfred Schulze, Irena Backus, Johannes van Oort, Jean-Louis Quantin) and Bergjan 2015. For more extensive study: on the Western world’s return to Cyril in the 15th century, see also Meunier 1989; on Calvin see Lane 2016; on the 17th century see Dingel 2010: 29 f., Bergjan 2010: 84–86, Stanciu 2010: 180. As Grotius’ epistolary demonstrates (see also *infra*) at the time in Paris there was significant attention on the work of Aubert.

46 On Peiresc see Fumaroli 2009 and Fumaroli 1993. On Grotius and Peiresc see Schwager 2012: 388–518 (see also Nellen 2005).

47 “Mitto ... nonnulla e Porphyrii libris allata a christianae fidei defensoribus ... Veneno, quod inesse iis libris potest, satis scriptis, illis praecipue quae contra Celsum Origenes, contra Iulianum Cyrillum commentati sunt.” (Meulenbroek 1967: 361). On the framework of Grotius’ role in the agreement between France and Sweden see Nellen 2014: 491 f.

48 Likely first in Latin, given that Grotius’ draft begins in Latin (f. 242r) only to be interrupted at ff. 243rv, where (see f. 243v) – always in 1635 – he goes back to summarizing from the first to the ninth book the contents of *Contra Iulianum* in Greek (ex *Cyrillo Graece*, Grotius notes), to then resume work until the tenth book (f. 243r) in Latin again, noting in the end that the very same year in Paris (*relegi Lutetiae Graece Nov. 1635*) he added several annotations in Greek – which in fact appear from time to time as side notes to the Latin text. On Grotius’ reading of *Contra Iulianum*, see Bergjan 2015.

49 Grotius’ epistolary (see Letter to Pierre Dupuy of 2.9.1632 in Meulenbroek, Molhuysen 1966: 65, letter of 16.5.1637 to Claude Saumaise in Meulenbroek 1971: 293, letter of 17.7.1637 to Gerard Vossius in Meulenbroek 1971: 429) shows he anxiously followed Aubert’s work-in-progress from 1632 onward at a distance (the first traces are found in the letter from Jean de Cordes to Grotius of 5.3 in Meulenbroek, Molhuysen 1966: 29). It is not beyond reasonable

The fifth book that Grotius references in his annotations of *De iure belli ac pacis* is drafted almost entirely in the Latin version (f. 242r).

Grotius does not dwell significantly on many passages from the fifth book of *Contra Iulianum*, so it is opportune to give due weight to the reference found in the 1642 edition of *De iure belli ac pacis*. The text that Grotius references is also annotated in his diary. There is an excerpt from *Adv. Iul.* 5.33⁵⁰ and this references a passage where Cyril reports the words of Julian (*C. Gal. fr.* 37).⁵¹ Immediately thereafter, in *Contra Iulianum* we find a digression – in this case Cyril's, not Julian's – on David and Samson: they are the very kings spoken of in the annotation of *De iure belli ac pacis* under examination. Cyril's confutation of Julian's statement also contains his defense of the just nature of the war fought by the Hebrew kings and, above all, the reasons that justify the valor of Hebrew combatants. Contrary to what Julian had put forth in his accusation of weakness on the part of

doubt that Grotius began to read the text in the edition of Oecolampadius. After all, his notes were often written quickly, in note form with short phrases and abbreviations. Regardless, there is some evidence worth examining, as we shall see. In any case, in light of the way the texts appear in Latin and Greek in the manuscript (see previous note), we can suppose that Grotius had begun to read Cyril in the Latin version available at the time, and then, due to the importance of the work and possibly caused by dissatisfaction with Oecolampadius' translation (a dissatisfaction which is probably both stylistic and theological, see Kinzig 2000: 175-184, Villani 2013: 126 f. Lane 2016: 185), eventually felt the need to turn to the original Greek, and – as Bergjan proposed in Bergjan 2015: 29 – used the text of BnF suppl.gr.424 (cfr. Kinzig, Brüggemann 2006: 270), which likely was the same copy made available by Aubert for his edition. Grotius' epistolary is of little aid in confirming this, but I too believe it to be the most plausible hypothesis.

50 Cyril. *Adv. Iul.* 5.33 (Riedweg, Boulnois 2016: 544).

51 This is the passage found on f. 242r: "Iul: Aegyptii: sapientia ab Hermete qui tertio in Aegyptum venit. Chaldei et Assyrii ab Ano et Belo. Graeci a Chirone." Allow me to make a philological annotation on this fragment. Oecolampadius' text (p. 45) states: "Nam et Aegyptii dicere possunt apud se numerari sapientium non paucorum nomina, multosque se habuisse ab Hermete successione. De Hermete inquam, qui tertio venit in Aegyptum. Chaldaei autem et Assyrii eos qui ab Ano et Belo: Graeci vero innumeros qui a Chirone, ex hoc enim omnes nati sunt natura sacerdotes et theologici, id quod Hebraei sua magnificentes sibi soli tribuunt." On the proximity between the lexicon of Oecolampadius and Grotius there is ample room for speculation, including other pericopes that go beyond the scope of this current work. Specifically, in terms of the aside Ἑρμοῦ δὲ φημι τοῦ τρίτου ἐπιφοιτήσαντος τῆ Αἰγύπτῳ we catch sight of a similarity between Grotius' "qui tertio in Aegyptum venit" and Oecolampadius' "qui tertio venit in Aegyptum" (in the place of, for example, the choice of "qui tertium in Aegyptum venit" from Aubert's Latin translation (p. 176), which one might hold as an undocumented relationship between Grotius and Aubert that would suggest there was an exchange of materials between the two). However, in arguing in favor of Grotius' dependency on Oecolampadius, we also see a similarity between Grotius' annotation "Chaldei et Assyrii ab Ano et Belo" and the corresponding text from Oecolampadius ("Chaldei ... et Assyrii ... ab Ano et Belo"), as both of them include the ablative "Ano" (in place of the "Anno" found, for example, in Aubert's text translating the ἄνωου we too read in the manuscript suppl.gr.424, p. 286). To this end, I would note that only certain manuscripts of *Contra Iulianum* have the variant ἄνωου followed by ἀπό, corresponding to Aubert's "Anno", which justifies the likely drop of an ω before the α of ἄνωου (for a conjectured ἀπό ἰάωνου). Ultimately, suggesting that Oecolampadius and Grotius employed the same manuscript would be pure speculation on the basis of current research.

the Hebrew sovereigns in settling for Judea alone, Cyril argues that David and Samson were second to none in military valor; their wars were just because they were defensive⁵² ones and not of pillage and devastation.⁵³ In developing this line of argument, Grotius follows in the footsteps of those before him (Osorio, Sepulveda, and Possevino, among others) who had defended Christianity from Machiavelli's accusations of having distanced Christians from war and worldly glory. Grotius shares the same purpose of those predecessors in turning to the models from biblical tradition we now examine.

Grotius fits within this line of thought, but in his own way. Mainstream literature previously responded to Machiavelli with Augustine. On the contrary, as shown, by deliberately working from Cyril and his defense of David and Samson's military valor, Grotius is demonstrating that he believes Augustine is not entirely suited for this context. In other words, Grotius appears to accuse Augustine of dissuading Christians from the enjoyment of military glory. In matching – or better, in preferring – Cyril to Augustine, Grotius ends up painting Augustine as a new '*katéchon*': he is the *auctoritas* that had theorized the need to stop or restrain oneself. Note that this was taking place in 1635 at the precise moment that France was removing any reservations about entering into war.

In this way, then, we can unravel the apparently contradictory nature of Grotius' defense of the absoluteness of *imperium* over the conquered in terms of temporary *occupatio bellica*. In addition, we recognize his personal way of entering certain mainstream discussions of his time. His reference to David and Samson is not casual in the least. Especially during the Thirty Years' War, the image of the zealous soldier – forged apologetically to redeem Christianity from Machiavellian accusations of not having provided those practicing the profession of arms with the required religious and worldly support – was grounded in both Catholic and Protestant tradition on the use of first-testament heroes, of which David and Samson held primal positions.⁵⁴ Indeed, to the extent of our knowledge, the figure of Samson was widely used on both fronts.⁵⁵ David, Samson, but also

52 A term which read rather technically at Grotius' time. It has to do with what in contemporary scholarship is the right of self-defense (see von Friedeburg 1999, which has been translated into English (not by chance) as *Self-defence and Religious Strife in Early Modern Europe*).

53 Cyril. *Adv. Iul.* 5.35 (Riedweg, Boulnois 2016: 548).

54 See Lavenia 2017: 20: "Specie durante la Guerra dei Trent'anni" it involved "di delineare un'icona di soldato zelante che riscattasse il cristianesimo dall'accusa machiavelliana di non fornire a chi esercitava il mestiere delle armi un abito insieme religioso e mondano di virtù, come accadeva agli antichi romani con i loro culti, i loro miti, i loro oracoli."

55 See Lavenia 2019: 175 f.

Abraham, Moses, Joshua, Gideon, Samuel, Judith, more specifically, are found placed alongside the figures of Constantine, Theodosius, and Charles the Great (all emperors whose victories are linked to the symbol of the cross) in the warfare catechetics beginning from Possevino.⁵⁶ This helps the reader understand Grotius' move from Augustine toward Cyril: Grotius sees Cyril as providing the better heroic example from the biblical tradition because it conforms better to the sensitivities of his age. Indeed, the argumentative context in which Cyril's exposition on Samson and David is particularly suited to the purposes of a generation of Christian writers who reflect the signs of their times, marked on one side by war and on the other by the specific features of the literature circulating during wartime – the most dreadful war experienced by man until World War I.

Based on recent scholarship on the patristic reception of Grotius, this should come as no surprise. In fact, it is not the first time that Grotius draws from the paradigms of this literature. In his 1605 commentary *De iure praedae* – an entirely different work but worth recalling – Grotius struggled to interpret Gen 14 (i.e., Abraham gathering his 318 servants to free his brother and nephew from captivity), which, together with Lev 3:14 and Deut 20 would become one of the most used episodes in the discussion on *ius ad bellum*. Grotius felt a lack of historical-exegetic tools to support the use of this biblical text to justify recourse to warfare⁵⁷ as he found the patristic repertoire at his disposal (above all Ambrosius, Bede, and Rabanus Maurus) of no help to his commentary. It is in this very framework that Grotius turned to the figure of Constantine (and in particular to Eusebius' Constantine, the vision of the cross and not the Roman Constantine of the *Sylversterlegende* and its various articulations); that is, to a particularly relevant figure in warfare literature of that time.⁵⁸ Based on a close analysis of the manuscript version of this early work by Grotius, which is stored in Leiden University Library (BPL 917), Silke-Petra Bergjan clearly shows that Grotius introduced Theodosius and Ambrosius at a later stage. At first, Constantine provided the hermeneutic framework for the patristic sources on his topics of interest.⁵⁹

56 Lavenia 2017: 120 f. Gratitude to Gian Marco Braghi for this annotation.

57 See Bergjan 2005-2007: 144 f.

58 See Lavenia 2017: 89 f., 105, 120 f., 243, 256 f. (see also Dainese 2020: 42 f.). For an initial approximation on the reception of the figure of Constantine in the Modern Age, see Biasiori 2013 and Motta 2013.

59 A further discussion might be on the source Grotius used to refer to Constantine. However, it is no stretch of the imagination to see the more or less indirect reference (and in this latter case, I exclude that Grotius' source was F. Baudouin [1556], since he wrote about reading this

3. Conclusion

There are two interconnecting conclusions that I have drawn from these reflections. The first regards the benefit of reading Grotius in light of the sources he uses and how he uses them. It allows us to measure the extent he can be included within the juridical-theological current of his age: the issues that Grotius raises are the same as his predecessors and contemporaries, but the solutions are not. What becomes evident is that Grotius distances himself – thematically and methodologically – from the sources that an entire tradition of thinkers considered their legacy. Since Augustine does not wholly convince him, Grotius – over the decades punctuated by both the Thirty Years' War and the many editions of his *De iure belli ac pacis* – orients himself toward Cyril. Furthermore, he does not stop at the Latin translation available at the time and prefers to turn to a fresh look at the research that Aubert was carrying out while anxiously awaiting its publication.

Deconstructing the specificity of Grotius' proposals – in terms of the circumstantial issue of *occupatio bellica* – in light of the sources he uses, we note the echoes of literature that we might not expect; that of the military treatise. From this point of view, we realize how the more Grotius distances himself from the Augustinian mainstream of his age, the less his juridical positions can be explained on the basis of prior tradition. His turn to figures popular in both Protestant and Catholic war catechisms such as Samson, David, and Constantine⁶⁰ (among others) calls for further research into connected literary genres, which historiography often relegates to the store-room of outdated scholarship. An auspicious resumption of these studies would likely lead to interesting and novel surprises. In the light of what we have seen, reading between the lines of Grotius' complex thought process we catch glimpses of the tacit backdrop of the Christendom regime, which clung tenaciously to its pieces from 1618 to 1648, despite its 'shattered' visage.⁶¹

work in a letter on 5th June 1635 to van den Vondel, see Bergjan 2005-2007: 140) to *De vita Constantini* of Eusebius or perhaps to *De mortibus persecutorum* by Lactantius. After all, by comparing the patristic readings of the 1630s attested by Grotius' scrapbook, it is clear that neither of these two works was subject to later study (perhaps because they were never read or, more likely, that they were known previously).

60 War catechisms, in particular, are a literary genre that prospered where Western Christianity faced the 'infidels'. Consider that the catechism of Possevino – obviously Catholic but no less widespread – written in the context of the Battle of Lepanto was continuously printed for decades. On Lepanto, see Civale 2009 and Hanß 2017.

61 This alludes to the Italian translation of Greengrass 2014 (*La cristianità in frantumi*).

This leads me to express a second, more general order of conclusion. This hybridization of military culture and patristic sources, which other scholars have examined in greater detail, brings me to make a brief foray into a historiographic issue whose in-depth analysis, unfortunately, must be left for another day. To put it plainly, I believe it complicates the quest for religious factors of the Thirty Years' War. Previously, these elements were far too indebted to the Machiavellian / anti-Machiavellian paradigm that, similar to Grotius with Grotianism, led Machiavelli's thought to be approached and understood with the tools developed by his later readers. It is a debate with two paradigmatic historiographic origins that join together in scholars' attitude to look at the early 1630s (to simplify, we can say with the Peace of Prague or with the death of Wallenstein) as the turning point of several wars that were distinct by nature: either as the transition from an anti-criminal war occurring entirely within the inherited territories of the so-called *Casa d'Austria* to a religious war in the anti-Machiavellian meaning, or from a religious war culminating in Gustavus Adolphus' intervention to a war dictated by reasons of state following the intervention of Richelieu-Mazarin. Regardless of these opposing interpretations of the War, the first historiographic paradigm of what we might define as the model of 1635, is historians endorsement of the Emperor's account (it is Ferdinand III himself who viewed the period from 1618-1648 as two distinct wars). The second paradigm involves the central role of the Protestant Reformation which, in recent times, is referenced authoritatively in the works of Schilling, MacCulloch, Greengrass, Burkhardt (*Der Krieg der Kriege*) and in all of the studies linking the French wars of religion with the German wars of the 16th century and to the Thirty Years' War (but also is part of a more deep-rooted debate on the contribution of post-Luther Lutheranism to the formation of the modern state seen as Weber's and Schmitt's monopoly of the *Gewalt*). As von Friedeburg⁶² suggests, this second historiographic paradigm is also biased or risky at the least. It appropriates the point of view of the princes – who (starting from the 1630s) were angrily derided as 'Machiavellian gangsters.' This perspective is then transferred to the idea of 'state' and, consequently, the representative function of the prince with regard to the state that would appear later is actually projected backward to a historical context that is still in evolution.

I will close with a question: if we anticipate this historical-religious element (beyond but also through its reflections in contemporary scholarship, which show it so clearly attested from the years

62 von Friedeburg 2016: 3.

of the so-called 'total war' or 'European war in Germany'),⁶³ to the beginning of the 17th century, is this enough to explain the outbreak of the war?⁶⁴ To use a euphemism, I would limit myself to stating that historiography is largely at odds on the subject.

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63 The 1630s, see respectively Parker 1984 (Chap. IV) and Kampmann 2008: 1.

64 After 63 years of peace in the Empire and in light of a review of the early historiographic stances influenced by French-speaking and Protestant scholarship on Spanish belligerence (starting with an interpretation of belligerence by Feros 2000 who held that, in the case of the Spanish, the war was the result of failed diplomatic efforts, versus Parker 1999 and Allen 2000 and, on the role of the conflict with the French in contrast to that in the Netherlands, see the priority of the first over the second in Kennedy 1989: 50 and Stradling 1988: 103 f. versus the later dating in the 40s made by Israel 1995). The open questions generally follow scholarship made by Elliott.

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THE BAN ON MARRIAGES BETWEEN CHRISTIANS AND MUSLIMS IN THE DUTCH REPUBLIC (1580-1795)

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Abstract: The States General of the Dutch Republic introduced in 1656 a law forbidding marriages between Christians and Muslims in a part of their territory, the so-called Generalitylands. The province of Gelderland introduced four years later the same rule. Several Roman-Dutch law jurists discussed to what extent this rule was applicable in the whole of the territory of the Republic. The legal authors Grotius and Van Leeuwen stated, before the enactment of the law, that these interreligious marriages were allowed in the Republic, based on the freedom of thought, belief and religion. In 1662 Simon van Leeuwen, referring to Hugo de Groot, writes about marriages between Christians and Muslims: "In our country, where almost all schools tolerate freedom (see Grot[ius] *De iure belli*, Book 2, ch. 15, no. 10), it is not prohibited". The liberal opinion of Van Leeuwen was overshadowed a short time later by a total ban on such marriages, a view propagated by Johannes Voet. Dutch jurists from around 1700 argued that the rule drafted for the Generalitylands in the 1656-law was applicable on the whole territory of The Netherlands. However, did marriages between Christians and Muslims take place? We will follow this debate, and how this debate was silenced and of little importance since this kind of interreligious marriage did seldom take place in this period.

Keywords: Interreligious marriages; Dutch Republic; Christians; Muslims; Echt-Reglement.

1. Independence of the Republic

Before discussing the ban on marriage between Christians and Muslims, it is important to have some insight into the state structure of the Republic and the relationship in the early modern period between the Low Countries and the countries where Muslims lived. In particular, from North Africa and the Ottoman Empire there was a cultural and political exchange with the Republic. I want to ignore the colonial situation in Indonesia at this point, and will focus on the relationship between the Netherlands and countries around the Mediterranean: the Ottoman Empire and the states at the Barbary Coast in North Africa.

The Republic of the United Provinces of the Netherlands is a partnership of seven provinces that rebelled from the year 1568 against the Spanish king and Habsburg Empire and obtained recognition of their independence and sovereignty by other states after an Eighty Years' War (1568-1648) at the Peace treaty of Münster (1648).¹ The renunciation of the King Philip II of Spain with the Act of Abjuration in 1581 brings little changes in the administrative institutions of the Republic. In the history of private and criminal law, this caesura is of minimal importance. The old legislation stays in force, and new legislation is difficult to introduce. As stated in the fundamental law of the Republic, the Treaty of the Union of Utrecht of 1579, the alliance of the seven provinces may only act collectively when foreign politics and defense were involved. The provinces were responsible for the most fields of the legislation, including family law; local entities safeguarded their acquired rights and refused interference from outside in this field. All seven provinces had their own legislation and, within these provinces, there were cities and other territories that had their own particular local criminal and private law. This local law came on the first place in the hierarchy of sources of law and had precedence over regional, provincial and national law. These small jurisdictions were sticking rigidly to these acquired rights. When the Spanish king reigned over the Low Countries, he was not able to break this deadlock of acquired local rights; his demands for codification of coutumes was perfectly sabotaged. During the Republic's period, a defined center of power lacked in the United Provinces. There was no authority like a monarch, and the central government got bogged down in a culture of coming together in "many meetings, followed by slow or not taken decisions".² This was a kind of Achilles heel of the Republic blocking any form of modernization of legislation. This conclusion can also be drawn with regard to the reform of marriage law, it was difficult to introduce new rules, though marriage was one of the main policy issues deemed 'necessary' to reform to construct a protestant republic.

The religious disputes between Catholics and Protestants were the root of the uprising of the Low Countries against the Spanish king, and this led during the Eighty Years' War to some new provincial legislation aimed at a separation between these confessions. This separation initiated by Protestant theologians was one of the main political objectives in the Republic, an inevitable goal, so it seems, but not easily achieved because all regions wished to pre-

1 Parker 1976.

2 De Rooy 2005: 12, also: Van Vree 1994; Prak 1999.

serve their own sovereignty and acquired rights.³ The introduction of new legislation aiming at a separation between Catholic and Protestant inhabitants was a complicated process that took a long time. One of the side effects of this separation between Protestants and Catholics was the introduction of restrictions on marriages between Protestants on the one side and Anabaptists and Jews on the other side.⁴

The relation between the Netherlands and Turkey in the 16-17th century pose several contravening aspects.⁵ In the time of the Eighty Years' War, the Protestant Republic and the Ottoman Empire considered the Catholic Habsburgs as their common enemy. The Dutch wanted to free themselves from the yoke of the Habsburg Empire, while the Ottoman armies stood at the gates of Vienna. The recognition by the Ottoman Empire of the Republic and the establishing of diplomatic relations between the Republic and the Ottoman court dates from 1612 and preceded the 1648 peace treaty by many years.⁶ On the one hand, the political and military power of the Ottoman Empire fascinated the Dutch in their own struggle for independence. On the other hand, the Dutch feared the Muslim religion and the barbary-coast navy. There was even financial Turkish support to William of Orange (1533-1584) during this war of independence.⁷ An example of the close connection is the insignia worn by the rebellious watergeuzen or Sea Beggars. The anti-Catholic watergeuzen who fought in the years 1571-1572 alongside William of Orange to bring an end to Spanish occupation, wore during the liberation of the town of Leiden on 4th October 1574 insignias with the text: 'Liever Turcx dan pavs', a slogan that can be translated as 'Better a Turk than a Papist', since they considered the tyranny of the Pope worse as the Turks: 'want sy achteden des Paeus tyrannie groeter dan des Turckes', a slogan that is still known in The Netherlands.⁸ The prefer-

3 Thorbecke 1839: 39.

4 Kremer 2013: 263 ff.

5 One could also point at the Koran translated into Dutch: *De Arabische Alkoran* [...], Hamburg: Gedruckt voor Barent Adriaensz. Berentsma, boeck-verkooper 1641, translated after the first German edition by Salomon Schweigger (1616). A second translation was published: *Mahomets Alkoran*, Amsterdam 1657, translated after the French translation. Both translations were reprinted several times. An interesting cultural exchange is also presented in the exhibition 'Carpets of the East in Paintings from the West', combining Anatolian carpets and Dutch 17th century paintings depicting these rugs, at the Metropolitan Museum of Art Fifth Avenue, New York, March 11th–June 29th, 2014. From around 1585 the printer Christoffel Plantijn published in Leiden books in Arab, see: Hoftijzer 2006: 109-123.

6 This important early recognition was heavily contested by the ambassadors of Venice and France at the Ottoman Court.

7 Parker 1979: 67-70.

8 Fruytiers 1577 fol. 18r. Translation taken from: Van Gelder 2015: 184.

ence for the Turks was prompted by the relative freedom of religion that existed in the Ottoman Empire for minorities.⁹ The Dutch theologian Voetius (1589-1676), in his academic thesis '*Over het mohammedanisme*' (On the Islam) from 1648, stated that the freedom of religion was better safeguarded among the Turks in the Ottoman Empire than by the catholic Habsburgs.¹⁰

2. Ordinances on matrimonial law (1580-1603)

After the reform of the Catholic marriage legislation during the Council of Trent (1545-1563) only one form of marriage was recognized, the ecclesiastical *Matrimonium in fronte ecclesiae* in the presence of a priest and witnesses, though other more or less 'secret' forms of marriage were tolerated.¹¹ The criticism of the former German monk Martin Luther against the Church of Rome was the beginning of the Protestant Reformation. An important change in the Republic in marriage law was the introduction of the Civil marriage after 1580. Alternatively, in the words of Hugo de Groot in his *Inleidinge tot de Hollandsche rechts-geleerdheid*, by adopting the Protestant religion in the Republic, all the rights of Catholic clergymen as in the administration of justice as in other matters, ceased and were transferred to the state.¹²

The Political Ordinance (*Ordonnantie van policie*) of the States of Holland and West Friesland (provincial parliament of the most influential province) of April 1st, 1580 introduced a set of rules on marriage and on *ab intestato* inheritance, but the most innovative aspect was the introduction of an civil administrative procedure prior to the marriage and state control on couples who wanted to marry.¹³ The aim was to create unity of legislation in the various local coutumes (local customary law) within the province of Holland. Protestant couples may conduct a marriage ceremony in the church; other inhabitants must celebrate their marriage at the town hall. The legal historian Huussen writes: "the impulse for this was undoubtedly the desire to Calvinize some ecclesiastically sensitive legal issues, such as marriage law".¹⁴ However, the legislators also saw a need for modernization of legislation; it must lead to a "better maintenance of the

9 Groenveld 1979: 86.

10 Van Amersfoort 1997: 14.

11 Fischer 1963: 464.

12 De Groot 1952: Book I, D. 15.

13 Groot-placaetboek 1655: vol. 1. 329-343.

14 Huussen jr. 1989: 638-653.

government and the welfare of the country and more justice for the inhabitants”¹⁵ Marriages that were not ‘contravened and celebrated’ according to the Political Ordinance would henceforth be ‘null and void’.¹⁶ The Political Ordinance contains elements of private law and criminal law. It was difficult for religious minorities to comply with these regulations, not only for Jews and for Catholics, but also for non-protestant Christians like the Anabaptists. The opposition from different regions within the province of Holland claiming their own old legislation resulted in a series of local exceptions to the inheritance law as codified in the Political Ordinance.¹⁷

Since there was no central institution that could promulgate this legislation for the entire territory of the Republic, every province had to take initiative. The protestant church tried to get new marriage legislation introduced on all territories of the Republic and wrote letters to the States General insisting on the elaboration of new marriage laws.¹⁸ However, it took a long time (between 1580 and 1648, or even later) before new legislation was introduced. The second province to introduce such rules was Zeeland. The Zeeland churches insisted on a similar regulation, as it existed in Holland, an Ordonnance of the Prince of 8th February 1583 proclaimed a new marriage regulation in Zeeland.¹⁹ In the province of Utrecht, the States issued on 6th October 1584 a regulation introducing the civil marriage. Couples could marry at the town hall, or in front of a Protestant pastor. Other forms of marriages were no longer recognized in Utrecht.²⁰ The legislation of the province of Gelderland will be discussed below.

3. The ‘Generaliteitslanden’

Only on certain territories, the government of the federation of the seven Provinces, the State’s General, had direct legislative power. In these territories called the Generaliteitslanden, the inhabitants lived under the direct rule of the States General, though these territo-

15 “beter onderhoudt van de policie ende staet vanden landen ende meerder gherechtigheyt der ingesetenen van dien” De Blécourt, Japikse 1919: 126.

16 A bylaw of 6th July 1580 introduced a detailed explanation.

17 In July 1580, an Act of Moderation (*Acte van moderatie*) was enacted for the rules on inheritance, a law in which exceptions were granted for some areas, a process that was repeated again in 1599 and 1604. Resol. Holland, 30th July 1580, p. 161 ff.; *Groot-placaetboek*, vol. 1, 1655, col. 343 ff.; *Groot-placaet-boeck*, vol. 1, 1655, col. 347 ff.

18 Knappert 1903: 267.

19 *Groot-placaetboek* vol. 1, 1655: 350 and vol. III: 508. Reenacted 18th March 1666, *Groot-placaetboek* vol. III: 592ff.

20 Muller 1903: 191.

ries had no representatives or vote at the States General or a way to claim their own old coutumes. The word generality (Dutch: *generaliteit*; French: *généralité*) was used during the ancien régime in several countries to identify the central administration or central government. It stands against particularity of the local authorities. The Generaliteitslanden included Staats-Brabant (North-Brabant), Staats-Vlaanderen a part of modern province of Zeeland north of the Belgian border, villages around the town of Maastricht, Staats-Overmaas and Staats-Opper-Gelre (both in the modern province of Limburg) and Westerwolde and Wedde (in the modern province of Groningen).²¹ This is not the place to discuss the way these territories were formed and at what date they became dependent to the States General. But it is important to know some dates, to stress that it needed not the whole period from beginning of the revolt until 1656 to introduce this marriage legislation, because the Republic did not possess executive power over these territories from the beginning. The Dutch revolt started when William of Orange crossed in 1568 the border of the Spanish territories near Heerlen, and stayed at the village Wittem for a while, but finally withdrew. After the Union of Utrecht of 1679, Heerlen stays in the Spanish southern part. Finally, the Republic conquers the territories along the Maas river in 1632, lost most of it 2 years later, but in 1644 it was taken again by the Republican army. A protestant civil government was set up in 1647-1648. The 1648 treaty of Münster was not yet settling all disputes over the Overmaas territories including Heerlen. In 1657, diplomatic negotiations were started, and finally in the 'Partagetractaat' of 1662, a division was made between the Spanish territories and States Territories. In the spring of 1663 the Republic took possession of Heerlen, in 1664 provincial edicts were executed to introduce government organization in the Land van Overmaas.

Westwolde in Groning was taken in 1593 by Willem Lodewijk van Nassau in the name of the Staten-Generaal, and became a Generality land. The Republican army's took Zeews Vlaanderen in 1604, to blockade the harbor of Spanish Antwerp, but it became part of the Republic in 1648. The Meierij van 's-Hertogenbosch became Staats-Brabant in 1629, after the capitulation of the city of 's-Hertogenbosch. Gelre joins the Unie van Utrecht of 1579 from the beginning, but some cities, like Venlo and surrounding territories, stayed

21 The word generality was used during the the ancien régime in several countries to designate central government or centralized ruler. It is opposed to particularity and that stands for the local authorities.

on the Spanish side, and only became part of the Republic after 1713, named Staats-Opper-Gelre.

These were territories on the borders of the Republic, and here the Catholic religion was widespread. For many territories the situation had only become clarified after the 1648 treaty of Münster – or even later – that they would be placed under the administrative power of the States General. On 18th March 1656, the State's General adopted a Regulation on the marriages (*Echt-Reglement, Over de Steden, ende ten Platten Lande, in de Heerlijckheden, ende Dorpen staende onder de Generaliteyt*) for these Generaliteitslanden.²² The *Echt-Reglement* introduced in art. 50 the following rule:

Neither may Christians on our territory, [marry] with Jews, Muslims or heathens, on punishment as mentioned above. [on the punishment of exile].²³

The punishment on an interreligious marriage was only exile, the marriage was not void.²⁴ With the 'heathens', the drafters of the *Echt-Reglement* meant 'Egyptians', or Gypsies.²⁵ Some years later, the States of the province of Gelderland introduced a comparable rule in their marriage law, the *Echtordeningh off ordonnantie op de houwelycken met den aenkleven van dien* (1660).²⁶ Also the Regulation on the marriages of the town of Culemborg (Kuilenburgsche Echterde van 1680) contained a similar rule.

The rule of the *Echtreglement*, banning marriages between Christians and non-Christians, lives today in a saying in Dutch language: "twee geloven op een kussen, daar slaapt de duivel tussen",

22 Munier uses the term 'Marriage Regulation Act'; Munier 1995: 63.

23 "Ook geen christenen onder ons gebiedt gehoorende, met eenige joden, mahumetanen nochte heydenen, op pene als voorens." [op straffe van verbanning]; *Echt-Reglement* 1664. Also printed in Wiltens, Scheltus 1722. The *Echtreglement* from 1656 used the term 'mahumetanen', and the English terms 'Mahometans' or 'Mohammedans' seem to be the most related, though I have decided to use the term Muslim in the text and translations, taking into regard the arguments of Gibb 1969: 1, who states: "Modern Muslims dislike the terms Mohammedan and Mohammedanism, which seem to them to carry the implication of worship of Mohammed, as Christian and Christianity imply the worship of Christ."

24 Van Apeldoorn 1925: 166.

25 Printed marginal note in the printed edition *Echt-Reglement* 1664.

26 "Oock geene Christenen onder ons gebiedt gehoorende, met Joden, Mahumetanen noch Heydenen, op poene als voren." [op straffe van verbanning]. The preamble the *Echtordeningh* (1660) states that earlier versions of this law were promulgated in 1597, 1627, 1658. The 1597 edition of the Gelderland marriage law does not have a provision on marriages with Jews or Muslims (Van Loon 1703: II.383). The 1660 edition does have a provision on marriages with Jews and Muslims (Van Loon 1703: II.57), the 1627 and 1658 versions were not traceable.

two religions on one cushion, there must sleep the devil in between, meaning that such a marriage will not last long.

The *Echtreglement* is not thoroughly researched by Dutch historians, although its effects deeply influenced and discriminated large groups of the inhabitants of The Netherlands from its introduction in 1656 until its abolition in 1796.²⁷ In his article on interconfessional protestant-catholic marriages the legal historian Fischer writes: “The 18th century Dutch lawyers are quite silent about the subject.”²⁸ Some (legal-)historians have investigated the way the *Echtreglement* functioned, and the results of this investigation suggest an attitude of the government that is ‘tolerating’ Catholic priests who married interconfessional couples in their church, and accepting that couples in border regions made a trip outside the Generality territories to marry (in Spanish-Brabant and Spanish-Limburg).

The question to what extent the rule in the marriage legislation of the Generality-territories and Gelderland prohibiting marriages between Christians and Muslims was a legally binding rule for the other territories of the Republic, initiated a small debate between the jurists of the first generation of Roman-Dutch lawyers. According to the legal historian Van Apeldoorn, a rule prohibiting marriages between Christians and Muslims was also applicable in Holland, and such marriages were punishable and void.²⁹

How could a rule issued for the Generality-territories and Gelderland influence the law in the other provinces? In the hierarchy of the sources of law in the Republic, the described local custom and the local written law were applied in the first place. After this, the judge could draw from the undescribed custom of the region and, if necessary, the undescribed custom of the neighboring province, except if it was a completely contradictory custom.³⁰ The Frisian jurist Ulrik Huber (1636-1694): “In cases where laws and costumes are completely absent, and one cannot find a legal rule in these sources, one follows the laws and customs of the nearby territories”.³¹ In the courts of the provinces of Overijssel, Groningen and Drenthe, for ex-

27 Munier 1995: 31. On 20th October 1796 a new *Echt-reglement over de steden en ten platten lande dezer provincie (Bataafsch-Brabant)* was enacted. The preamble to this regulation stated that a new regulation was necessary since “articles in the 1656 *Echtreglement* were opposed to the principle of separation of church and state”.

28 Fischer 1963: 481.

29 Van Apeldoorn 1925: 166.

30 De Blécourt 1932: 28.

31 “In voorvallen daer wetten ofte coustumen ganselijk ontbreekt, soo dat men geen reeden uit andere diergelijke kan trecken pleegt men zich welke reguleeren nae de rechten en gewoonten der nabuiren” (Huber 1742: 1.II.62).

ample, legislation and custom from province of Holland and works by authors on this provincial law were invoked. Since there was in the provinces of Holland and Zeeland no ordonnance or other written law prohibiting marriages between Christians and Muslims, it is interesting to consult the authors of the Roman-Dutch school, Voet, Van Leeuwen, De Groot and Brouwer on this subject.

4. Johannes Voet

The Dutch jurist Johannes Voet (1647-1713) is the author of a voluminous *Commentarius ad Pandectas*. The work was a theoretical commentary on the Justinian Digest, but at the same time a useful work for the contemporary legal practice since Roman law was a secondary but important source of law. Even today these writings are used in the South African courts.³² The second part of his *Commentarius ad Pandectas* dealing with marriage law was published in 1704.

Voet states: “Jews, Pagans, or Muslims cannot marry Christians by the civil law or by the present law”.³³ His argument is based upon a law issued by the Emperors Valentinian, Theodosius, and Arcadius of the year 388, long before Mohammed founded his religion, and the Roman law only stated: “No Jew shall marry a Christian woman, nor shall any Christian man marry a Jewess; for if anyone should be guilty of an act of this kind, he will be liable for having committed the crime of adultery, and permission is hereby granted to all persons to accuse him.”³⁴

The next sources used by Voet is the Roman imperial decree ‘*De Iudaeis et Coelicolis et Samaritanis*’.³⁵ Then follows ‘*de nuptiis gentilium*’ of the Codex Theodosianus, forbidding any Roman citizen or provincial to marry a barbarian.³⁶ Finally Voet arrives in his own times, quoting the *Echt-reglement* (Marriage act) of the Staten Generaal of 1656, which forbade marriages between Christians and Muslim in the Generaliteits-territories. But now Voet must straighten an error made by a predecessor, he writes that such interreligious marriages are forbidden, “and the case is not different in Holland, as Simon van

32 Domanski 2013: 251-265.

33 Voet 1704: lib. XXIII, tit. 2, 26.

34 Though Voet refers to Cl. 1.9.6., it seems Cl. 1.9.5. is the issue here. Translation after Scott 1932.

35 CTh. 16.8, *De Iudaeis et Coelicolis et Samaritanis*; Cl. 1.9, *De Iudaeis et caelicolis*. This law in the Codex is also cited in French literature on marriages, where muslims are made equal to the jews in this law: Lange 1694, p. 75. As well as Duval 1705: 282.

36 CTh. *De nuptiis gentilium* (3.14.1.); see also: Mathisen 2009: 140-155.

Leeuwen wrongly thinks". The States of Holland and West Friesland have set rules on the way a marriage must be conducted following the Political Ordinance of 1580, without mentioning Jews or Muslims in that instrument, though according to Voet "yet it cannot rightly be inferred from this that the States General have allowed by their Ordinance marriages between Jews and Christians, or that they have thought that such marriages ought to be allowed." As an extra argument against interreligious marriages, Voet quotes the Roman Catholic Canon law and the glosses of Gothofredus (Cl. 1.9.6).

5. Simon van Leeuwen

Who was this Simon van Leeuwen, the author who wrongly thinks that interreligious marriages are not forbidden? The advocate Simon van Leeuwen (1625-1682), best known for introducing the term 'Rooms Hollands recht' or Roman-Dutch law, also worked as a historian and translator. He had knowledge of places where Muslims lived, his father was a member of the council of the East Indian Company (VOC), and Simon van Leeuwen translated in 1667 a book on Persia, written by the VOC director Johannes de Laet (1581-1649).³⁷ In 1662 he published his *Censura forensis, theoretico-practica*, where he stated that interreligious marriages are not forbidden.³⁸ It was published shortly after the enactment of the *Echtreglement* of 1656. The *Censura forensis, theoretico-practica* described the Roman civil law and its reception in the province of Holland, in a methodical way, and also treated the law in such a way that it was of practical use in 17th and 18th century courts. According to Van Leeuwen marriages between Christians and Jews or Turcks (*Turcae*, as a synonym for Muslims) were forbidden in the German Empire.³⁹ In Holland the case was different:

37 De Laet 1667.

38 Van Leeuwen 1662.

39 Van Leeuwen refers to: Schultze 1628: 25 (Lib. I. Tit. X, De Nuptiis). Also in Van de Kreke 1773: 75. Next to *Turcae*, also the synonym *Turci* was used; see: de Groot 1986: 2. This legislation was applicable in Prussen until 1851. When drafting the Allgemeine Landrecht für die Preußischen Staaten a first draft contained the rule "Der unterschied der Religionen verhindert die Ehen der Christen mit Heiden, Mohamedanern und Juden." In the final version this rule was adapted: "Ein Christ kann mit solchen Personen keine Heirath schließen, welche nach den Grundsätzen ihrer Religion sich den christlichen Ehegesehen zu unterwerfen gehindert werden." § 36 ALR II 1 (see: Fonk 1961: 25). See also for Hungary (occupied by the Turks for many decades): Voglmayr 1697 and also: Corpus juris Hungarici 1822.

In our land, where nearly all schools tolerate freedom (which defends Grot[ius] *De Iure belli*, Book 2, chap. 15, no. 10) it [a marriage] is not prohibited, but according to the law, the marriage of worshipers, each of a different religion or sect, is celebrated in front of the local magistrates, Political Ordinance of Holland. Anni 1580. num. 3.⁴⁰

Van Leeuwen uses here in interesting word, the Latin '*connivens*' (closing an eye) or 'to tolerate' which could be translated in Dutch by the modern term 'gedogen', a famous word in Dutch government circles meaning that the government accepts, allows and does not sanction certain behavior contrary to the law.⁴¹ Van Leeuwen makes no reference to the *Echtreglement* of 1656, or its application in the province of Holland, but refers to Hugo de Groot.

The reedition of Van Leeuwen's *Censura Forensis Theoretico-Practica* from 1741 edited by Gerardus Haas refers to the opinion of Voet as the standard authority in this issue: "Haec Auctoris nostri sententia merito resillitur a Clar. Voet", no marriages with Muslims in the Republic.⁴²

6. Grotius

Hugo de Groot (1583-1645) wrote on the marriages of Christians with non-Christians long before the enactment of the *Echtreglement* of 1656. His *De iure belli ac pacis* on law and war, one of the key publications on international law in the 17th century, was published for the first time in 1625. De Groot writes in de paragraph on "Contracts with people outside the sphere of the true religion" that such contracts are not prohibited:

40 "Quod tamen apud nos, quibus omnium paene sectarum connivens est libertas (quam defendit Grot[ius] de Jure belli, lib. 2 cap. X, num 10.) prohibitum non est: sed & lege cautum, ut inter disparis religionis aut sectae cultores matrimonia coram magistratu loci celebrentur. Politic. Holland. Ordin. Anni 1580. num. 3. Quae tamen apud Brabantos & Pontificiae Religionis addictos tanta non est, ut quibus non tantum cum Judaeis matrimonium contrahere, certa poena prohibitum est *arg. l. 6. Cod. De Jud. cap 10 & cap. 15 caus. 28 quaest. 1. Sed & cum quibuscunque haereticis, qui vel levi argumento a Iudicio Catholicae (ut illi vocant) Religionis deviare videntur, matrimonia commiscere piaculum est, arg. l. 2 par. 1. Cod. De heretic. & cap. Si quis Judaicae 17 caus. 28 quest 1. Sic ut e converso in Ecclesia Genevensi reformatis connubia cum Pontificia Religionis addictis celebrare in tantum prohibetur, ut prorsus irrita censeantur, rescindanturque matrimonia cum Papistis celebrata, Ordin. Eccles. Genev. art 112."*

41 Vermeer 2010.

42 Van Leeuwen 1741.

4. Proof again will by no means naturally follow from this fact that we ought not of our own will to submit to the rule of the heathen or contract marriages with them. For in both these cases it is apparent that there is greater danger, or at any rate greater difficulty is thrown in the way of practising the true religion. Add also the consideration that such ties are more lasting, and in marriage the choice is freer, while treaties have to be made to satisfy the exigencies of the time word and place. Moreover, as it is not wrong to do good to the heathen, so it is not wrong to implore their aid, as Paul invoked the aid of Caesar and the tribune.⁴³

The paragraph is followed by a paragraph entitled “Beware of such contracts”. The *‘Libertas’* is discussed by Grotius at several occasions. Van Nifterik writes: ‘according to Grotius every human being by nature holds as his own (*suum*) his life, body, limbs, reputation, honour and freedom to act (IBP II. 17.2.1. [...]). The *‘actiones propriae’* might be translated as freedom or liberty.⁴⁴ *Libertas* could be translated as the power over oneself (*potestas in se*).⁴⁵ The freedom to conclude contracts with other free people is leading concept in the work of Grotius. During the first, and again during the second English conference in the years 1613 and 1615 Grotius stressed the need to maintain contracts and treaties with the people in the East-Indies. A simple change of circumstances could not be a legal argument to abrogate a contract with an infidel. According to Grotius: “*Pacisci est libertatis, stare pacto necessitatis*”.⁴⁶ Or freely translated into English: every person has the freedom to conclude a contract, but he is then obliged to fulfill it.⁴⁷ To create a open and free market for foreigners, including Muslims, in Holland and for Dutch merchants abroad, religious freedom was a necessary element in trade treaties.⁴⁸

43 “Overeenkomsten met personen die buiten de ware religie staan zijn niet verboden naar Christelijke wetten”. De Groot 1913-1925. Another translation can be found in De Groot 2005: vol. 2, ch. 15, num. 10.

44 Van Nifterik 2004.

45 This seems not to be the roman *Libertas* (‘freedom’ or ‘liberty’) of a Roman citizen under the Republic. See: Lee 2011: 371-392.

46 Cited in Clark, Van Eysinga 1940: 203.

47 Nellen 2011: 59-73.

48 Hugo de Groot writes Claude Salmasius on 24th february 1631: “*Exspectantur ibidem ex novo federe Persae habituri Mahumetanae religionis usum in ea urbe, ut nostri suae in Perside. Id ad excitanda magis magisque Arabica studia pertinebit.*” (De Groot 1964: 343) This concept stems from a letter of Johannes Uytenbogaert to Hugo de Groot, 14th february 1631: “De besloten negotie tuschen dese landen ende de Persiaen sal de Persianen, Mahumetanen,

This rather liberal opinion towards mixed marriages shown by Grotius is in contrast with other publications, in which he, as a Protestant, gives arguments to put Muslims on the path of true protestant faith. In these writings, Grotius addressed questions with regard to the Islam several times from a theological point of view. This book, written in verse, was to be used by sailors in theological debates with non-Christians.⁴⁹ A second theological book *De veritate religionis Christianae*, published in 1627, based on the arguments of this poem, was influential since it was translated in many languages – even in Arab in 1660.⁵⁰ These theological writings stress on the importance and supremacy of the Christian faith, marginalizing the Islam.⁵¹ It can be said that the xenophobe view in *De veritate religionis Christianae* is the opposite of Grotius' liberal view of marriages with Muslims in *De iure belli ac pacis*.

The arguments of Van Leeuwen and Grotius with regard to the '*libertas*' as a legal principle allowing the marriage between Christians on the one side and Jews and Muslims on the other side in the territories of the Dutch Republic, was not followed by later generations of Roman-Dutch-law jurists, starting with Voet.⁵² Both published their books before or shortly after the enactment of the *Echtreglement* of 1656 and the ban on such marriages in the Generality territories and Gelderland. But it took some years before there was a general legal opinion that such marriages were also forbidden in Holland. Although the *Echtreglement* of 1656 was only enacted for the Generality territories, the rules were also applied in Holland.⁵³ The legal historian De Smidt states: "Art. 50 and 51 of the *Echtreglement* on banning marriages with Jews, Muslims and unbaptized persons were applied in the same way in the legal practice of the province of Holland."⁵⁴ Not only the ban of marriages between Christians and Jews and Muslims was applied in Holland, also other rules of the *Echtreglement* were followed, though they were not enacted

geven vrijheyt van religie t'Amsterdam ende de onse gereformeerden in Persiën." (De Groot 1964: 334).

49 "Wederlegging van de Mahumetistery" in De Groot 1622.

50 De Groot 1627, Arab translation by Edward Pococke (De Groot 1660). Juynboll 1931: 85-89, 196-199. Recently discussed in Heering 2004; Van Liere 2016: 580-590.

51 Jongeneel 2015: 33-35. De Groot 2019.

52 A liberal opinion on freedom of religion is defended by Locke: "if we may openly speak the Truth, and as becomes one Man to another, neither Pagan, nor Mahometan, nor Jew, ought to be excluded from the Civil Rights of the Commonwealth because of his Religion. The Gospel commands no such thing." (Locke 1689: 53 f.).

53 De Blécourt, Japikse 1919: 275-287 (art. LI). Van der Heijden 1998: 299-326.

54 De Smidt 2002: 91-102.

as a law in the province of Holland.⁵⁵ The *Echtreglement* was also printed in the *Resolutien van de Heeren Staten van Hollandt ende Westvrieslandt* and this version contains a comparative apparatus of the *Echtreglement* and comparable rules in other legislation of the provinces – but about art. 50 no comparisons with rules from other provinces are made.⁵⁶

7. Eduard van Zurck and Gijsbert Hemmy

The more practical books of the Roman-Dutch school do repeat the ban of marriages between Jews and Christians, but at the beginning of the 18th century Muslims are no more mentioned in this context. The Roman-Dutch school author Eduard van Zurck (died ca. 1726), who wrote in his *Codex Batavus* that Jews are not allowed to marry Christians on banishment: “Joden mogen met Christenen niet trouwen op pene van bannissement, Egtrel. ter General. 18 Marti 1656. art. 50.”⁵⁷ After which he only gives several examples of marriages concluded between Jews and Christians; Muslims are not mentioned. In the ‘Nieuw Nederlands advys-boek’ of 1782 the 1656 *Echt-Reglement* is mentioned, and the ban on marriages between christens and jews in art. 50 of the *Echt-Reglement* is considerend applicabale as a general law in the whole territory of The Netherlands, mMuslims are not mentioned.⁵⁸

A thesis presented to the University of Leiden in 1770 for the degree of doctor of both laws by Gijsbert Hemmy, born in the South-African Cape Town, states: men had “to avoid marriage with them [Matthew 18.17], however, in such a way that if a husband who had an unbelieving wife, loved her and therefore wanted to retain her he was not compelled to leave her [Corinthians 7.12 and 13].”⁵⁹ In his thesis, Hemmy does not make reference to the *Echt-Reglement*, the theological discussions of Protestant theologians or the legal opinions of Voet, Van Leeuwen or Grotius.

55 De Wit 2008: 182, 195, 212, 214.

56 Resolutien 1656-1659.

57 Van Zurck 1727: 468.

58 Van den Berg 1782: 500.

59 Hemmy 1998.

8. Verklaring van de Regten van den Mensch en van den Burger

In 1795, the prohibition for Christians to marry a Jew came to an end as the result of the Declaration of the Rights of Man and of the Citizen (*Verklaring van de Regten van den Mensch en van den Burger*) enacted by the Provisional Representatives of the People of Holland, the supreme governing body of the province of Holland, instituted after the Batavian Revolution, during the period in which the Netherlands was transitioning from the Dutch Republic to the new constitutional state of the Batavian Republic. Under this Declaration of 31st January 1795, the distinction between citizens on the basis of their religion was abolished. Furthermore, that year saw the end of regulations designed to discourage mixed marriages.⁶⁰ Even after the Declaration of the Rights of Man some legal scholars stick to the old rules. In his doctoral thesis Campegius Lambertus Vitringa (1786-1864) discusses at length legal aspects of the marriage, treating natural law and positive law. He states in 1809 that the marriage between Jews and Christians and for example with Pagans and Muslims is void:

Judaeis cum Christianis ac eorum exemplo cum Paganis ac Mohamedanis nullum est connubium, ne a vera religione in aliam deflectant Christiani.⁶¹

Vitringa refers in his sources only to the Codex Justinianus and the Codex Theodosianus.⁶² Several other thesis, mainly published after 1800, discuss multiple forms of forbidden marriages, but they do not refer to the *Echtreglement*.⁶³

9. Theologians

The ban on marriages between Christians and Jews, but maybe also Muslims was introduced as law upon the demand of Calvinist theologians.⁶⁴ Several Protestant theological treaties deal with ban on these interreligious marriages. The protestant synode used books

60 Huussen jr. 1975: 35 f.; Fischer 1963: 483.

61 "Judaeis cum Christianis ac eorum exemplo cum Paganis ac Mohamedanis nullum est connubium, ne a vera religione in aliam deflectant Christiani"; Vitringa 1809: 83. Knappert 1907.

62 Vitringa: 'L. 6. C. de Jud. Et Coelic. L. I. C. Theod. De Nup. Gentil.'

63 Lichtenvoort 1779; Van Vredenburg 1805, Nederburgh 1809; Meertens 1811.

64 Older church legislation prohibiting sexual relations between Christians and Muslims like the Canons of the Concil of Nablus of 1120 will not be discussed in this article.

like Beza's *'De repudiis et divortiis examen'*, Melanchthon's *'De arbore consanguinitatis'* and from Zanchius' *'de Operibus Dei'* the chapter on *'De sponsalibus, matrimonio et divortiis'*.⁶⁵

The Italian protestant theologian Hieronymus Zanchius (1516-1590) published several theological treaties and also published a volume with legal advices. His publications were quoted as a legal authority in court in the Republic.⁶⁶ He states that marriages of Christians are not allowed with infidels and the enemies of the Church, like Jews, Turks and Heretics, who reject the foundations of Christianity: "infideles Christique et ecclesiae hostes quales sunt Judaei, Turcae talesque haeretici, qui fundamentum religionis Christianae convellunt".⁶⁷ Here the word 'Turcae' is used as a synonym of Muslim.

The theologian and jurist Theodore Beza (1519-1605), one of the leaders of Reformation in Geneva, raises in *Tractatus de repudiis et divortiis* the question whether marriage vows between fidels and infidels may be admitted: "either before or after the betrothal such imparity breaks the engagement (if there is no other obstacle to the cause) It is not allowed even if he is willing to live with an unbeliever."⁶⁸ Beza distinguished between those religions who deviate from the reformed church only in some doctrines and those who openly oppose the Christian religion like Jews and Muslims: "eos qui Chr. religionem ex professo oppugnent, quales hodie sunt Judaei et Mahumetani". With these religions no intermarriage.⁶⁹

10. Muslims in the Republic

There was a strict ban on marriages of Muslims living in the Republic, when we follow the opinion of Voet, but now a last question arises, were there Muslims living in the Republic at all, willing to engage in a relationship with non Muslims?⁷⁰

65 Knappert 1903: 268.

66 For example: Van den Sande 1570: 67.

67 Zanchius 1613: 795 and Zanchius 1602.

68 "Respondeo sive ante, sive post sponsalia ejusmodi imparitas inciderit dirimi sponsalia (si nihil aliud causae obstiterit) non licere, quandiu consentit infidelis cum fidei habitare." Beza 1569: 99. Beza is cited by Brouwer: 552.

69 Maruyama 1978: 76-78. Paraphrasing Beza, Maruyama only writes that "a marriage contracted between a Christian and a non-Christian is de jure valid and sanctified".

70 This essay is not the place to discuss and evaluate the obstacles under Islamic law for interreligious marriages, nor to describe legal situation and Christian – Muslim encounters in the Dutch territories in Indonesia. Although millions of Muslims lived in the colonies of the Republic of the Seven United Netherlands and the Kingdom of the Netherlands, it was not until the census in 1879 that the first mention was made of Muslims in the Netherlands: thirteen men and thirty-six women presented themselves as Muslims at the time.

There were muslims in the Low Countries in the 17th century. In the battle of the Seabeggars against the troops of the Spanish King in the province of Zeeland in 1599, the Dutch were assisted by Ottoman sailors who were either sent from Turkey to support the Dutch or freed from Spanish captivity.⁷¹ When the Zeeland village of Sluis was under siege in 1604, 135 Turkish galley slaves were left behind by the Spanish troops and liberated by the sea beggars, and near to Sluis the geographical denomination of Turkeye and Constantinople still can be found today.⁷² After a while they were returned to Turkey. In later times 'Turks and Moors' were regularly enslaved by the Dutch in the fight against the barbarine coast pirates. From the 18th century there are several records of these enslaved landed and sold in Medemblik, Hoorn and Enkhuizen. After a while they were returned to Turkey. In later times 'Turks and Moors' were regularly enslaved by the Dutch in the fight against the barbarine coast pirates. From the 18th century there are several records of these enslaved landed and sold in Medemblik, Hoorn and Enkhuizen.

Another category of Muslims were the Dutch sailors, who had been enslaved by the barbarine marine in the Mediterranean Sea, and converted to Islam, who were after a period of time, bought out or freed, returned to the Low Countries.⁷³ Many Dutch sailors, captured on the Moroccan coast or the Mediterranean, were converted and able to build a career in the Ottoman navy.⁷⁴ In Holland campaigns were started to collect money for families to pay ransom and get these people back again, the government did not wanted to get involved in such actions. One of them was Jan Jansz van Haarlem, who converted and took the name of Moerad Rais.⁷⁵ His son Anthony Janszoon van Salee (also called Van Fes, 1607-1676) raised in Salé and Algiers, moved via Amsterdam to New Amsterdam (today's New York). Van Salee was staying in Amsterdam when he obtained a marriage license on December 15th, 1629 to marry Grietse Reyniers, two days before their ship left for the New Amsterdam, where he became known as 'Anthony the Turk'. In the marriage documents he states he is coming from Cartagena.⁷⁶ In modern sources on the

71 De Groot 1978: 106-111. Luiten, De Graaf 2016: 41. Van Gelder 2015: 185.

72 Obdeijn, De Mas 2012: 68; De Marez Oyens 1908: 50-96. See also: Van Dijk 1986: 1-22. Hondius 2005: 13-24.

73 Florijn 2018: 264, 270-272.

74 Van Gelder 2015: 175-198.

75 De Vries 1684: 65 f.; Van Gelder 2015: 188.

76 Frijhoff 2007: 461; Hershkowitz 1965: 299-310.

history of New York Anthony Janszoon van Salee is considered one of the first Muslims of the town.⁷⁷

An Ottoman trading post, the Turkse stapel or Turkish Staple, was opened in Antwerp in 1582.⁷⁸ From Amsterdam trade is being conducted in the 17th and 18th century with countries all over the world, from the Baltic States, Germany, France and England to the Near and Far East and South America.⁷⁹ In the period from 1600 until 1680 the economy in Holland, which was booming at the top, needed a lot of workforce, most of them came from the other Dutch provinces, but also from Northern France and Germany. Cities like Rotterdam, Delft, Leiden, Vlissingen, Middelburg, Utrecht and Amsterdam saw a doubling of residents in a short time.⁸⁰ Between 1500 and 1672 the city of Amsterdam grew from 12,000 to 200,000 inhabitants.⁸¹ The marriage registers give an impression of the origins of the bride and groom. Many people from abroad settle in Amsterdam. Hart gives a number of almost 150,000 marriages between 1601 and 1800. Around 1600 more than 30% of the newcomers come from the Southern Netherlands.⁸² The new Amsterdammers also come from Germany, but they are also Norwegian seamen and maids, Sephardic Jews from Spain and Walloon mercenaries, but Muslims or people from North Africa are not mentioned in this research.⁸³

In the 16th century Ottoman merchants, though almost exclusively non-Muslims such as Jews, Greeks and Armenians, came to the Low Countries.⁸⁴ From about 1590 a growing number of Dutch merchant ships sailed to North African and more eastern Ottoman (Levantine) ports, making Holland in this period the most important trade partner. In 1612, diplomatic relations between the Republic and the Ottoman Empire became official and Cornelis Haga became the first Dutch ambassador in Constantinople. In the treaty of 1612, the rights and obligations of the Dutch were laid down in detail in the Ottoman Empire. The Dutch were allowed to trade on favourable terms with the Empire and were allowed to travel and settle there. There was a permanent Dutch embassy in Istanbul and consulates

77 Gomez 2005: 128-142. In 1647 the 6 years old daughter of Anthony Janszoon was baptized in New Amsterdam: Shaw Romney 2014: 214.

78 De Groot 1986: 3.

79 Lesger 2001.

80 Geyl 1961: 240; Geerts 1966: 34; Kuijpers 2003.

81 Lesger 2006: 97-121.

82 Van Dillen 1964: 5.

83 Sogner 1993: 515-532.

84 De Groot 1986: 3.

in various port cities. The first visit of Omer Agha as a representative of the Sultan in 1614 led to a missive to the Dutch Ambassador in Istanbul, asking to avoid such missions since the costs for the States General of such visits were too high.⁸⁵ Also Turkish merchants came to the Republic, on 17th century Dutch paintings we see Ottoman merchants wander through Amsterdam. A painting by Gerrit Berckheyde of *Dam Square, view to the North* (1674) depicts several people on the central square of Amsterdam, including two men in turbans and dressed in an oriental style. Also in Dutch poetry the theme of freedom of religion is linked to the impression that there were many Jewish and Turks living in Holland. This is most probably a sort of overrepresentation, especially for Turks (Muslims). If they were Muslims in the Republic, they stayed mainly in Amsterdam and The Hague, cities where merchants and ambassadors from Morocco, the Ottoman Empire and Persia often stayed for some time.⁸⁶

One can come to the conclusion that interreligious marriages between Christians and Muslims were rare, almost nonexistent.⁸⁷ In the 17th and 18th centuries, marriages with Muslims did occur in literary fiction, but also in practice. The theatre play *Clucht-Wyse Comedie vande Mahometaensche slavinne Sultana Bacherach* by Cornelis de Bie (1627-ca. 1715) from 1698, where a Muslim girl is sold by a Zeeland pirate to an elderly Jewish man who wants to marry her but finds an adversary in a nobleman, belongs to the fiction. But the opinions of professors in theology demanded by local magistrates shows that such interreligious marriages were planned.⁸⁸ In the category of Dutch people who – in free will or forced – had ended up in an Islamic country, and who had converted to Islam there and been circumcised, there are cases in Holland in which the question was raised whether they were allowed to marry or not. The professors in theology considered a marriage of a Christian girl with a converted convert possible though a public confession of guilt in the church was necessary, and in this way a specific Dutch instrument of disciplining misconduct was introduced.

The place where cases of marriages with presumed Muslims were dealt with, was not the local court, but the local magistrates and the church council of the Reformed church. Several publications show that a whole range of misdeemed behaviors could lead to a

85 De Groot 1986: 9.

86 Kaplan 2007.

87 Knappert 1903: 269.

88 De Bie 1702.

disciplinary case for the church council of the Reformed churches.⁸⁹ In these cases the church council were mainly focused on reconciliation. As the church council had no authority for criminal prosecution, it usually forwarded more serious cases to the court. In 1658, the theological faculty of Leiden was asked by the the city magistrates of Schiedam whether a man from Schiedam, who had been enslaved by the Turks and had converted to Islam and now wished to marry a girl in Schiedam, could obtain permission to do so: “ghenomen van de Turcken van Algiers, alwaer hy hem korts daernaer heeft laeten besnyden, het Christengeloove versaectt, ende het Mahometaensche aenghenomen heeft”.⁹⁰ The question is, whether the magistrates of Schiedam were supposed to tolerate (the word ‘ghedooghen’ is used) that man to marry a Christian girl: “The question is whether the magistrate of Schiedam should tolerate and allow the person in question to be allowed to marry a Christian daughter, “de vraeghe is, of de magistraet van Schiedam behoort te ghedooghen ende toe te staen, dat ghemelte persoon met een Christendochter sal moghen trouwen”. The theologians Abraham Heidanus (1597-1678), Johannes Coccejus (1603-1669) and Johannes Hoornbeeck (1617-1666) stated that the man, who said he had the intention to live a life as a ‘sincere Christian’ in Holland, could not simply be allowed to marry.⁹¹ He had to make a public confession of guilt in the church before he was allowed to marry the girl.⁹² For this man, no trace of a marriage could be found in the Schiedam archives, maybe he married the girl in that town, or another town, but it must be underlined that the public confession of guilt in the church was a feared instrument and in many cases people convicted to this specific Dutch instrument of discipline did not show up in church.⁹³

89 Klock 1990: 78-122; Roodenburg 1990.

90 In comparable cases on marriages, the responses of professors of the faculty of theology are quoted in legal scholarly publications: Consultation 1660: 37. Lulius 1778: 16, 20.

91 Johannes Hoornbeeck was *een expert inzake bekeringen*: Hoornbeeck 2018.

92 Advice from 24th december 1658; Coccejus 1701: 13. Eekhof 1921: 109, 316; Florijn 2018: 270. The faculty of theology of the university of Utrecht was addressed in a comparable case. A Dutch sailor was captured, enslaved, tortured and converted to the Islam, but finally returned to Holland. Now he wanted to return to Christian faith. On 25th may 1661 the professors Gisbertus Voetius (1589-1676), Andreas Essenius (1618-1677) and Matthias Nethenus (1618-1686) composed a complex ritual to be performed in the protestant church including a public confession of guilt, a preaching on Matthew 26 and a profession of faith. Advice from 25th may 1661; Cramer 1932: 449-451. Florijn 2018: 270. On the practice of public confession of guilt in protestant churches in 18th century Amsterdam: Roodenburg 1990: 124-131.

93 Roodenburg 1990.

11. Final remarks

How can we explain the change in the opinion between Grotius and Van Leeuwen on one side, and Voet on the other? As stated before, in the period prior to 1648 the States General did not have power over the Generalty lands, and it took until 1656 that the States General enacted a regulation against interfaith marriages.

In academic research on marriage law in the 17th century, a shift of opinion of the Protestant church's views and persecution by local magistrates on issues such as divorce and premarital sex can be detected, a development is taking place from a certain flexibility in the period of the Reformation giving way to a more rigid view as a result of the later stages in the reformation (*nadere reformatie*) that took place from about 1650 onwards.⁹⁴

The enactment of the *Echtreglement* in 1656 seems to fit in this development. In legal scholarly writing freedom of belief was given up for religious rigidity, though in the end the Muslim-Christian marriages could take place due to a policy of 'gedogen' and a lack of (administrative) instruments to identify the beliefs of the marriage candidates.

94 On the Dutch Second Reformation or Further Reformation: Selderhuis 2014: 338-341. See: Van der Heijden 1998: 270-272, and Van Rhee 2001: 183-185; Van Lieburg 1989; Groenendijk 1984.

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