

## **LAW AS RELIGION, RELIGION AS LAW**

The conventional approach to law and religion assumes that these are competing domains, which raises questions about the freedom of, and from, religion; alternate commitments of religion and human rights; and respective jurisdictions of civil and religious courts. This volume moves beyond this competitive paradigm to consider law and religion as overlapping and interrelated frameworks that structure the social order, arguing that law and religion share similar properties and have a symbiotic relationship. Moreover, many legal systems exhibit religious characteristics, informing their notions of authority, precedent, rituals and canonical texts, and most religions invoke legal concepts or terminology. The contributors address this blurring of law and religion in the contexts of political theology, secularism, church-state conflicts, and the foundational idea of divine law. This title is also available as Open Access on Cambridge Core.

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# Law As Religion, Religion As Law

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remain, accurate or appropriate.

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## Christian Feasts and Administration of Roman Justice in Late Antiquity

*Silvia Schiavo*

### I INTRODUCTION

Law as religion and religion as law: these expressions evoke the intertwining of two experiences, the legal one and the religious one, which characterizes every society, ancient and modern.

In pagan Rome the interconnection between *fas* and *ius* led to noteworthy consequences. Think, for example, about the role of the *pontifices*, not only in the religious dimension, but also in the interpretation and creation of law or, further, the close connection, in various legal and government contexts, between the magistracies and the sacerdotal colleges.<sup>1</sup>

In this work, however, our attention is drawn towards late antiquity and the relationship between the Christian religion and imperial legislation on administration of justice.

We will look at the problem of the articulation of the “times” of trials which, from a certain moment onwards, took on the Christian dimension of time as a new point of reference, examining how Christianity managed to influence the rhythms of the judicial administration.

Since the second century, the central Christian feasts were Sunday and Easter, both referred to the resurrection of Christ. As time has gone on, particularly at a local level, also commemoration of great martyrs took on importance. Unlike the pagan and Judaic feasts, Christian holidays were not connoted by a specific quality, there being no distinction between a “sacred” day and a “profane” day, since every day is a day of the Lord. As Jerome explains, the resurrection of Christ is celebrated every day, but some days are established for meetings between Christians, so as not to let people’s faith diminish and so that there is more joy in the mutual meeting.<sup>2</sup>

<sup>1</sup> General outline in A. WATSON, *The State, Law and Religion: Pagan Rome*, Athens – London, 1992. For various perspectives on the relationship between law and religion in Rome, see the essays in C. ANDO, J. RÜPKE (eds.), *Religion and Law in Classical and Christian Rome*, Stuttgart, 2006. A view of the Roman Republic is provided by the works collected in the recent volume: O. TELLEGEN-COUPERUS (ed.), *Law and Religion in the Roman Republic*, Leiden-Boston, 2012.

<sup>2</sup> Hier. *Ep. ad Galatas*, 2,4, PL 24, c. 596. On these aspects, see A. DI BERARDINO, *Cristianizzazione del tempo civico nel IV secolo*, in B. LUISELLI (ed.), *Saggi di storia della cristianizzazione antica*

However, a considerable change took place over the fourth century. In fact, the old pagan Roman calendar was based on a different conception, according to which sacred time took on a different meaning compared to profane time: think of the distinction between *dies fasti*, devoted to commercial activities and trials and *dies nefasti*, during which significant jurisdictional and political activities were not permitted.<sup>3</sup>

Based on these principles, legislation began to move in a similar direction and the Christian articulation of time very slowly became intertwined with the civil calendar, influencing it profoundly. The emperors used “religious time” to articulate “legal time.”

This happened, for example, through the establishment of some of Christian feasts as *feriae publicae*, thanks to the recognition of some days or periods of the year for the accomplishment or suspension of certain acts; in parallel with the abolition of pagan public sacrifices and *feriae* connected with pagan feasts, which became ordinary working days.<sup>4</sup> Another important instrument used by the emperors was the prohibition of spectacles on Christian feasts:<sup>5</sup> games and theatrical performances distracted believers from Christian services and this is confirmed by many invectives in the works of the Fathers of the Church.<sup>6</sup>

*e altomedievale*, Rome, 2006, p. 186 ss., to which we refer for some observations contained in this first paragraph.

- <sup>3</sup> See, among many others, K. L. NOETHLICH, *Revolution from the top? Orthodoxy and the persecution of heretics in imperial legislation from Constantine to Justinian*, in C. ANDO, J. RÜPKE (eds.), *Religion and Law in Classical and Christian Rome*, Stuttgart, 2006, p. 118; J. RÜPKE, *Religion in Republican Rome. Rationalization and Ritual Change*, Philadelphia, 2012, p. 94 ss.; *Id.*, *Rationalizing Religious Practices: the Pontifical Calendar and the Law*, in O. TELLEGEN-COUPERUS (ed.), *Law and Religion*, cit., p. 85 ss.; G. FORSYTHE, *Time in Roman Religion. One Thousand Years of Religious History*, New York-London, 2012, p. 21 ss.; U. AGNATI, *Costantino e la scansione cristiana del tempo (Cod. Iust. III 12,2 e Cod. Th. II 8,1)*, in *L'indagine e la rima. Scritti per Lorenzo Braccesi*, I, Roma, 2013, p. 23 ss.; *Id.*, *Constantine's Statutes on Sunday Rest. Social and Juridical Remarks*, in *Calumet-Intercultural Law and Humanities Review*, II, 2015, p. 1 ss., with notes 1 and 2.
- <sup>4</sup> On the above, see in particular M. BIANCHINI, *Cadenze liturgiche e calendario civile fra IV e V secolo. Alcune considerazioni*, in *Atti dell'Accademia Romanistica Costantiniana. Atti del VI Convegno internazionale*, Perugia, 1986, now in M. BIANCHINI, *Temi e tecniche della legislazione tardoimperiale*, Torino, 2008, p. 234, with an indication of other literature; D. BAUDY, *Prohibitions of Religion in Antiquity: Setting the Course of Europe's Religious History*, in C. ANDO, J. RÜPKE (eds.), *Religion and Law*, cit., p. 110 s.; M. R. SALZMAN, *On Roman Time. The Codex-Calendar of 354 and the Rhythms of Urban Life in Late Antiquity*, Berkeley, Los Angeles, Oxford, 1990, p. 235 ss. who stresses that, while in the mid-fourth century “Pagan cult reigned virtually unchallenged,” in the second half of the century Christian emperors attempted “to disassociate paganism from the culture and civic life of the empire.”
- <sup>5</sup> For this profile, we refer particularly to E. Franciosi, *Dies festos nullis volumus voluptatibus occupari. Spettacoli e feste cristiane nella legislazione postclassica e giustiniana*, in F. BOITTA (ed.), *Atti del Convegno “Il diritto giustiniano fra tradizione classica e innovazione”*, Torino, 2003, p. 53 ss., and more recently A. DI BERARDINO, *Cristianizzazione del tempo civico*, cit., p. 187 s. which equally refers to the legislation abolishing spectacles during Christian feasts.
- <sup>6</sup> For example, John Chrysostom complained that, in Constantinople, churches were empty during spectacles while the people crowded into the circus: *De Anna, sermo IV I*, PG LIV, c. 660. Observations on the meaning of the prohibition of *spectacula* during Christian feasts in N. SPINETO,

Through the filter of the imperial constitutions, Christian feasts (such as Sunday, Easter, Pentecost, Christmas, Epiphany)<sup>7</sup> gradually came to be placed alongside civil feasts such as *dies Natalis* and the emperor's assumption of the throne<sup>8</sup> and became a powerful instrument for spreading the Christian message. All of this particularly follows the Edict of Thessalonica issued in 380, after which the most significant testimonies, which will be analyzed herein, are placed.<sup>9</sup>

It was not a complete replacing of the Roman calendar, because the "Christian time" started working alongside the "Pagan time." The attempts of Christian emperors to make pagan festivals and holidays illegal were only partially successful: they were celebrated also in the fifth and sixth centuries. They progressively lost their original religious meaning, rather becoming a matter of popular custom and culture.<sup>10</sup>

Nevertheless, the new way of organizing social time brought with it a set of symbols, rites, ceremonies, and values,<sup>11</sup> eventually conditioning people's daily lives.

Our attention will focus on texts that cover the *dies dominicus* and the Easter cycle. Hence, some constitutions will be examined through which Sunday and the days of the Easter cycle are used to influence and govern the times of trial, in particular (but not only) through the establishment of the obligation to suspend certain activities.

The statutes we will examine, chronologically to be placed after the 380, come mostly from the Theodosian Code. Later, some of them have been incorporated into the Justinian one. With reference to the two codifications, consequently, a complete, definitive picture emerges, showing that the Christian festivals have profoundly impacted the civil calendar.

It must however be pointed out that the various laws, at the time of their promulgation, were destined to different geographical areas, and were therefore measures in response to specific local needs, or that reacted to particular problems.

*De spectaculis: aspetto della polemica antipagana*, in A. SAGGIORO (ed.), *Diritto romano e identità cristiana. Definizioni storico-religiose e confronti interdisciplinari*, Rome, 2005, p. 220 ss. On the problem of contested Roman festivals in the fourth century, see F. GRAF, *Roman Festivals in the Greek East. From the Early Empire to the Middle Byzantine Era*, Cambridge, 2015, p. 128 ss.

<sup>7</sup> In general, on Christian feasts, see A. DI BERARDINO, *Tempo sociale pagano e cristiano nel IV secolo*, in A. SAGGIORO (ed.), *Diritto romano e identità cristiana*, cit., p. 104 ss. The list of Christian feasts is provided in C.Th. 15,5,5, the constitution of Theodosius II issued in 425 through which Epiphany and Christmas became known as *feriae publicae*. The constitution, along with the passages of C.Th. 2,8,18 and C.Th. 2,8,19, is also included in C.3,12,6 (see A. SCARCELLA, *La legislazione di Leone I*, Milan, 1997, p. 329, note 29).

<sup>8</sup> For a general outline, see M. BIANCHINI, *Cadenze liturgiche e calendario civile*, cit., p. 248 s.

<sup>9</sup> *Id.*, p. 235.

<sup>10</sup> Important evidence is given by the Calendar of *Polemius Silvius* (448–49 AD), from Gaul, in which many pagan festivals and *ludi* are reported, probably the ones the author considered still useful and necessary and that at the time were commemorated together with the Christian holidays. See M. R. SALZMAN, *On Roman Time*, cit., p. 239 ss. For a different stance, see A. DI BERARDINO, *Christian Liturgical Time and Torture (Cod. Theod. 9,35,4 and 5)*, in *Augustinianum*, 51,1, 2011, p. 192, who talks about a gradual substitution of the pagan time by the Christian one.

<sup>11</sup> In this regard, A. DI BERARDINO, *Tempo sociale pagano e cristiano nel IV secolo*, cit., p. 98.

Where possible, we will try to highlight these aspects, emphasizing the occasion in which the various constitutions were issued.

## II CONSTANTINE AND THE “DIES SOLIS”

However, before examining the legislation on *dies dominicus* and the Easter festivity, it is first necessary to look at some measures of the Constantinian era, very well-known and debated among scholars, that is, two constitutions through which contractual activities and trials were suspended on the *dies Solis*.

They were C. 3,12,2(3), from C. 3,12 *De feriis* and CTh. 2,8,1, from CTh. 2,8 *De feriis* : formally two distinct measures, both addressed to Elpidius *vicarius urbis Romae*, the former issued on March 3, 321 and the latter on July 3 of the same year, but which some scholars consider to be two fragments of a single law.<sup>12</sup> Anyway, the constitutions were initially applied only in the West, and after the victory over Licinius they were extended also to the Eastern provinces.<sup>13</sup>

C. 3,12,2(3). Imp. Constantinus A. Helpidio. Omnes iudices urbanaeque plebes et artium officia cunctarum venerabili die solis quiescant. ruri tamen positi agrorum culturae libere licenterque inserviant, quoniam frequenter evenit, ut non alio aptius die frumenta sulcis aut vineae scrobibus commendentur, ne occasione momenti pereat commoditas caelesti provisione concessa. PP. V. non. Mart. Crispo II et Constantino II cons. (a 321).<sup>14</sup>

CTh. 2,8,1. Imp. Constantinus A. Helpidio. Sicut indignissimum videbatur, diem solis, venerationis sui celebrem, altercantibus iurgis et noxiis partium contentionibus occupari, ita gratum ac iocundum est, eo die, quae sunt maxime votiva, compleri. Atque ideo emancipandi et manumittendi die festo cuncti licentiam habeant, et super his rebus actus non prohibeantur. PP. V. non. Iul. Caralis, Crispo ii. et Constantino ii. Caess. Cons. (a 321).<sup>15</sup>

<sup>12</sup> See O. SEECK, *Regesten der Kaiser und Päpste für die Jahre 311 bis 476 n. Chr.*, Stuttgart, 1919, p. 62, according to which both laws refer to March 321; M. BIANCHINI, *Cadenze liturgiche e calendario civile*, cit., p. 235; S. CORCORAN, *The Empire of the Tetrarchs. Imperial Pronouncements and Government. A. D. 284–324*, Oxford, 1996, p. 164, note 188; p. 312. J. GOTHOFREDUS, *Codex Theodosianus cum perpetuis commentariis*, Lipsiae, 1736, p. 137 which seems to exclude the two laws being a single measure, stating that they are two distinct constitutions addressed at different times to *vicarius urbis Helpidius*.

<sup>13</sup> *Soz. Hist. Eccl.* 1,8. On this problem: A. DI BERARDINO, *Christian Liturgical Time*, cit., p. 195.

<sup>14</sup> “Emperor Constantine Augustus to Helpidius. All judges and the people in the city should rest, and the work in all crafts should cease, on holy Sunday. But the people in the country may freely and lawfully apply themselves to cultivating their fields, so that the benefit conferred by the providence of God may not perish in an instant, since it often happens that grain can be sown in the furrows and vines planted in the trenches on no better day. Posted March 3, in the consulship of Crispus, for the second time, and Constantine, for the second time.” (English Translation in B. W. FRIER *et al.* (eds.), *The Codex of Justinian. A New Annotated Translation with Parallel Latin and Greek Text Based on a Translation by Justice Fred H. Blume*, I, Cambridge, 2016, p. 346.

<sup>15</sup> “Emperor Constantine Augustus to Helpidius. Just as it appears to Us most unseemly that the Day of the Sun (Sunday), which is celebrated on account of its own veneration, should be occupied with legal altercations and with noxious controversies of the litigation of contending parties, so it is pleasant

Constantine intervened with C. 3,12,2 establishing that on the *dies Solis* the activities of all judges and inhabitants of the cities must have rest and that only inhabitants of the countryside could work in the fields. With CTh. 2,8,1 the emperor underlined that litigation must stop, in place of which suitable space should be left for the activities he referred to as *votiva compleri*. The only acts that could be accomplished were emancipations and manumissions, due to their non contentious nature.<sup>16</sup>

In relation to the time relationship between the two texts, the opinion of Gothofredus appears worthy of consideration, according to which CTh. 2,8,1, where the emperor talks about the past (*sicut indignissimum videbatur*), follows C. 3,12,2 from a chronological viewpoint: hence Constantine first established the prohibition of all judicial activities and, for the inhabitants of the cities, the suspension of all activities. The rule was different for the inhabitants of the countryside, who could continue their agricultural work.<sup>17</sup> At a later date, through the measure referred to in CTh. 2,8,1, the emperor is considered to have extended the range of permitted exceptions, stating that emancipations and manumissions could also be performed on Sundays.<sup>18</sup>

The texts mentioned, as has been seen, contain a reference to the *dies Solis*, an expression connoted by a certain amount of ambiguity, since it can be attributed both to the pagan solar cult and to Christian thought, which indicates Sunday as the day of the Lord.<sup>19</sup>

and fitting that those acts which are especially desired shall be accomplished on that day. 1. Therefore all men shall have the right to emancipate and to manumit on this festive day, and the legal formalities thereof are not forbidden. Posted on the fifth day before the nones of July at Cagliari in the year of the second consulship of Crispus and Constantine Caesars.” (English translation in C. PHARR, *The Theodosian Code and Novels and the Sirmondian Constitutions. A Translation with Commentary, Glossary and Bibliography*, Princeton, 1952, p. 44.)

<sup>16</sup> See J. GOTHOFREDUS, *Codex Theodosianus*, I, cit., p. 137, which summarizes the contents of CTh. 2,8,1 stating: “discrimen igitur facit Constantinus inter actus contentiosae et voluntariae Iurisdictionis.” Gothofredus notes that in the Visigothic *Interpretatio* there is a mistake. In fact, it mentions the possibility of *gesta conficere* when the emperor Constantine refers to the fulfillment of the acts of emancipation and manumission and not to the drafting of the related *gesta* certifying the successful emancipation.

<sup>17</sup> On the possible meaning of this exception, see *infra*, in this paragraph.

<sup>18</sup> See J. GOTHOFREDUS, *Codex Theodosianus*, I, cit., p. 137, according to which CTh. 2,8,1 was not the first of Constantine's measures to ratify the prohibition to perform activities on Sundays – the previous one was therefore C. 3,12,2. An interesting perspective is that of K. M. GIRARDET, *L'invention du dimanche: du jour du soleil au dimanche. Le dies Solis dans la législation et la politique de Constantin le Grand*, in J. N. Guinot, F. Richard (eds.), *Empire chrétien et Église aux IV<sup>e</sup> et V<sup>e</sup> siècles. Intégration ou “concordat”? Le témoignage du Code Théodosien*, Paris, 2008, p. 346, according to which CTh. 2,8,1 is part of a rescript urged by Elpidius himself in order to obtain clarifications on C. 3,12,2, regarding the disparity of treatment between pagans and Christians. In fact, Christians were already authorized to proceed with *manumissio in ecclesia*. A different approach is presented in E. MORENO RESANO, *El dies Solis en la legislación constantiniana*, in *Antiquité Tardive*, 17, 2009, p. 292, according to which these are fragments of the same imperial constitution.

<sup>19</sup> On the use of the expression *dies solis* also among Christians and Christian emperors to indicate the day of the Lord see U. AGNATI, *Constantine's Statutes on Sunday Rest*, cit., p. 10.

As we know, scholars have always been divided on the question and diverging interpretations of these texts have also been provided in recent times.

To briefly summarize the discussion, it is first necessary to remember that some of the words used by Constantine, that is, *venerabilis dies Solis* and *dies Solis veneratione sui ceber*, and the absence of motivations that openly refer to Christian thought, point towards the preeminent will of the emperor to reconnect with the cult of the sun, to which Constantine and the members of his family were dedicated prior to the conversion to Christianity.<sup>20</sup> Therefore, Constantine's choice of terminology would make it possible to relink his provisions to the cult of the sun<sup>21</sup> while not being able to fully deny the fact that this choice would give life to a sort of compromise between the Christian and the pagan worlds, thus allowing a not too clear position to be taken, during years which were undoubtedly still a time of transition. Hence, Christians benefited, although indirectly, from Constantine's provisions.<sup>22</sup>

On the other hand, for an opposite interpretation (already identifiable for example in the comment that J. Gothofredus dedicates to CTh. 2,8,1)<sup>23</sup> Constantine intended to impose respect for the Christian feast of Sunday, *dies dominicus*, by still calling it *dies Solis*.<sup>24</sup> According to this different stance, the

<sup>20</sup> See L. DE GIOVANNI, *Costantino e il mondo pagano*, Naples, 1977, p. 108, who, regarding CTh. 2,8,1, underlines how sun worship certainly influenced the emperor in some way and that the subject of assimilation to the sun recurs until the complete decline of Licinius (even after the disappearance of the pictures of the sun from coins, around the year 320). See also M. BIANCHINI, *Cadenze liturgiche e calendario civile*, cit., p. 235. On the importance of the cult of the sun for the Constantine dynasty, see the recent P.O. CUNEO, *Anonymi Graeci oratio funebris in Constantinum II*, Milan, 2012, p. 95 ss.

<sup>21</sup> Among others, A. H. M. JONES, *The Decline of the Ancient World*, London, 1966, p. 41 s.; P. R. COLEMAN-NORTON, *Roman State and Christian Church*, I, London, 1966, p. 83 s.; W. RODORF, *Sunday. The History of the Day of Rest and Worship in the Earliest Centuries of the Christian Church*, London, 1968, p. 163 s.; A.S. SCARCELLA, *La legislazione di Leone I*, cit., p. 331, note 35, M. WALLRAFF, *Constantine's Devotion to the Sun after 324*, in *Studia Patristica*, 34, 2001, p. 256 ss.; E. MORENO RESANO, *El dies Solis en la legislación constantiniana*, cit., p. 289 ss.; Id., *La ley constantiniana del dies solis en su context politico y legislativo*, in *Studia Historica*, 27, 2009, p. 187 ss.; G. FORSYTHE, *Time in Roman Religion*, cit., p. 153. General outline in U. AGNATI, *Constantine's Statutes on Sunday Rest*, cit., p. 10 ss.

<sup>22</sup> See, among others, E. MORENO RESANO, *El dies Solis en la legislación constantiniana*, cit., p. 303. On the ambiguity of the law see M. R. SALZMAN, *On Roman Time*, cit., p. 236.

<sup>23</sup> See J. GOTHOFREDUS, *Codex Theodosianus*, I, cit., p. 137, who starts his comment by stating: "Dies solis, seu Dominico, est haec Constantini M. constitutio: cuius de eodem altera, verum prior tempore ad eundem Helpidium hoc ipso anno extat *Cod. Iustinianeo lex 3. Hoc. Tit.*"

<sup>24</sup> Also with reference to this different interpretation, the literature is very vast. We will limit ourselves to remembering B. BIONDI, *Il diritto romano cristiano*, I, Milan, 1962, p. 162 ss.; P. BONETTI, *Dies Solis e dies dominicus nella legislazione imperiale romano-cristiana*, "Boll. Scuola di perfezionamento e di specializzazione in dir. del lavoro e della sicurezza sociale Univ. Trieste", 9,25–27, 1963, p. 13 ss.; A. DI BERARDINO, *La cristianizzazione del tempo nei secoli IV-V: la domenica*, in *Augustinianum*, 47, 2002, p. 97 ss.; Id., *Tempo sociale pagano e cristiano nel IV secolo*, cit., p. 95 ss.; Id., *Cristianizzazione del tempo civico nel IV secolo*, cit., p. 179 ss.; K. M. GIRARDET, *L'invention du dimanche: du jour du soleil au dimanche*, cit., p. 341 ss.; P. SINISCALCO, *Il cammino di Cristo nell'Impero romano*, Bari, 2009, p. 170; U. AGNATI, *Constantine's Statutes on Sunday Rest*, cit., p. 4 ss.; G. ANELLO, *The Rest and the West. The Legacy of Constantine's Rules Concerning the Dies Dominica: Anthropological Notes*, in *Calumet-*

constitutions with which we are dealing LXVII connected with the Christian cult<sup>25</sup> on the basis of different signs.

In particular, it should be considered that in the legislation of the Christian emperors of the fourth century who, through different measures, attempted to overcome the paganism that still covered civil society (we will look at some examples below), the expression *dies Solis* is used to indicate Sunday without any pagan connotation. This implies that it may also be used in this sense in Constantine's texts,<sup>26</sup> and not in relation to the cult of the sun. Again, it should not be forgotten that in the Christian conception Christ had been considered the *Sol Iustitiae* for some time, and that the cult of the sun had certainly had a strong influence on the Christian worship.<sup>27</sup>

To this it must be added that Constantine pursued policies that clearly distinguished Christian feasts from Jewish ones. Think about the Council of Nicaea, during which the independence of the Christian Easter with respect to Passover was established with the identification of a common date for all the Christian communities.<sup>28</sup> Since the emperor most probably issued a measure (which we do

*Intercultural Law and Humanities Review*, 1, 2015, p. 1 ss.; P. F. BRADSHAW, M.E. JOHNSON, *The Origins of Feasts, Fasts and Seasons in Early Christianity*, London, 2011, p. 25 ss. J. RÜPKE, *The Roman Calendar from Numa to Constantine. Time, History and the Fasti*, Chichester-Malden, 2011, p. 165: "Although the ruling is delivered in a religiously neutral form, there can be no doubt that its motivation is Christian. In the law's wording, *venerabilis* refers to a cult practice that must comprehend more than an astrologically favourable disposition on the 'day of sun'."

<sup>25</sup> This is the position expressed recently by U. AGNATI, *Constantine's Statutes on Sunday Rest*, cit., 4 ss.

<sup>26</sup> See particularly U. AGNATI, *Constantine's Statutes on Sunday Rest*, cit., p. 10 ss. The scholar also reminds us that in the writing of Christian authors, Sunday is often talked about using the expression *dies Solis*: for example in Justin Martyr (1 *Apol.* LXVII 3); in Gregory of Tours (*Hist. franc.* III 15), while Tertullian uses *dies dominicus* when addressing Christians (*De idol.* XIV 7), and *dies Solis* when addressing pagans (*Apol.* XVI, 1). A collection of constitutions of Christian emperors in which the expression *dies Solis* is used in relation to the Christian Sunday can be found in A. DI BERARDINO, *La cristianizzazione del tempo nei secoli IV-V: la domenica*, cit., p. 101.

<sup>27</sup> See U. AGNATI, *Constantine's Statutes on Sunday Rest*, cit., p. 13 ss., with a collection of sources. On these aspects see also M. BIANCHINI, *Cadenze liturgiche e calendario civile*, cit., p. 236, which highlights the fact that the name *Sol Iustitiae* in relation to Christ dates back a long way (as far as Justin Martyr); and G. FORSYTHE, *Time in Roman Religion*, cit., p. 133 ss.

<sup>28</sup> As testified by Eusebius, *Vita Constantini* III, XVI–XX: according to the writer, the most important result of the council was not the solution to the Arian question, rather the identification of the date for Easter. On these aspects see A. M. RABELLO, *L'observance de fêtes juives dans l'Empire romain*, in H. TEMPORINI, W. HAASE (eds.), *Aufstieg und Niedergang der Römischen Welt: Geschichte und Kultur Roms im Spiegel der Neuren Forschung*, II, 21.2, Berlin-New York, 1984; A. M. RABELLO, *The Jews in the Roman Empire: Legal Problems, from Herod to Justinian*, Aldershot, Burlington Usa, Singapore, Sydney, 2000, p. 1309 ss.; A. DI BERARDINO, *L'imperatore Costantino e la celebrazione della Pasqua*, in G. BONAMENTE, F. FUSCO (eds.), *Costantino il Grande*, I, Macerata, 1992, p. 363 ss.; M. DELCOGLIANO, *The Promotion of the Constantinian Agenda in Eusebius of Caesarea's on the Feast of Pascha*, in S. INOWLOCKI, C. ZAMAGNI, *Reconsidering Eusebius. Collected Papers on Literary, Historical and Theological Issues*, Leiden, 2011, p. 39 ss.; U. AGNATI, *Constantine's Statutes on Sunday Rest*, cit., p. 20 ss. It should also be observed that until the second half of the fourth century, i.e. until the Council of Laodicea, from a liturgical point of view Sunday had still not taken on a precise physiognomy; some oriental communities continued, for example, to observe Saturday. The fact that Christians united on Sundays to pray and celebrate the Eucharist was more a custom than an



not know) on respecting Saturday for Jews,<sup>29</sup> it is very likely that with the constitutions of C. 3,12,2 and CTh. 2,8,1, Constantine also intended to promote the Christian cult, connoting the day of *dies Solis* as a holiday to be considered the day of the Lord, and not as being connected with the cult of the sun.

Therefore, the two constitutions allegedly aimed to favor Christians who, free from any civil and trial-related commitments, could dedicate Sunday to rest for praying,<sup>30</sup> without the risk of any negative consequences. Through Constantine's decrees, Sunday was therefore taken away from judicial and commercial activities, which by their very nature were forebears of hostility, exchange of money, and the risk of fraud.<sup>31</sup> In fact, as pointed out, in CTh. 2,8,1 acts such as emancipations and manumissions remain outside the emperor's provisions.

It is difficult to know which position to take within this debate and to opt for one interpretation over another.

However, an aspect that appears to be significant is that of the sure "appropriation" by Christians of Constantine's constitutions. We refer to the operation led by some writers who see the aforementioned measures as indisputably connected with Sunday as the day of the Lord.

First of all, Eusebius of Caesarea.<sup>32</sup> In the *Vita Constantini*,<sup>33</sup> the writer mentions various times Constantine's legislation on the *dies Solis*, highlighting its connection with the Christian cult.<sup>34</sup>

According to Eusebius, Constantine established that the most important day of the week, the one that "really comes first" be dedicated to prayer and belong to the

obligation. On these aspects see M. BIANCHINI, *Cadenze liturgiche e calendario civile*, cit., p. 236 ss., with further bibliographical indications. For a collection of texts from which it emerges how important it was to the ecclesiastical hierarchies that the believers attended the Sunday service, see U. AGNATI, *Constantine's Statutes on Sunday Rest*, cit., p. 24 ss.

<sup>29</sup> Eusebius, *Vita Constantini* IV,18,2. See U. AGNATI, *Constantine's Statutes on Sunday Rest*, cit., p. 19.

<sup>30</sup> According to U. AGNATI, *Constantine's Statutes on Sunday Rest*, cit., p. 22, it is not a question of protecting rest in itself, rather for the purpose of the Christian cult and prayer. Different stance in J. RÜPKE, *The Roman Calendar from Numa to Constantine*, cit., p. 166.

<sup>31</sup> See again U. AGNATI, *Constantine's Statutes on Sunday Rest*, cit., p. 23.

<sup>32</sup> This is highlighted by J. GOTHOFREDUS, *Codex Theodosianus*, I, cit., p. 137.

<sup>33</sup> On the work, and on the reliability of Eusebius, see in particular A. CAMERON, S. HALL, *Eusebius. Life of Constantine, Introduction, Translation and Commentary*, Oxford, 1999, p. 6 ss., with a discussion of the problem of the citation of Constantine's imperial legislation within the work.

<sup>34</sup> It is not possible to establish whether the writer is referring here precisely to CTh. 2,8,1 and C. 3,12,2 or to other measures with similar content of which we are not aware. The testimony of Eusebius of Caesarea on this point is considered by many, including A. DI BERARDINO, *La cristianizzazione del tempo nei secoli IV-V: la domenica*, cit., p. 110 ss.; J. RÜPKE, *The Roman Calendar*, cit., p. 165; U. AGNATI, *Constantine's Statutes on Sunday Rest*, cit., p. 8. See also the observations of K. M. GIRARDET, *L'invention du dimanche: du jour du soleil au dimanche*, cit., p. 349 ss., according to which the words of Eusebius (with general indications without stopping to look at any concrete circumstances or exceptions) confirm the existence of a general rule of rest on the *dies solis* (to be interpreted in the Christian sense) prior to 321, presumably straight after the conversion of Constantine. CTh. 2,18,2 and C. 3,12,2 according to the scholar are some exceptions to a previously established rule. In the same regard see R. SORACI, *Dies solis e dies Domini. Dai riti mistagogici al culto cristiano*, in V. AIELLO, L. DI SALVO (ed.), *Salvatore Calderone (1915-2000). La personalità scientifica*, Messina, 2010, p. 242 s.



Lord.<sup>35</sup> Again, the author reminds us that the emperor ordered all citizens of the empire to rest on the days of the Savior, and people were also required to respect Saturdays. The writer specifies that this probably happened to remember the actions which according to tradition were performed by the Savior.<sup>36</sup> Finally, he stated that the provincial governors were obliged to observe the day of the Lord; the emperor also required them to honor the festivities of the martyrs and to celebrate the feasts of the Church: all this according to Constantine's wishes.<sup>37</sup>

The words of the bishop of Caesarea describe Constantine's interventions as being undoubtedly connected to the Christian cult, focused on respecting Sunday as the day devoted to prayer.<sup>38</sup> In the perspective adopted by Eusebius the strong link between Constantine and Christianity emerges, without any doubt; it is also significant that in Eusebius, *Vita Constantini*, IV,XVIII,2 a "parallel" intervention is remembered in relation to respecting Saturday, most likely addressed to Jews.<sup>39</sup>

Scholars who sustain the connection of C. 3,12,2 and CTh. 2,8,1 with the cult of the sun do not consider the words of Eusebius to be reliable, believing that he must have been motivated by apologetic reasons.<sup>40</sup>

Eusebius of Caesarea was not alone in underlining the connection between Constantinian legislation and the Christian cult. The testimony of Sozomen of Gaza also suggests the same, stating that Constantine established the obligation to observe the day of the Lord.<sup>41</sup> He underlines that the function of Constantinian legislation<sup>42</sup> is to respect Sunday as a day devoted to the Lord, through the prohibition to perform judicial and contractual acts: Sunday must instead be used for prayer, therefore believers are exonerated from any activities that could hinder the spirituality of the day in any way.

<sup>35</sup> Eusebius, *Vita Constantini*, IV, XVIII, 1.

<sup>36</sup> *Id.*, 2.

<sup>37</sup> *Id.* On this see K. L. NOETHLICH, *Revolution from the Top?*, cit., p. 117.

<sup>38</sup> A. DI BERARDINO, *La cristianizzazione del tempo nei secoli IV–V: la domenica*, cit., p. 111, notes also that in Eusebius, *Vita Constantini* IV, XVIII–XIX the writer also talks about the need to celebrate the *dies solis* by the army. See also Eusebius, *Laudes Constantini* IX,10, where the writer reminds us again that Constantine established that a day must be devoted to prayer: again here it talks about the first day of the week, the day of the Lord and the Savior.

<sup>39</sup> It is very likely that the measures relating to Saturday issued by Constantine, and interpreted by Eusebius in the Christian sense, allowed Jews to abstain from work on Saturdays. On these aspects see S. G. HALL, *Some Constantinian Documents in the Vita Constantini*, in S. N. C. LIEU, D. MONSERRAT (eds.), *Constantine*, London, 1998, p. 101 ss. On the problem, see also U. AGNATI, *Constantine's Statutes on Sunday Rest*, cit., p. 18 ss. The point made by Eusebius is also confirmed by CTh. 16,8,20, Honorius's and Theodosius's constitution issued in 412 in which the emperors, within the context of a series of provisions in favor of Jews, confirm respect for Saturdays referring to various previous imperial constitutions which, unfortunately, have not been kept.

<sup>40</sup> A critical stance on the interpretation of the bishop of Caesarea is shown, for example, by M. WALLRAFF, *Constantine's Devotion to the Sun after 324*, cit., p. 260, who considers the testimony to be unreliable and repropose the idea that Constantine's constitutions referred to the cult of the sun. See also E. MORENO RESANO, *El dies Solis en la legislación constantiniana*, cit., p. 304.

<sup>41</sup> Soz. *Hist. Eccl.* I,8, II.

<sup>42</sup> J. GOTHOFREDUS, *Codex Theodosianus*, I, cit., p. 137, relates Sozomen's passage with CTh. 2,8,1.

Sozomen also offered an opening on the reason why Constantine dictated such rules, suggesting that Sunday was the day on which Christ rose again, hence beating death.<sup>43</sup> It was therefore a “Paschal” day of the week and, as such, was to be celebrated.<sup>44</sup>

In short, these testimonies show that beyond what should have been the original meaning of Constantine’s measures, C. 3,12,3 and CTh. 2,8,1 (or similar measures) were immediately linked to Christianity and therefore perceived as a way of enhancing Christian worship.<sup>45</sup>

Returning now to the contents of the two Constantinian laws, they establish abstention from all judicial and contractual activities, with the exception of emancipations and manumissions. Again, as has been seen in C. 3,12,2 the emperor asked for the work of the inhabitants of the cities to stop, while those living in the countryside could continue their activities if necessary.<sup>46</sup>

There has been some discussion as to the meaning of this exception. According to scholars who consider the law to be connected to the Christian cult, it was a prudent stance by the emperor, who did not want to impose a law inspired by Christianity on the inhabitants of the countryside who were connected to paganism.<sup>47</sup>

As for judicial activities, specifically of interest to us, the words of the emperor point towards the suspension on Sundays of all proceedings. This is the starting point to be considered for looking now, in greater depth, at the problem connected with the relationship between Christian feasts and administration of justice.

### III CHRISTIAN SUNDAY FROM VALENTINIAN II TO LEO

The suspension of judicial and contractual activities on Sunday is found in 386, in a western constitution by Valentinian II. For those who already see a link to Christianity in the Constantinian constitutions, this text surpasses all related ambiguities, presenting a definitively Christian connotation of the *dies Solis* and

<sup>43</sup> There are mentions of Sozomen’s testimony in A. DI BERARDINO, *La cristianizzazione del tempo nei secoli IV e V: la domenica*, cit., p. 111; *Id.*, *Tempo sociale e pagano*, cit., p. 103.

<sup>44</sup> See also John 20,19 and Justin Martyr in the *Prima Apologia* (LXVII, 8).

<sup>45</sup> See E. MORENO RESANO, *El dies Solis en la legislación constantiniana*, cit., p. 304. It is to be remembered that from the point of view of the councils, it was necessary to wait for the Council of Laodicea (the date of which is uncertain, but presumably in the second half of the fourth century) which establishes that believers were to honour Sundays by abstaining from work. On this point see M. BIANCHINI, *Cadenze liturgiche e calendario civile*, cit., p. 237, with note 8.

<sup>46</sup> As for the problem of contractual activities which should have been banned, E. MORENO RESANO, *El dies solis en la legislación constantiniana*, cit., p. 296, considers that all commercial activities in urban centers were prohibited, whereas it was still possible to perform small activities in rural centers, also in light of CIL. III, 4121, an inscription that commemorates the institution, by the emperor Constantine, of a market (*nundinae*) to be held on the *dies Solis* at the bath complex of *Aquae Iasae*. According to scholars, the inscription dated back to shortly before the legislation passed in 321.

<sup>47</sup> On this issue, see the thoughts put forward by U. AGNATI, *Costantino e la scansione cristiana del tempo*, cit., p. 27 s., who goes over the ancient debate testified by Serv. Dan. *ad Verg. Georg. I*, 268. A different approach can be found in J. RÜPKE, *The Roman Calendar from Numa to Constantine*, cit., p. 166.

contributing to the idea that Sunday is the day of the Lord.<sup>48</sup> On the other hand, according to those who believe Constantine was still connected to the cult of the sun, it is the first intervention envisaging the suspension of judicial and contractual activities on the Christian Sunday.<sup>49</sup>

The constitution was issued in Aquileia by Valentinian II, probably under the deep influence of his mother, Justina.<sup>50</sup>

It is CTh. 2,8,18, from the title *De feriis*, also reported by the compilers of the *Codex Theodosianus* in CTh. 8,8,3 and CTh. 11,7,13.<sup>51</sup>

CTh. 2,8,18. Imppp. Gratianus, Valentinianus et Theodosius AAA. ad Principium Praefectum praetorio. Solis die, quem dominicum rite dixere maiores, omnium omnino litium, negotiorum, conventionum quiescat intentio; debitum publicum privatumque nullus efflagitet; nec apud ipsos quidem arbitros vel iudiciis flagitatos vel sponte delectos ulla sit agnitio iurgiorum. et non modo notabilis, verum etiam sacrilegus iudicetur, qui a sanctae religionis instinctu rituve deflexerit. Proposita III non nov. Aquileiae, accepta viii k. dec. Romae Honorio n.p. et Evodio cons. (a. 386).<sup>52</sup>

If we accept the theory according to which Constantine had already imposed respect for the Christian Sunday, the text is undoubtedly placed in a continuous line with those provisions, more clearly defining the connection with Christian thought and outlining the conception of the feast in the Christian sense. Significantly, the expression *dies Solis* is specified here through the words . . . *quem dominicum rite dixere maiores* . . .<sup>53</sup>

<sup>48</sup> As mentioned in the preamble, a further series of constitutions contains the provision of prohibiting the organization of all kinds of spectacles, which could interfere with the meaning of the religious feast. See, for example, CTh. 2,8,20 and CTh. 15,5,2. On these aspects of late imperial legislation, see abundantly E. FRANCIOSI, *Dies festos nullis volumus voluptatibus occupari*, cit., p. 56 ss.; M. R. SALZMAN, *On Roman Time*, cit., p. 239 stresses that pagan festivals and holidays nevertheless continued to be celebrated.

<sup>49</sup> For the different positions, see, among many, M. BIANCHINI, *Cadenze liturgiche e calendario civile*, cit., p. 248 and note 38; A. S. SCARCELLA, *La legislazione di Leone I*, cit., p. 331, note 35; E. FRANCIOSI, *Dies festos nullis volumus voluptatibus occupari*, cit., p. 56 ss.

<sup>50</sup> J. GOTHOFREDUS, *Codex Theodosianus cum perpetuis commentariis*, II, Lipsiae, 1737, p. 618.

<sup>51</sup> Some extracts of this constitution can also be found in the title *De feriis* of the *Codex Iustinianus*, in C. 3,12,6, together with passages from another text, CTh. 2,8,19.

<sup>52</sup> "CTh. 2,8,18. Emperors Gratian, Valentinian, and Theodosius Augustuses to Principius, Praetorian Praefect. On the Day of the Sun, which our ancestors rightly called the Lord's Day, the prosecution of all litigation, court business, and suits, shall be entirely suspended. No person shall demand the payment of a public or a private debt, nor shall there be any cognizance of controversies before arbitrators, whether they have been requested in court or chosen voluntarily. 1. That person shall be adjudged not only infamous but also sacrilegious who turns aside from the inspiration and ritual of holy religion. Posted on the third day before the nones of November at Aquileia: November 3. Received on the eighth day before the kalends of December at Rome in the year of the consulship of Emperor Designate Honorius and of Evodius-November 24, 386." (English translation in C. PHARR, *The Theodosian Code*, cit., p. 44).

<sup>53</sup> A. DI BERARDINO, *Tempo sociale pagano e cristiano*, cit., p. 103 underlines that the expression *dies solis* is maintained here, specified through the words *quem dominicum rite dixere maiores*, hence understandable both for pagans and Christians.

Again, another common thread connects CTh. 2,8,18 with a previous law of Valentinian I, which established that on the *dies Solis* Christians could not be subjected to tax collection,<sup>54</sup> whereas in a later one, CTh. 2,8,19 issued in 389, Sunday, still known by the expression *dies Solis*, was listed among the feast days.<sup>55</sup> Here Theodosius states that “all days shall be court days” enumerating exceptions, among which *dies solis* and holy Paschal days, with the seven preceding and following days.<sup>56</sup>

Coming to an in-depth analysis of the contents of the constitution, Valentinian II requires that on the *dies Solis/dominicus* all proceedings and contractual activities be suspended, including acts before arbitrators.

All this is confirmed further in the *Interpretatio* that accompanies the text (CTh. 8,8,3) in the *Breviarium Alaricianum*:

Int. ad CTh. 8,8,3. Die Solis, qui Dominicus merito dicitur, omnium hominum actio conquiescat, ut nec publicum nec privatum debitum requiratur, nulla iudicia neque publica neque privata fiant. Quod qui non observaverit, reus sacrilegii teneatur.<sup>57</sup>

The interpreter grasps the extent of the prohibition ratified by the emperor, which covers all *iudicia*, *privata* or *publica*.

As underlined in the commentary of J. Gothofredus (on CTh. 8,8,3), the measure therefore has a very extensive scope of application.

*Ratione causarum*, since according to the constitution, all types of proceedings must be suspended. *Ratione personarum*, because no-one, on the day of the Lord, can be involved in judicial proceedings: the provision also relates to non-Christians. *Ratione iudicum*, given that proceedings in front of judges are stopped but also those run by arbitrators, whether such arbitrators are called upon by judges or magistrates, or spontaneously chosen by the parties.<sup>58</sup>

<sup>54</sup> CTh. 8,8,1. Regarding this constitution, following the comment of Gothofredus (J. GOTHOFREDUS, *Codex Theodosianus*, II, cit., p. 615 s.), a “sectorial” provision is to be highlighted, in the sense that the constitution only regards tax collection. An extremely significant aspect lies in the fact that here the emperor is still talking about the *dies Solis* defining it as *qui dudum faustus habetur*, hence showing the awareness of a previous discipline governing the theme of Sunday. Gothofredus also notes that the constitution only related to Christians.

<sup>55</sup> On these texts see A. DI BERARDINO, *Tempo sociale pagano e cristiano*, cit., p. 104 and recently F. GRAF, *Roman Festivals in the Greek East*, cit., p. 105 ss. Some parts of CTh. 2,18,8, of CTh. 2,8,19 and of CTh. 15,5,5 converge in C. 3,12,6.

<sup>56</sup> On CTh. 2,8,19 see M. R. SALZMAN, *On Roman Time*, cit., p. 236; F. GRAF, *Roman Festivals in the Greek East*, cit., especially p. 114 ss.

<sup>57</sup> Interpretation: “On the Day of the Sun (Sunday), which is deservedly called the Lord’s Day, lawsuits of all men shall cease, so that non-payment of either a private or public debt shall be exacted. There shall be no trials, either public or private. If any person should not observe this regulation, he shall be held guilty of sacrilege” (English translation in C. PHARR, *The Theodosian Code*, cit., p. 209).

<sup>58</sup> J. GOTHOFREDUS, *Codex Theodosianus*, II, cit., p. 617.

On this aspect, the connection has been noted with what was already provided for in the late classic period in a passage by the jurist Ulpian, who talked about the inefficacy of the *sententia arbitris* issued on feast days.<sup>59</sup>

Again, it is to be pointed out that in 469 the emperors Leo and Anthemius, with a constitution that we know through the *Codex Iustinianus*, C. 3,12,9 (11), and about which we will talk shortly,<sup>60</sup> underlining the prohibition of judicial activities on Sundays, allowed litigants to conclude agreements and transactions which, again according to J. Gothofredus, could be favored by recourse to arbitrators.<sup>61</sup>

An aspect that appears particularly significant to us comes from the grave consequences envisaged in the event of violating the rules dictated in the constitution. Anyone who did not respect these rules, infringing the Sunday rest (*qui a sanctae religionis instinctu rituve deflexerit*) was to be considered not only infamous (*notabilis*) but also sacrilegious (*sacrilegus*).

Hence, in the case in question, *crimen sacrilegii* is applicable, as on the other hand also clarified by the *Interpretatio*:<sup>62</sup> this is an important reinforcement of the discipline.<sup>63</sup> The emperors used Sunday as a day for suspending judicial proceedings and contractual activities for a decisive thrust towards the spread of the Christian religion and to do so the instrument of criminal sanctions was also necessary.

As mentioned above, there is another important text, by the emperors Leo and Anthemius, C. 3,12,9(11), focusing on respect for Sundays, as well as other Christian feasts, which returns, among other issues, to the suspension of judicial activities.<sup>64</sup>

<sup>59</sup> D. 4,8,36 (Ulp. libr. 77 ad ed.). See K. H. ZIEGLER, *Das private Schiedsgericht im antiken römische Recht*, Munich, 1971, p. 187.

<sup>60</sup> See *infra*, in this paragraph.

<sup>61</sup> J. GOTHOFREDUS, *Codex Theodosianus*, II, cit., p. 617.

<sup>62</sup> The stance of A. S. SCARCELLA, *La legislazione di Leone I*, cit., p. 329 does not appear to be convincing, according to which in the constitution in question, only moral reprobation was to be expressed against anyone violating the provisions relating to Sundays. Observations on the term *sacrilegus* in the constitution can be found in R. BRATOŽ, *Aquileia tra Teodosio e i Longobardi*, in G. CUSCITO (ed.), *Aquileia dalle origini alla costituzione del ducato longobardo*, Trieste, 2003, p. 483. On *crimen sacrilegii* in late antiquity, see in general O. ROBINSON, *Blasphemy and Sacrilege in Roman Law*, in *The Irish Jurist*, 8, 1973, especially p. 364 ss.; *Id.*, *The Criminal Law of Ancient Rome*, London, 1995, p. 84; B. SANTALUCIA, *Diritto e processo penale nell'antica Roma*, Milan, 1998, p. 290: in late antiquity it was conceived as a crime against Christian religion. Again, offenses against priests and places of worship are also included in this area, as is failure to comply with the legislative and administrative provisions of the emperor. In CTh. 16,5,25 and CTh. 16,5,8 the *sacrilegium* is referred to with reference to heretics: see C. HUMFRESS, *Orthodoxy and the Courts in Late Antiquity*, Oxford, 2007, p. 236.

<sup>63</sup> In CTh. 8,8,2 in relation to the prohibition to collect taxes from Christians, a sanction is envisaged. In fact, general reference is made to *periculum*.

<sup>64</sup> It is also necessary to remember that in C. 3,12 *De feriis* there is a text, C. 3,12,6(7) which merges passages of CTh. 15,5,5 (constitution of Theodosius II dated 425) with CTh. 2,8,18 and CTh. 2,8,19; there is also a reference here to the need to observe Sundays, indicated by the expression *dies Solis*: C. 3,12,6(7), 4-5.

The constitution, which dates back to 469, was placed by Justinian's compilers in C. 3,12 *De feriis*, a title which shows the by then established link between the Christian festivities and the civil calendar.<sup>65</sup>

C. 3,12,9(11). Imp. Leo et Anthemius AA. Armasio pp. Dies festos, dies maiestati altissimae dedicatos nullis volumus voluptatibus occupari nec ullis exactionum vexationibus profanari. 1. Dominicum itaque diem semper honorabilem ita decernimus venerandum, ut a cunctis executionibus excusetur, nulla quemquam urgeat admonitio, nulla fideiussionis flagitetur exactio, taceat apparitio, advocatio delitescat, sit idem dies a cognitionibus alienus, praeconis horrida vox silescat, respirent a controversiis litigantes, habeant foederis intervallum, ad se veniant adversarii non timentes, subeat animos vicaria paenitudo, pacta conferant, transactiones loquantur. 2. Nec tamen haec religiosi diei otia relaxantes obscaenis quemquam patimur voluptatibus detineri. nihil eodem die sibi vindicet scaena theatralis aut circense certamen aut ferarum lacrimosa spectacula: etiam si in nostrum ortum aut natalem celebranda sollemnitas inciderit, differatur. 3. Amissionem militiae, proscriptionem patrimonii sustinebit, si quis umquam hoc die festo spectaculis interesse vel cuiuscumque iudicis apparitor praetextu negotii publici seu privati haec quae hac lege statuta sunt crediderit temeranda. D. v id. Dec. Constantinopoli Zenone et Marciano cons. (a. 469).<sup>66</sup>

With the constitution in question, provision is therefore made for all the Christian feasts. It is very significant that the names of each feast are not listed: reference is hence only made to "festal days, the days dedicated to the Highest Majesty." This is probably a sign of the then established awareness of the people of the meaning of Christian feasts and the religious duties resulting therefrom.<sup>67</sup>

Respect for such feasts implies abstention from civil activities and from amusements, *voluptates*. With particular regard to the *dies dominicus*, Leo and Anthemius provide for it being dedicated to rest and prayer, therefore a series of activities,

<sup>65</sup> In that regard, E. FRANCIOSI, *Dies festos nullis volumus voluptatibus occupari*, cit., p. 63 s.

<sup>66</sup> "C. 3,12,9(11). Emperors Leo et Anthemius to Armasius, Praetorian Prefect. We do not want the festal days, the days dedicated to the Highest Majesty, to be taken up with pleasures or profaned by vexatious demands. 1. We decree therefore that the Holy Lord's Day shall always be honored and venerated and excused from all executions of judgments. No summons shall disturb anyone; no exaction for providing surety shall be made; the clerks of the court shall be silent; let advocates retire from court; trials shall not be held on that day; the harsh voice of the auctioneer shall not be heard; litigants shall relax from controversies and have respite from their contracts; let adversaries come together without fear, let reciprocal penitence enter their minds; let pacts be made and settlements speak loudly. 2. But despite allowing this leisureliness on a day dedicated to God, We permit no one to give himself over to unseemly pleasures. The day shall not be open for the theater, the competition of the circus, or the tearful spectacle of wild beasts. If Our birthday or the day when We came to the throne should fall on Sunday, its celebration shall be deferred. 3. If anyone ever attends spectacles on that festal day, or if any clerk of a judge should believe that he can rashly violate the provisions of this law under the pretext of public or private business, he shall suffer the loss of his office and confiscation of his property. Given December 9, at Constantinople, in the consulship of Zeno and Marcianus (469)." (English translation in B. W. FRIER *et al.* (eds.), *The Codex of Justinian*, I, cit., p. 645 s.).

<sup>67</sup> The consideration is, again, by E. FRANCIOSI, *Dies festos nullis volumus voluptatibus occupari*, cit., p. 66.

meticulously listed in the constitution, were to be suspended: exactions, *admonitio*, which was an introductory act of trials, *advocatio*, that is, the activities of lawyers; and all trials (*cognitiones*) were suspended<sup>68</sup>.

With reference to vivid images that communicate the harshness of the procedural activities, the emperor provided for the *horrida vox* of the town crier (*praeco*) to be quiet and for litigants to take a break from the disputes in which they were involved (*respirent a controversiis litigantes*), so that a truce could be created between them.

The only activity still possible was that leading to the conclusion of agreements and transactions, clearly perceived as being compatible with the festivity considering their nature as instruments for pacification.

It was mentioned above that in CTh. 2,8,18 the prohibition of judicial activities on the *dies Solis* also related to arbitrators, both appointed by a judge and by the litigants themselves and that passage of the constitution is also referred to in the Justinian code, in C. 3,12,6.

J. Gothofredus noted a different stance in CTh. 2,8,18 with respect to Leo's subsequent law.<sup>69</sup> Can a contrast between the two provisions be effectively recognized? We do not think so: while the constitution of 386 intended to stop the judicial activities of arbitrators, Leo and Anthemius probably referred to out-of-court activities for concluding agreements and transactions.

Alongside these prescriptions, it was also prohibited to hold spectacles. Within the context of a path already marked out previously, the emperors provided that on religious days, to be dedicated to prayer and contemplation, no theatrical performances or circus events or spectacles involving beasts could be held, not even to celebrate the birthday or accession to the throne of the emperor.

The spectacles are here specified with the word *voluptates*, amusements, as in previous laws collected in the Theodosian Code. Describing *ludi* as *voluptates*, the Christian emperors tried to disassociate the spectacles themselves from the pagan holidays to which they were originally connected, indicating them as cultural events, without a religious meaning.<sup>70</sup>

In the final part of the constitution, some sanctions were provided for against anyone violating the various prohibitions. *Amissio militiae* and *proscriptio patrimonii* are mentioned, that is, loss of public office and confiscation of assets, to be applied both to anyone taking part in spectacles on days dedicated to festivities, and to the

<sup>68</sup> For the analysis of Leo's text see A. S. SCARCELLA, *La legislazione di Leone I*, cit., 328 ss.

<sup>69</sup> J. GOTHOFREDUS, *Codex Theodosianus*, II, cit., p. 617.

<sup>70</sup> Pagans continued to appreciate their religious meaning, while Christians had a different approach; starting from 392 the emperors legislated against these spectacles on Sundays and then on other Christian holidays (see CTh. 2,8,20; 2,8,21; 2,8,23; 2,8,24). On the problem M. R. SALZMAN, *On Roman Time*, cit., p. 237 ss. For the reconstruction of the imperial legislation, starting from 392 AD., which prohibits the performance of spectacles on Christian feasts, see also E. FRANCIOSI, *Dies festos nullis volumus voluptatibus occupari*, cit., p. 56 ss. It can perhaps be sustained that the prohibition of the celebration of *spectacula* was complementary to the suspension of judicial activities, and was used by the emperors, although in a gradual way, as a means of spreading Christianity within the context of a society that was still profoundly pagan.



clerk of any judge marring them with the excuse of public or private proceedings. With reference to the suspension of civil activities and proceedings, we have seen that negative consequences had already been envisaged, as the application of *crimen sacrilegii*.<sup>71</sup>

This constitution from certain viewpoints seems to conclude the *iter* undertaken by other emperors, perhaps by Constantine himself, an *iter* that aimed to push people to respect Christian feasts and, in particular, Sundays. It has been said that the emperor showed his desire to give a moral and religious imprint to judicial activities, not only by considering the *dies dominicus* as a solemn feast day, but also as a day of conciliation and penance. Hence there is undoubtedly an idea of the establishment of justice being profoundly influenced by what was by then the State religion.<sup>72</sup>

It should be pointed out, again, that the reiterated need for emperors to intervene to promote respect for Sundays probably indicates the great difficulty in ensuring compliance with such provisions.

#### IV SUNDAY, PRECAUTIONARY CUSTODY AND BISHOPS IN A CONSTITUTION BY HONORIUS

Sunday as a feast day is also taken into consideration in an important imperial constitution by Honorius, issued in Ravenna (409 AD). The text comes from the Theodosian title *De custodia reorum*, dedicated to precautionary custody in prison, applied both in civil and criminal suits.<sup>73</sup> Again here, the Christian feast is used by the emperor, in some way, as an instrument for controlling and managing some stages of the procedure, and as a mechanism for spreading Christian thought. The text is:

CTh. 9,3,7. Impp. Honorius et Theodosius AA. Caeciliano praefecto praetorio. Post alia: iudices omnibus dominicis diebus productos reos e custodia carcerali videant et interrogent, ne his humanitas clausis per corruptos carcerum custodes negetur. Victualem substantiam non habentibus faciant ministrari, libellis duobus aut tribus diurnis vel quot existimaverint, commentarienses decretis, quorum sumptibus proficiant alimoniae pauperum. Quos ad lavacrum sub fida custodia duci oportet,

<sup>71</sup> In CTh. 2,8,18 but that clearly did not apply according to Leo and Anthemius, and, then, from Justinian's perspective.

<sup>72</sup> On these aspects of the text, see the considerations of A. S. SCARCELLA, *La legislazione di Leone I*, cit., p. 332. Of certain interest there is also a canon of *Concilium Tarraconense* dated 516 (can. IV, Mansi, col. 541 s.), prohibiting the clergy from passing judgment on Sundays, which was actually allowed on other days, with the exclusion of criminal proceedings. It is striking that conciliar sources actually include provisions of this kind following compliance with imperial legislation. This canon is mentioned in C. VENTRELLA MANCINI, *Tempo divino e identità religiosa. Culto rappresentanza simboli dalle origini all'VIII secolo*, Turin, 2012, p. 188, note 63.

<sup>73</sup> The law is also reported in *Codex Iustinianus* (C. 1,4,9), in the title *De episcopali audientia*. On precautionary imprisonment, see, among others, M. BIANCHINI, *Cadenze liturgiche e calendario civile*, cit., p. 250; A. LOVATO, *Il carcere nel diritto penale romano dai Severi a Giustiniano*, Bari, 1994.



multa iudicibus viginti librarum auri et officiis eorum eiusdem ponderis constituta, ordinibus quoque trium librarum auri multa proposita, si saluberrime statuta contempserint. Nec deerit antistitum christianae religionis cura laudabilis, quae ad observationem constituti iudicis hanc ingerat monitionem. Dat. VIII. kal. febr. Ravennae, Honorio VIII. et Theodosius III. aa. cons. (a. 409).<sup>74</sup>

With this constitution, Honorius imposes some positive changes to the conditions of prisoners through the application of the observance of the *dies dominicus*.

In fact, the emperor orders that on Sundays judges must investigate the condition of prisoners, by meeting them and obtaining information from them. In particular, they were to check that the detainees were not subject to any treatments against *humanitas* and ensure that the *commentarienses*, appointed to manage the prisons and the custody of the detainees,<sup>75</sup> saw to providing sustenance for them and that the prisoners were taken to the baths under *custodia*.

If the judges or their *officia* did not enforce these provisions, they would be fined twenty pounds of gold (while the high-ranking members of the office staff three pounds of gold). Again, the emperor established that the bishops were to be involved, guaranteeing assistance and religious comfort for the detainees, also dealing with controlling the officials.<sup>76</sup>

The constitution marks an important step forwards in the discipline relating to precautionary imprisonment, a sector already affected by different imperial interventions (particularly, by constitutions that aimed to make the situation of the detainees less harsh, or to accelerate proceedings to make imprisonment as short as possible).<sup>77</sup>

<sup>74</sup> “CTh. 9,3,7. Emperors Honorius and Theodosius Augustuses to Caecilianus, Praetorian Prefect. (After other matters) On every Lord’s Day, judges shall inspect and question the accused persons who have been led forth from the confinement of a prison, lest human needs be denied these prisoners by corrupt prison guards. They shall cause food to be supplied to those prisoners who do not have it, since two or three libellae a day, or whatever the prison registrars estimate, are decreed, by the expenditure of which they shall provide sustenance for the poor. Prisoners must be conducted to the bath under trustworthy guard. Fines have been established, fixed at twenty pounds of gold for the judges and the same weight of gold for their office staffs, and for the high ranking members of the office staffs fines of three pounds of gold have been set, if they should scorn these very salutary statutes. For there shall not be lacking the laudable care of the bishops of the Christian religion which shall suggest this admonition for observance by the judge. Given on the eighth day before the kalends of February at Ravenna in the year of the eight consulship of Honorius Augustus and the third consulship of Theodosius Augustus – January 25, 409.” (English translation in C. PHARR, *The Theodosian Code*, cit., p. 229).

<sup>75</sup> On the *commentarienses*, recently, see L. MINIERI, *I commentarienses e la gestione del carcere in età tardoantica*, in *Teoria e storia del diritto privato*, IV, 2011, p. 1 ss.

<sup>76</sup> On the contents of the constitution, see in particular M. BIANCHINI, *Cadenze liturgiche e calendario civile*, cit., p. 251; A. DI BERARDINO, *La cristianizzazione del tempo nei secoli IV-V: la domenica*, cit., p. 105; A. LOVATO, *Il carcere nel diritto penale romano*, cit., p. 209 ss.; C. CORBO, *Paupertas. La legislazione tardoantica*, Napoli, 2007, p. 173 s.; L. MINIERI, *I commentarienses*, cit., p. 32.

<sup>77</sup> See, for example, CTh. 9,3,1 = C. 9,4,1, of Constantine and CTh. 9,3,6 of Theodosius I. On the constitutions referred to herein, see M. BIANCHINI, *Cadenze liturgiche e calendario civile*, cit., p. 250 as well as the observations of A. LOVATO, *Il carcere nel diritto penale romano*, cit., p. 197 ss.

The interesting aspect here for us lies in the close connection between the innovations introduced by Honorius and the festivity of Sunday. According to some scholars, the *dies dominicus* is used by the emperor for spreading the Christian message further, a message which must find practical application in an environment of pain and suffering as prison is, even though it has also been highlighted that Honorius had an “affected” attitude, which was not actually guided by a profound sense of justice.<sup>78</sup>

The final part of CTh. 9,3,7 is also significant, which provides for the involvement of bishops in the assistance to prisoners,<sup>79</sup> an involvement which on one hand can be seen as a sign of Christian charity and on the other could be interpreted as the necessary integration of a state organization that was inefficient in itself.<sup>80</sup>

From this point of view, it has to be stressed that Honorius himself issued other constitutions involving bishops in various frameworks of civil life; this could be seen as a sign of the decadence of the public system of the Western empire at that time.<sup>81</sup>

From this point of view, it may be interesting to remember that in the sixth century, within the *Concilium Aurelianense V* dated 549, rules are established that are very similar to those that can be read in Honorius’ constitution. In fact, *intuitu miserationis*, it is provided that anyone in prison must be visited by the archdeacon or by the manager of the church; in compliance with the divine precepts, with mercy, they should be assisted in their needs. Again, the bishop was to appoint a diligent and faithful person, who saw to finding the essential items for prisoners; the bishop himself was responsible for providing the necessary supplies, to be taken from the episcopal residence.<sup>82</sup> It seems worthy of attention that in conciliar sources, rules of this type are testified for the sixth century. From this point of view, on the other hand, the emperors appear in the front line, anticipating models that were to be imposed subsequently in the conciliar canons<sup>83</sup>.

<sup>78</sup> Some evaluations on this can be found in M. BIANCHINI, *Cadenze liturgiche e calendario civile*, cit., p. 251 s.

<sup>79</sup> See also *Sim.* 13, the further constitution of Honorius dated 419, through which the emperor agreed that bishops could enter the prisons.

<sup>80</sup> See also M. BIANCHINI, *Cadenze liturgiche e calendario civile*, cit., p. 254, which reminds us that the *lex* shows the gradual growth of the power of bishops in the cities and states that the requirement of the presence of bishops here cannot easily be related to Justinian’s provisions of 529 contained in C. 9,4,6, where the presence of bishops in prisons is separated from the *dies dominicus*.

<sup>81</sup> For a list of the imperial provisions that led to the progressive involvement of bishops in civil issues see J. GOTHOFREDUS, *Codex Theodosianus cum perpetuis commentariis*, III, Lipsiae, 1738, p. 45; Gothofredus describes Honorius’ laws as interventions against the cruelty of the times. On these problems, see M. BIANCHINI, *Cadenze liturgiche e calendario civile*, cit., p. 252 ss.

<sup>82</sup> *Concilium Aurelianense V*, a. 549, can. XX, in Mansi, IX, col. 134.

<sup>83</sup> The affinity between can. XX of the *Concilium Aurelianense* and CTh. 9,3,7 is underlined by J. GOTHOFREDUS, *Codex Theodosianus*, III, cit., p. 46. On the relationship between the constitution of Honorius and the canon, see also C. VENTRELLA MANCINI, *Tempo divino e identità religiosa*, cit., p. 188.

## V PASCHAL PERIOD AND CRIMINAL TRIALS: TWO CONSTITUTIONS BY THEODOSIUS I

Among the imperial interventions relating to Christian feasts subsequent to the Edict of Thessalonica significant for judicial activities in general, various constitutions placed between 380 and 408 are reported. With these measures, through similar mechanisms to that seen in relation to the Sunday feast, the emperors govern the Paschal period in a “special” way.

On this point it is useful to remember, as already mentioned in the second paragraph, that the Christian Easter was originally celebrated in relation to the Jewish one, and that Constantine was the first emperor to treat this festivity *ex professo*. During the Council of Nicaea in 325 a single date was determined for all the Christian communities, to be celebrated on a Sunday.<sup>84</sup>

Over the course of the fourth century, the Christian Easter and the pre-Paschal period developed greatly from a liturgical and organizational point of view, also thanks to the legislative interventions of the Christian emperors.<sup>85</sup> Think, just by way of example, about the important laws on Paschal *indulgentia*, obviously inspired by the dimension of forgiveness which cannot be dealt with here.<sup>86</sup>

We will approach these constitutions in chronological order, examining interventions relating to torture and criminal proceedings.<sup>87</sup>

<sup>84</sup> On these aspects, as well as the authors referred to in Section II, see also A. DI BERARDINO, *Christian Liturgical Time and Torture*, cit., p. 191 ss., with literature cited in note 26. The testimony of Athan. *Ep. ad Afros episcopos* 2, PG 26, c. 1032 is significant. See C. VENTRELLA MANGINI, *Costantino e il dissenso: i concili e la sua visione sociale*, in *Rivista di Diritto romano*, XIII, 2013, p. 7.

For an overview of the history of Easter, Lent and the Holy week, see P. F. BRADSHAW, M. E. JOHNSON, *The Origins of Feasts, Fasts and Seasons in Early Christianity*, cit., p. 39 ss.

<sup>85</sup> See the observations of A. DI BERARDINO, *Christian Liturgical Time and Torture*, cit., p. 195 ss. The scholar remembers the recognition of a period of preparation for Easter that was progressively longer and a subsequent period. On Lent see also M. BIANCHINI, *Cadenze liturgiche e calendario civile*, cit., p. 239, note 18.

<sup>86</sup> See M. BIANCHINI, *Cadenze liturgiche e calendario civile*, cit., p. 240, note 19, according to which granting amnesty for Easter could not be placed on the same plane as the constitutions that provided for the adaptation of the time scales of the judicial administration to Christian feasts. In fact, similar measures had already been issued to mark certain events or occasions. On the theme of Paschal amnesty, for example, G. BASSANELLI SOMMARIVA, *Il giudicato penale e la sua esecuzione*, in *Atti dell'Accademia Romanistica Costantiniana. XI Convegno internazionale*, Naples, 1996, p. 57; A. DI BERARDINO, *Cristianizzazione del tempo civico*, cit., p. 191 ss.

<sup>87</sup> The Easter period, defined by the words *diebus quindecim paschalibus* (for which see C. 3,12,6(7)) is also taken into consideration in CTh. 2,8,21 of Theodosius, dated 392. These days were also used by the emperor to affect judicial and contractual activities, which seem to undergo a complete suspension: CTh. 2,8,21. Imppp. Valentinianus Theodosius et Arcadius Tatiano PP. *Actus omnes seu publici seu privati diebus quindecim paschalibus sequestrentur*. Dat. VI. K. iun. Constantinopoli Arcadio A. ii et Rufino cons. (a. 392). The version of the constitution accepted in *Codex Iustinianus*, C. 3,12,7(8) is also interesting: C. 3,12,7 (8). Imppp. Valentinianus Theodosius et Arcadius AAA. Tatiano pp. *Actus omnes seu publici seu privati diebus quindecim paschalibus conquiescant. in his tamen emancipandi et manumittendi cuncti licentiam habeant, et super his acta non prohibeantur*. Dat. VI. K. iun. Constantinopoli Arcadio A. ii et Rufino cons. (a. 392).

The first constitution, CTh. 9,35,4, was issued by Theodosius just a month after the Edict of 380, when the emperor was still in Thessalonica, and it was accepted in CTh. 9,35 *De quaestionibus*. It was also included in *Codex Iustinianus*, under the title C. 3,12 *De feriis* (C. 3,12,5):

CTh. 9,35,4. Imppp. Gratianus Valentinianus et Theodosius AAA. Albuciano vicario Macedoniae. Quadraginta diebus, qui auspicio cerimoniarum paschale tempus anticipant, omnis cognitio inhibeat criminalium quaestionum. Dat. VI. Kal. April. Thessalonicae, Gratiano A. V. et Theodosio A. I cons. (a. 380).<sup>88</sup>

The constitution establishes the important and noteworthy rule according to which all criminal proceedings were suspended during Lent.<sup>89</sup>

The text is not clear as the expression *cognitio criminalium quaestionum* is used here. The word *quaestio*, as we know, usually refers to torture, to the application of *tormenta*, which in the Roman criminal trial was used both in relation to defendants and to witnesses. In fact, the title 9,35 of *Codex Theodosianus*, *De quaestionibus* contains constitutions dedicated to various profiles connected with the discipline of such inquiry measure.<sup>90</sup> However, in Theodosius's provision, it appears to be used with a more general meaning, that is, related to all criminal proceedings.<sup>91</sup> For confirmation of this see, for example, *Interpretatio* of the constitution within the *Breviarium Alaricianum*:

Int. ad CTh. 9,35,4. Diebus quadragesimae, pro reverentia religionis, omnis criminaliter actio conquiescat.<sup>92</sup>

As can be noted, the correspondence with the text from the *Codex Theodosianus* is not perfect: Justinian's version of the constitution also reproduces part of the Constantinian CTh. 2,8,1 dedicated to the *dies Solis* (which, as we remember, was not referred to by the Justinian compilers). In particular, there is a point in which Constantine allowed emancipations and manumissions to be performed, actions that were considered compatible with the Christian feast. Hence, this derogation was used, within the Code of Justinian, with reference to the fifteen Paschal days, through combining two constitutions that originally referred to different feasts.

<sup>88</sup> "CTh. 9,35,4. Emperors Gratian, Valentinian, and Theodosius Augustuses to Albucianus, Vicar of Macedonia. During the forty days which anticipate the Paschal season by the auspicious beginning of ceremonies, all investigation of criminal cases through torture shall be prohibited. Given on the sixth day before the kalends of April at Thessalonica in the year of the fifth consulship of Gratian Augustus and the first consulship of Theodosius Augustus – March 27, 380." (English translation in C. PHARR, *The Theodosian Code*, cit., p. 251).

<sup>89</sup> On calculation of the forty days of Lent, see P. F. BRADSHAW, M. E. JOHNSON, *The Origins of Feasts, Fasts and Seasons in Early Christianity*, cit., p. 109 ss.

<sup>90</sup> For a general analysis of the contents of CTh. 9,35, see M. BIANCHINI, *Cadenze liturgiche e calendario civile*, cit., p. 238 ss.

<sup>91</sup> See J. GOTHOFREDUS, *Codex Theodosianus*, III, cit., p. 278 who underlines that the inclusion of the title *De quaestionibus* of the *Codex Theodosianus* in the constitution is the result of a misinterpretation by the compilers. Its placement in Justinian's code is more correct, in C. 3,12 *De feriis*. *Contra*, C. PHARR, *The Theodosian Code*, cit., p. 251: the author translates *omnis cognitio criminalium quaestionum* as "all investigation of criminal cases through torture" (see note 88).

<sup>92</sup> Interpretation: "During the days of Quadragesima, in reverence for religion, all criminal actions shall be in abeyance." (English translation in C. PHARR, *The Theodosian Code*, cit., p. 251).

The interpretation clarifies the idea that the constitution is directed towards the general suspension of criminal proceedings (it says *omnis criminaliter actio conquiescat*). Further, with respect to Theodosius's text, the *ratio* of the imperial intervention is also explained: *pro reverentia religionis*, in reverence for religion.

Therefore, the constitution aims to introduce a cause for the suspension of all activities relating to criminal proceedings, including the application of torture, during the period of Lent before Easter. Clearly, all this is related to the idea of forgiveness and rebirth connoting the Paschal period, which Theodosius decides to use as a way of governing and influencing the time scales of the criminal trial, providing for the suspension thereof.

As has been highlighted, the suspension of the criminal proceedings and torture during the period of Lent is established *intuitu temporis*, that is, considering the peculiarities and sacredness of the moment in time. Up to now, exemptions from the application of *tormenta* were envisaged, for example, *intuitu personae*, with regard to the *status* taken on by the party who was to be subjected to torture, and never in relation to the time in which the use of this measure of inquiry was used.<sup>93</sup>

The expression of "forty days" reflects the duration of Lent in the Illyricum and in Greece: it was a law issued concerning the Macedonian provinces.<sup>94</sup> By scholars who believe that through CTh. 2,8,1 and C. 3,12,2 Constantine continued to move in a pagan context, the innovative importance of Theodosius's constitution is underlined. It appears to be the first measure by a Christian emperor to envisage the interference between the liturgical festivities and the civil (judicial) calendar. It also appears to be the first testimony of the adaptation of the time scales of the judicial administration to the reality of Christianity.<sup>95</sup>

Some years later, the emperor Theodosius returned to the subject through a new constitution, in 389. The constitution is addressed to the praetorian prefect of the East,<sup>96</sup> while the previous one was applied in the Illyricum.<sup>97</sup> Therefore, we read CTh. 9,35,5:

CTh. 9,35,5. Imppp. Valentinianus Theodosius et Arcadius AAA. Tatiano P.P. Sacratissimas quadagesimae diebus nulla supplicia sint corporis, quibus absolutio expectatur animarum. Dat. VIII. Id. Septemb. Foro Flaminii, Timasio et Promoto cons. (a. 389).<sup>98</sup>

<sup>93</sup> See M. BIANCHINI, *Cadenze liturgiche e calendario civile*, cit., p. 240. In relation to the prohibition of torture for certain parties (e.g. the *honestiores*), see, among others, P. GARNSEY, *Social Status and Legal Privilege in the Roman Empire*, Oxford, 1970, p. 213 ss.

<sup>94</sup> A. DI BERARDINO, *Christian Liturgical Time and Torture*, cit., p. 202, stresses that it is not possible to know if it was applied also in the other provinces; for the year 380 probably it had not concrete application elsewhere.

<sup>95</sup> In that regard, see the reflections of M. BIANCHINI, *Cadenze liturgiche e calendario civile*, cit., p. 290.

<sup>96</sup> It was issued at the *Forum Flaminii*, a Roman municipality, after Theodosius' first visit to Rome. See A. DI BERARDINO, *Christian Liturgical Time and Torture*, cit., p. 215.

<sup>97</sup> On these issues see in particular J. GOTHOFREDUS, *Codex Theodosianus*, III, cit., p. 277, as well as the observations of M. BIANCHINI, *Cadenze liturgiche e calendario civile*, cit., p. 291.

<sup>98</sup> "CTh. 9,35,5. Emperors Valentinian, Theodosius, and Arcadius Augustuses to Tatianus, Praetorian Prefect. On the consecrated days of the *Quadagesima*, during which time the absolution of souls is awaited, there shall be no corporal punishment. Given on the eighth day before the ides of September

A very similar precept is established here to the one found in the previous measure, although more restricted; whereas CTh 9,35,4 provided for the suspension of all criminal proceedings, here the emperor's attention concentrates only on the *supplicia corporis*, hence exclusively on the application of torture, which is suspended during Lent. It therefore follows that on the basis of this law, in the East, there was no limitation of the criminal trial as a whole, rather only in relation to the use of *tormenta* against *rei* and witnesses.

From the comment dedicated by Gothofredus to the constitution clues also emerge that allow some hypotheses to be put forward on the events that led to its promulgation, although only in brief. In fact, Gothofredus also points out that in literary sources, particularly in the work of John Chrysostom,<sup>99</sup> a revolt is remembered that took place in Antiochia, in relation to which the criminal trial was held during Lent that year. The revolt, caused by the imposition of new taxes, led to the destruction of some statues of the emperor.

It appears that during the trial the judges made use of torture against witnesses in such a cruel way as to push the bishop Flavianus to appeal to the emperor to ask for his intervention, which would actually have led to the issue of the law of CTh. 9,35,5.<sup>100</sup>

The law, which refers in part to the contents of the previous one<sup>101</sup>, prohibits the use of *supplicia* during Lent with a very clear reason: it is a time reserved for *absolutio animarum*. During this period, bodies had to be left in peace: "Non sunt seculari iudicio corpora supplicio afficienda, quando a caelesti iudicio absolutio animarum expetitur."<sup>102</sup>

Lent is thus dedicated to penitence, reconciliation, conversion and admission of guilt: the constitution therefore reflects the evolution which over the course of the fourth century the conception of the Paschal period underwent.

The reciprocal forgiveness has become a fundamental aspect of this moment, and the Lenten preaching insisted a lot on the idea of Christian mercy. The idea under the law by Theodosius was probably the same inspiring legislation on amnesty: the celebration of Easter leads to the necessity of pardon for persons tormented by judicial investigation under torture and the fear of punishment.<sup>103</sup>

at Forum Flaminii in the year of the consulship of Timasius and Promotus – September 6, 389." (English translation in C. PHARR, *The Theodosian Code*, cit., p. 251).

<sup>99</sup> 99 *De statutis*, 13,137.

<sup>100</sup> In that regard, see J. GOTHOFREDUS, *Codex Theodosianus*, III, cit., p. 278. It is to be noted that according to M. BIANCHINI, *Cadenze liturgiche e calendario civile*, cit., p. 241, note 21, this hypothesis is not very likely. Since an insurrection of Antiochia was testified in 387 and the law of Theodosius being dated to two years later, it would mean that some defendants, two years after the events, were still in prison and on trial. All of this cannot be excluded considering the fact that precise time limits for precautionary custody had not been established, as far as we are aware, until Justinian's era. A different stance can be found in A. BERARDINO, *Christian Liturgical Time and Torture*, cit., p. 202 s.

<sup>101</sup> That, according to A. BERARDINO, *Christian Liturgical Time and Torture*, cit., p. 203, seemed not to be known by Libanius or Chrysostom writing on the facts of Antiochia.

<sup>102</sup> That is, when absolution of souls is required, there shall be no corporal punishments. See J. GOTHOFREDUS, *Codex Theodosianus*, III, cit., p. 278.

<sup>103</sup> See CTh. 9,38,4; observations in A. DI BERARDINO, *Christian Liturgical Time and Torture*, cit., p. 198.

Moreover, it cannot be excluded that through this constitution Theodosius intended to involve in some way the work of the priests in the penitential ministry, ensuring that confessions were obtained without the judges having to resort to the application of *tormenta*.<sup>104</sup> From this point of view, it is interesting to note that, according to John Chrysostom, during the trial after the insurrection in Antiochia, the judges themselves suffered for the torture, because they were forced to be instruments of an awful tragedy:<sup>105</sup> application of torture seems to be, first of all, a problem for the torturers.

The constitutions seen now, as mentioned, originally regarded the Illyricum and the Eastern prefecture.

However, it is quite possible that even in the Western part of the Empire there was legislation that aimed to prevent the application of torture during the Paschal period or connected with certain Christian feasts.

In *De obitu Valentiniani consolatio*<sup>106</sup> Ambrosius reconstructs the reaction of the emperor Valentinian in relation to a query from the praetorian prefect regarding a criminal trial: the response points towards excluding all types of cruelty during the days defined as *sancti*:<sup>107</sup> *respondit ut nihil cruentum sanctis praesertim diebus statureretur*.<sup>108</sup> It is not unlikely that the reference is to a prohibition to apply the inquiry measure of torture.

## VI THE CASE OF *LATRONES ISAURI*

It has therefore been seen that with reference to Lent, criminal proceedings and torture undergo an important suspension *intuitu temporis*, hence connected with the particular nature of the reference time. However, this does not prevent the emperors from intervening, also providing for important derogations, dictated by contingent reasons.

Still on the subject of the relationship between the Paschal period and criminal procedure, and in particular suspension of torture, there is in fact a constitution of Theodosius II that we must remember, since it introduces a significant exception to the prohibition expressed in the previous constitution. This is the text, dated 408:

CTh. 9,35,7. Imp. Honorius et Theodosius AA. ad Anthemium pp. Provinciarum iudices moneantur, ut in Isaurorum latronum quaestionibus nullum quadragesimae nec venerabilem pascharum diem existiment excipiendum, ne differatur sceleratorum proditio consiliorum, quae per latronum tormenta quaerenda est,

<sup>104</sup> On all this, see M. BIANCHINI, *Cadenze liturgiche e calendario civile*, cit., p. 242 s. The author actually excludes the constitution being only inspired by Christian mercy.

<sup>105</sup> *De status*, 13,137. A. DI BERARDINO, *Christian Liturgical Time and Torture*, cit., p. 198.

<sup>106</sup> On this work by Ambrosius, see in particular E. PERETTO, *Testo biblico e la sua applicazione nel De obitu Valentiniani di Ambrogio*, in *Vichiana. Rassegna di studi filologici e storici*, 18, 1989, p. 99 ss.

<sup>107</sup> See J. GOTHOFREDUS, *Codex Theodosianus*, III, cit., p. 278. A. DI BERARDINO, *Christian Liturgical Time and Torture*, cit., p. 216, points out that, to refer to the period of Lent, John Chrysostom uses the expression *sancta quadragesima* while Agostino talks about *sancti dies*.

<sup>108</sup> *De obitu Valentiniani consolatio*, 18.



cum facillime in hoc summi numinis speretur venia, per quod multorum salus et incolumitas procuratur. Dat. V kal. Mai. Constantinopoli Basso et Philippo cons. (408).<sup>109</sup>

The emperor admonishes the judges of the provinces who were not to suspend the application of torture against *latrones Isauri* during Lent and on Easter day. As we know, the Isaurians can be attributed with numerous raids and, in particular, they can be blamed for the depredation, between 404 and 408, of South and East Asia Minor, of the Diocese of the East and the island of Cyprus.<sup>110</sup>

It is therefore a constitution that contains emergency rules, clearly dictated to reinforce the instruments available to the *iudices* when it was time for them to try those responsible for such actions.

The explanation that the emperor provides on the need for such exceptional treatment is very significant: . . . *cum facillime in hoc summi numinis speretur venia, per quod multorum salus et incolumitas procuratur*. Theodosius II states that the application of torture on *latrones Isauri* is justified for reaching safety and welfare of many: and in view of this divine forgiveness can be easily obtained.

The words of the emperor combine requirements for justice and religious aspects perhaps even more clearly than what happens in the other constitutions examined up to now: the application of Christian time, previously also used for governing civil and legal activities (criminal trial, application of torture, etc.) finds a limit here depending on contingent requirements.

It is perhaps possible to make out a connection with what was established by Constantine in C.3,12,2: as will be remembered, by ratifying abstention from work on the *dies Solis*, Constantine had however allowed work in the fields, clearly for reasons of “public utility”;<sup>111</sup> Theodosius II, again to satisfy practical needs (in the case in question security and safety), established the possibility for the judges to resort to torture also on days considered as feasts.<sup>112</sup>

<sup>109</sup> “CTh. 9,35,7. Emperors Honorius and Theodosius Augustuses to Anthemius, Praetorian Prefect. The judges of the provinces shall be admonished that in the examination under torture of the Isaurian brigands, the betrayal of the wicked plans of the brigands shall not be deferred, although such betrayal must be sought through the torture of the brigands. They shall not suppose that any day of the Quadregesima or the holy day of Easter shall be excepted, since pardon of the Highest Divinity is very easily hoped for in regard to such action, by which the safety and welfare of many are obtained. Given on the fifth day before the kalends of May at Constantinople in the year of the consulship of Bassus and Philippus – April 27 (February 26), 408.” (English translation in C. PHARR, *The Theodosian Code*, cit., p. 251).

<sup>110</sup> On all of this see essentially E. STEIN, *Histoire du bas-empire*. 1.1. *De l'état romain à l'état byzantine*, Texte, Bruges, 1959, p. 238. There is reference to the various episodes that featured the Isaurians as protagonists in the thread of testimonies of Ammianus Marcellinus and Zosimus, in J. GOTHOFREDUS, *Codex Theodosianus*, III, cit., p. 280.

<sup>111</sup> On this problem in C. 3,12,2 see J. RÜPKE, *The Roman Calendar from Numa to Constantine*, cit., p. 166 ss.

<sup>112</sup> See J. GOTHOFREDUS, *Codex Theodosianus cum perpetuis commentariis*, III, cit., p. 280.



Within the context of the *Codex Iustinianus* derogation to the right of torture appears to be wider. In fact, by including the constitution in C. 3,12 *De feriis*, the compilers made a significant change to the text:

C. 3,12,8(10). Impp. Honorius et Theodosius AA. Anthemio pp. Provinciarum iudices moneantur, ut in quaestionibus latronum et maxime Isaurorum, nullum quadragesimae nec venerabilem pascharum diem existiment excipiendum, ne differatur sceleratorum proditio consiliorum, quae per latronum tormenta quaerenda est, cum facillime in hoc summi numinis speretur venia, per quod multorum salus et incolunitas procuratur. D. v. k. Mai. Constantinopoli Basso et Philippo cons. (a. 408).<sup>113</sup>

Justinian's version of the constitution says *in quaestionibus latronum et maxime Isaurorum*: this means that the judges were free to apply torture during Lent and on Easter day against all *latrones*, and not only against Isaurians.<sup>114</sup>

## VII CONCLUSION

The collection of constitutions examined herein has enabled us to reconstruct, although briefly, how the Christian emperors used some of the Christian feasts to influence the civil calendar, with special regard to the administration of justice.

It is an operation pursued particularly following the Edict of Thessalonica of 380 but that could possibly have its roots further back in time if we accept the idea that Constantine's constitutions on the *dies Solis* already had a Christian connotation, as many scholars believe.

These statutes are originally intended for different regions, issued to respond to particular, local needs. Think, for example, at CTh. 9,3,7 by Honorius. Involving the bishops on Sunday for the benefit of those in pre-trial detention in prison, the emperor dictated a measure justified by practical, contingent needs of integration of an inadequate public apparatus. Or to CTh. 9,35,5, of Theodosius I, who suspended torture during Lent probably following what happened after the revolt of Antiochia, when even the judges were horrified by the harshness of torture. Again for local needs, the same emperor re-enacts the torture during Lent, when the Isaurian thieves came into consideration.

In spite of the different motivations behind the various constitutions, it is possible to glimpse a common line gradually brought forward by the emperors: the occasion of the

<sup>113</sup> "Emperors Honorius and Theodosius Augusti to Anthemius, Praetorian Praefect. Let the judges of the provinces be warned not to think that they should omit any of the forty days of Easter or even the holy day of Easter itself in examining bandits (under torture) and especially the Isaurians, so that the disclosure of criminal conspiracies, which is to be sought through the torture of bandits, may not be deferred, since for this purpose, through which the safety and peace of many is secured, pardon from the Almighty is unquestionably hoped for. Given April 27, in the consulship of Bassus and Philippus at Constantinople (408)." (English translation in B. W. FRIER *et al.* (eds.), *The Codex of Justinian*, I, cit., p. 645 s.).

<sup>114</sup> On this aspect of the Justinian version of the constitution, see R. BONINI, *Ricerche di diritto giustiniano*, Milan, 1990, p. 120 and note 85.

Christian feasts is taken for the introduction of measures soothing brutal aspects of trials and administration of justice; also the pagans could benefit from these measures.<sup>115</sup>

Through imperial legislation, what we can define as “Christian time” became, at least with reference to certain sectors, the “time of law.”

The Roman emperors began articulating time based on the liturgical days, and the most important Christian feasts became reference points for handling judicial activities<sup>116</sup> and, more generally, for a new social organization.

Reference was made in the first paragraph to the fact that the emperors apply, in their constitutions on the times of the trial, a pattern that comes from the pagan world, where there was a distinction (unknown to Christianity) between *dies fasti* and *dies nefasti*. We remembered Jerome in the first paragraph, for whom every day, without distinction, is a feast, because the resurrection is celebrated every day.

From this point of view it is possible to state that the pagan culture, through law, had an important impact on Christianity. These imperial constitutions led to a significant outcome: exactly as happened in the Roman pagan world, the days of Christian feasts took on a particular connotation which made them different from the others. Sacred time therefore obtained a special connotation, a *qualitas* that it did not have before.

A quick examination of the language used by the emperors in the different measures clarifies this point. Think, for example, about one of the constitutions dedicated to Sunday (CTh. 2,8, 18) where the emperor states that who does not respect the Sunday is a *sacrilegus*, because he turns aside from the inspiration and ritual of holy religion. Again, in Leo’s constitution, Christian feast days are defined as *dies festi* and are connoted as special, since they are days dedicated to the Highest Majesty. In the measures on the suspension of torture during Lent, Theodosius I states that this period has a singular quality, being reserved for absolution of souls.

At the same time, the opposite assumption is also true: through imperial legislation, Christianity, with its liturgical feasts, has a strong impact on the Roman world.<sup>117</sup> Contractual and legal activity, precautionary imprisonment, the criminal trial, and torture are governed also considering the liturgical requirements of Christians.

This means that the importance of the feasts leaves the “private circle” of Christian communities and meets with the “public circle,” contributing to regulating times and social organization, with deep consequences (in a much wider perspective) on the Western world.<sup>118</sup>

A significant example of “law as religion” and “religion as law.”

<sup>115</sup> See A. DI BERARDINO, *Christian Liturgical Time and Torture*, cit., p. 220.

<sup>116</sup> M. BIANCHINI, *Cadenze liturgiche e calendario civile*, cit., p. 255 ss. Note how what is described appears to be a specular mechanism with respect to the one used by the Church which, starting from Constantine’s era, started to take on similar administrative structures to the imperial ones.

<sup>117</sup> In that regard, still in relation to CTh. 2,18,1 and C. 3,12,2, G. ANELLO, *The Rest and the West*, cit., p. 4.

<sup>118</sup> See *id.*, p. 4, with reference to Constantine’s legislation on the *dies Solis*.

