

CHRISTIAN LITURGICAL TIME AND TORTURE (*COD. THEOD.* 9,35,4 AND 5)

Christians slowly formed a calendar to organize their time of community prayer. Beginning with Constantine (*Cod. Iust.* 7,12,2 for Sunday; *Cod. Theod.* 2,8,1), this calendar was organized and imposed by the emperors on all the inhabitants of the empire. The imperial legislation evolved according to the evolution of the organization of Christian time, which gradually substituted pagan social, political and religious time. The celebration of Easter was better structured over the course of the fourth century with the pre-Paschal and the post-Paschal period. This *solemnitas Paschalis* (that is, the periods before and after Easter until Pentecost) was recognized by the Roman Emperors, who issued a series of laws to have them observed with all authority. In particular, they prohibited legal proceedings and, as a consequence, torture on account of the time (*ratione temporis*).

The celebration of Easter, at the beginning of the fourth century, for a long time had already acquired a central role, in the organization of Christian community life. Already, since the first Christian generation the day after the Jewish Sabbath had become the gathering time for prayer. It now acquired a new name: *kyriakos emera, dies dominicus* (Greek and Latin respectively: the Lord's Day). In their relations with the outside world, however, Christians used the usual expression understood by all, namely the *dies solis* (i.e., Day of the Sun). We do not know when Christians began to celebrate the Christian Easter as a day distinct from the Jewish Passover, which was already clearly understood by the mid-second century. In fact, there arose strong disagreements between the Roman tradition, which wanted to celebrate it on the *dies solis* (Day of the Sun), and the Asiatic tradition, which, instead, followed the Jewish tradition of the 14th day of the lunar year: the 14th day of the first month of the liturgical year, that is, Nisan. The rite took place during the night vigil between the 14th and 15th day of this month until the crowing of the rooster and was centered on the typology of the accounts and the book of *Exodus*, chapter 12 (the Paschal lamb). This prolonged

the practice of the Jewish-Christians of the first communities. For this reason, the feast could occur on any day of the week. Both traditions followed the Jewish method for calculating the date of Easter, which was based on the course of the moon and secondly on the course of the sun. In the meantime, the Sunday tradition acquired its own way for calculating by using the Spring equinox.

After the conflicts of the second half of the second century, although in disagreement in their respective uses, the churches remained in harmony. Constantine was the first Emperor to become interested in this Christian feast. In fact during the Council of Nicaea of 325, one of the three topics treated was precisely the question of Easter,¹ alongside that of Melitius and Arius. Athanasius wrote that the reasons for the convocation of the Council of Nicaea were twofold: the dating of Easter and the controversy with Arius.

« The council was gathered because of the Arian heresy and Easter, because the Christians of Syria, Cilicia and Mesopotamia were in disagreement with us and held the feast during the time in which it was celebrated by the Jews ».²

The importance of this question leads one to suspect that the Emperor was very interested in the day of the celebration, and put pressure on dissenting bishops because many “Eastern bishops”, though not approving, signed the canons of the Council. It was not easy to impose the new discipline on all the churches because not only was it necessary to change old customs and introduce a new understanding of time in relation to Easter, but also the theology and the preaching had to be reviewed and adapted to the new situation.³ The quattodeciman Easter recalled in a special way the passion of the Lord, his descent into hell and his victory. Although the resurrection of the Lord was especially celebrated on the *dies dominicus* (Lord’s day), which is the first and eighth day of the week,

¹ See A. Di Berardino, *L'imperatore Costantino e la celebrazione della Pasqua*, in *Costantino il Grande*, eds. G. Bonamente-F. Fusco, Macerata 1992, pp. 363-384; J. Janssens, *Il concilio di Nicea (325 d.C.) e la data della Pasqua*, in *Haec sacrosancta synodus: konzils- und kirchengeschichtliche Beiträge*, eds. R. Messner-R. Pranzl, Regensburg 2006, pp. 43-59.

² Athan., *ep. ad Afros episcopos* 2 (PG 26, c. 1032).

³ Cf. *Éphrem de Nisibe, Hymnes pascales*, ed. F. Cassingena-Trévedy, [SC 502], Paris 2006, pp. 15ss.

and was considered the “Easter week”. Now, with the new Easter celebration on Sunday, preaching had to allot more space to Christ’s resurrection, the theology of baptism and the forgiveness of sins granted to recently reconciled penitents.

The “Letter of Aithalla of Edessa”, a fourth-century text, portrays a bishop who writes to his community and mentions Constantine’s⁴ pressing request to have a unanimous agreement on the day of the Easter in relation to the Spring equinox, thus passing over the Jewish system of calculation.⁵ The text is important because it reflects the difficulty those churches experienced in adopting the new system. Recent research, through the study of the *Didascalia Apostolica* (3rd c.), the writings of Aphraates († 345?) and Ephrem († 373), has demonstrated that these sources followed the custom of the Quartodeciman Passover.⁶ Only after the Council of Nicaea, did Quartodecimans slowly adapt to the new discipline for the Sunday Easter. In fact, the *Apostolic Constitutions*, which are dated to around the year 380, demand the deposition of any cleric who celebrates Easter before Spring equinox, and who thus follows the Jewish practice (cf. *Const. apost.* 8,17: *Les constitutions apostoliques*, ed. M. Metzger, [SC 329], Paris 1986, pp. 266-267). Some Quartodeciman communities continued in subsequent decades; although, even they made distinctions among their own adherents.⁷ In fact, according to Epiphanius of Salamis, the Audians⁸ celebrated Easter on the same

⁴ Even at the Council of Arles (314), which was convoked by the Emperor Constantine, the council Fathers spoke of Easter; it is not certain if the Emperor was present. See A. Di Berardino, *L'imperatore...*, p. 365.

⁵ Cf. P.I. Thorossian, *Aithallae episcopi edesseni epistula ad christianos in Persarum regione de fide*, Venezia 1942; G. De Durand, *Un document sur le concile de Nicée*, in *RevSPhTh* 50(1966), pp. 615-527; P. Bruns, *Brief Aithallahas, des Bischof von Edessa (Urhai) an die Christen des Perserlandes über den Glauben, in Oriens Christianus* 77(1993) 122-138.

⁶ Cf. G.A.M. Rouwhorst, *Les hymnes pascales d'Ephrem de Nisibe: analyse théologique et recherche sur l'évolution de la fête pascale chrétienne à Nisibe et à Edesse et dans quelques églises voisines au quatrième siècle*, vol. I : *Étude*, Leiden 1989.

⁷ Cf. J.-D. Dubois, *Les "Actes de Pilate" au quatrième siècle*, in *Apocrypha* 2(1991), pp. 85-98.

⁸ A rigorous monastic sect located in Syria and Mesopotamia, founded by a certain Audis. He was a deacon of the Church of Edessa, which accepted anthropomorphism and Quartodeciman practices.

day as the Jews; they also accused the Catholics from the time of Constantine that they had distanced themselves from the tradition, and argued that

« in the celebration of Easter you have abandoned the custom and have changed the day to please the will of the Emperor ... to celebrate Constantine's *dies Natalis* (i.e., birthday) you have changed (at Nicaea) the calculation ».⁹

A law from the year 428 (*Cod. Theod.* 16,5,65 = *Cod. Iust.* 1,5,5) condemned the Audians. Theophanes of Philadelphia (Lydia), before 431, had converted many Quartodecimans back to the Church's practice.¹⁰ A request was made of the Quartodecimans that its clergy sign a statement of faith; the request caused chaos (cf. Socr., *h.e.* 7,27: PG 67, c. 805); in Sardis and Miletus, secular authorities had to suppress a rebellion that ended with much bloodshed. Even Theodoret of Cyrrhus attested to the existence of the Quartodecimans during the early decades of the fifth century (cf. Thdt., *haer.* 3,4: PG 83, c. 405).

Constantine indirectly treated the question of Easter in a speech titled *Oratio ad sanctos*, which was delivered, it seems, in the year 325.¹¹ He, however, began the revolution of the social, political and religious time in the Roman Empire with the recognition of the *dies solis* as a day of rest.¹² His first known law dates back to 321¹³ (*Cod. Iust.* 7,12,2),¹⁴ which has not been preserved in the *Codex*

⁹ Cf. Epiph., *haer.* 70,9 (PG 42, c. 353).

¹⁰ See E. Honigmann, *Trois mémoires posthumes d'histoire et géographie de l'orient chrétien*, Bruxelles 1961, p. 78.

¹¹ See the recent work by R. Cristofoli, *Costantino e l'oratio ad sanctorum coetum*, Napoli 2005.

¹² See A. Di Berardino, *La cristianizzazione del tempo nei secoli IV-V: la domenica*, in *Aug* 42(2002), pp. 97-125; K.M. Giradet, *L'invention du dimanche: du jour du soleil au dimanche. Le dies solis dans la législation et la politique de Constantin le Grand*, in *Empire chrétien et Église aux IV^e et V^e siècles. Intégration ou « concordat » ? Le témoignage du Code Théodosien*, eds. J.-N. Guinot-F. Richard, Paris 2009, pp. 341-370.

¹³ Cf. W. Rordorf, *Sunday, The History of the Day of Rest and Worship in the Earliest Centuries of the Christian Church*, Philadelphia 1968, pp. 162-166.

¹⁴ *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*

Theodosianus but only in the *Codex Iustinianus*;¹⁵ although the city in which the text was published was is not specified, but it could be Rome; the posting date is March 3rd. This law would be issued sometime before, when Constantine was in Illyricum. The extract of this law preserved in the *Codex Iustinianus* is part of the copy sent to Elpidius, who during that period (321-324) was the *vicarius urbis Romae* (vicar of the city of Rome). Similar copies were sent to the « governors (Western) of every province, demanding that they show respect to the Day of the Lord » (cf. Eus., *v. Const.* 4,23). This law and the subsequent law of July 321 (*Cod. Theod.* 2,8,1) for the Sunday rest from legal and business dealings in the city life were initially applied only in the West, and after 324, with the victory over Licinius, Constantine extended its application to the Eastern provinces.¹⁶

The Christian Easter, because of its biblical and soteriological contents, underwent an enormous liturgical and organizational development in the Fourth Century. The temporal extension was lengthened and enriched, with a time of preparation that was increasingly longer (Lent)¹⁷ and a subsequent time with the Sunday *in albis* (i.e., first Sunday after Easter) and the fifty days until Pentecost. The post-Paschal period, starting from the Sunday of the Resurrection, was seen and celebrated as a special festive day. The pre-Paschal period was enriched with numerous elements: serious

sulcis aut vineae scrobibus commendentur, ne occasione momenti pereat commoditas caelesti provisione concessa. pp. V Non. Mart. Crispo II et Constantino II Cons. (anno 321).

¹⁵ Cf. *Cod. Iust.* 3,12,2 and *Cod. Theod.* 2,8,1: are both addressed to Helpidius and bear the date the “3rd” (of March and July respectively) of the year 321; for this reason one scholar is led to think that they are possibly fragments of the same law. (See T.D. Barnes, *Eusebius and Constantine*, Cambridge 1981, p. 313); O. Seeck, *Regesten der Kaiser und Päpste für die Jahre 311 bis 476 n. Chr.*, Stuttgart 1919, p. 171. Krüger published *Cod. Iust.* 7,12,2 and *Cod. Theod.* 2,18,1a, as if it were the first part of *Cod. Theod.* 2,8,1. But if they were fragments of the same law, it seems strange that the compilers of the two codices – who place the two laws under the rubric of *de feriis* – chose two different passages, especially that the *Codex Theodosianus* only reported one passage that presupposes the existence of a more extensive Law.

¹⁶ See Soz., *h.e.* 1,8.

¹⁷ Peter of Alexandria, at the beginning of the 4th c., established the period of forty days of fasting.

preparation, both moral and intellectual through ascetic exercises¹⁸ and instructions for catechumens,¹⁹ exorcisms, the reconciliation of penitents, baptism on the Easter vigil, prayers and fasting accompanied by almsgiving, intense preaching,²⁰ post-baptismal instructions for the neophytes, who for seven days attended the Eucharistic celebrations and the mystagogical instructions. Fasting also had a charitable scope.²¹ The *qualitas*, which was specific to the Lenten period, also required a renewal of moral conduct, fasting, intense prayers, generous alms and even abstinence from sexual relation amongst married people. Augustine added that:

« Now is the time when married men should abstain from their wives, and married women from their husbands, in order to have leisure time for their prayers » (cf. s. 210,6,9; see DA CL II, cc. 2151-2152).

The entire period was considered a united celebration. Augustine referred to it as: *tota Paschalis solemnitas* “ the entire Easter feast ” (s. 210,7,9; see Jo. Chrys., *de statutis* 6,3: PG 49, c. 84). Egeria wrote the following concerning Jerusalem:

« when Easter time arrives, it is celebrated in the following manner. We celebrate forty days before Easter, but here they observe eight weeks before Easter. They observe eight weeks because on Saturday and Sunday they do not fast, with the exception of one Saturday,

¹⁸ Eusebius of Caesarea calls Lent *tessarakonthêmeros askêsis* (*De solemnitate paschali*).

¹⁹ At the beginning of Lent, they were inscribed on a list of those needing to be baptized (*illuminandi*); nearly thirty days earlier they began a period of intense preparation (see *Jean Chrysostome, Huit catéchèses baptismales inédites*, ed. A. Wenger, [SC 50bis], Paris 1970, p. 74). The term “ catechumen ” referred to the children of both Christian and pagan families who were inscribed on a list of those needing to be baptized and remained such for a long period of time.

²⁰ When explaining Jerusalem’s Lent practice, Egeria spoke of the Wednesday preaching: « a bishop and a presbyter preach with earnestness so that the people may always be instructed in the law » (cf. *pereg.* 27,6). Even elsewhere preaching was held during the weekdays, see F. Sottocornola, *L’anno liturgico nei sermoni di Pietro Crisologo*, Cesena 1973, pp. 144; 199.

²¹ Augustine exhorted that « voluntary mortification become the sustenance of the one in need » (cf. s. 210,12).

namely that of the Easter vigil in which one is obligated to fast » (cf. Aeth., *pereg.* 27,1).

The reciprocal forgiveness is a fundamental aspect of the change: « the person who caused the injury asks forgiveness, while the person who has been injured grants forgiveness ». ²² All this is done because:

with his passion the Lord ‘passed’ from death to life and has opened to us believers the way toward the Resurrection, so that we might pass from death to life (cf. Aug., *en Ps.* 120,6; *civ. Dei* 16,43,1).

John Chrysostom, although speaking of fasting, which varies from person to person, insisted that during Lent the best fast is abstinence from sin. Leo the Great, in the Easter spirit, exhorted the faithful that

« they forgive the sins of others, they unlock the chains, [and that] the vendettas vanish so that the holy solemnity...finds us all free from wrongdoing » (Leo M., s. 40,5). ²³

The Lenten and Easter spirit also conquered territory in the society not only through Christian action, but also with the help of imperial legislation. The Lenten preaching insisted not only on a change of life but also on Christian forgiveness, so that during Easter the human being might be totally renewed. The Emperor Valentinian I, in 367 (369?), inaugurated a practice of granting a general amnesty for the Easter feast (*indulgentia*) ²⁴ for all those accused and locked in prison – with the exception of those guilty of certain crimes – without distinction of religious affiliation, but only in relation to the crimes, actual or presumed. Even the pagans, who were still the majority in the Roman Empire, benefited from a law that was inspired by exclusively Christian grounds: Emperors Valentinian, Valens, and Gratian Augustuses to Viventius, Prefect of

²² Cf. Aug., s. 210,12. The entirety of *Sermon* 211 is on mutual forgiveness.

²³ Cf. *Sancti Leonis Magni, Tractatus*, ed. A. Chavasse, [CCL 138 A], Turnholti 1973, p. 231.

²⁴ According to G. Bassanelli Sommariva, the legislator preferred the term *indulgentia*, which had a Christian background, over the traditional Latin term *abolitio*, see *Il giudicato penale e la sua esecuzione*, in *Atti Accademia Romanistica Costantiniana XI Convegno internazionale, in onore di Felix B.J. Wubbe*, Napoli 1996, p. 57.

the City. On account of the Day of Easter, which we celebrate in the depths of our hearts, we release from confinement all those persons who are bound by criminal charges or who are confined in prison (*Cod. Theod.* 9,38,3).²⁵

The writer of this text betrays a Christian inspiration with the expression: On account of the Day of Easter, which we celebrate in the depths of our hearts (*ob diem paschae, quem intimo corde celebramus*). Who suggested to Valentinian this first measure of Easter amnesty? An analysis of the law sets forth a new situation for the Christian influence on the judicial practice. The ecclesial organization of the liturgical year now had an ever-increasing influence on the social, political and religious life of the empire and on the destiny of human beings, both pagan and Christian or those of other religious beliefs. A subsequent law preserved on the amnesty of 370 (*Cod. Theod.* 9,38,4) begins with these words: The celebration of Easter demands that we pardon persons now tormented by the unhappy expectation of judicial investigation under torture and the fear of punishment.²⁶ By that point the concession of the Easter amnesty became common and entered into the yearly practice.²⁷

I think that in the Christian spirit of Lent, which is called by John Chrysostom “the medicine for our souls”,²⁸ that is, of the pre-Paschal period in the Christian sense, one must also insert the

²⁵ Cf. *The Theodosian Code and Novels*, ed. C. Pharr, New York 1952, p. 253; A. Di Berardino, *Tempo cristiano e la prima amnistia pasquale di Valentiniano I*, in *Munera amicitiae: Studi offerti a Salvatore Pricoco*, eds. R. Barcellona-T. Sardella, Soveria Mannelli 2003, pp. 130-150.

²⁶ *Imppp. Valentinianus, Valens et Gratianus AAA. Ad Viventium praefectum urbi. ob diem paschae, quem intimo corde celebramus, omnibus, quos reatus adstringit, carcer inclusit, claustra dissolvimus*. Translation from *The Theodosian Code and Novels...*, p. 253.

²⁷ Cf. *Cod. Theod.* 8,38,7 (year 384); *ibid.* 8,38,8 (year 385); *Sirmondiana* 8 (year 386); see Ambr., *ep.* 20,6 (PL 16, c. 1038): « *sanctis diebus ebodomadae ultimae, quibus solebant laxari vincula, stridunt catenae* » (on the holy days of the last week, in which the bonds were usually undone, the chains rattle off); Jo. Chrys., *adv. Iudaeos* 2,1; *de statutis* 6,3; 20,7; 21,3 (see F. van de Paverd, *St. John Chrysostom, The Homilies on the statues: an Introduction*, [Orientalia christiana analecta 239], Roma 1991); Leo M., s. 40,5 (Chavasse) and 45,4,4; etc.

²⁸ Cf. Jo. Chrys., *de ieiunio s. quadragesimae* 1 (PG 53, c. 23; *Discorso esortatorio per l'inizio della santa quaresima*, ed. M.L. Cervini, [Corona patrum salesiana 16], Torino 1953, p. 3).

two laws issued by the Emperor Theodosius, which prohibited criminal trials and the tortures closely connected to them. The first dates to March 380 and is preserved both in the *Codex Theodosianus* (9,35,4) and the *Codex Iustinianus* (3,12,5) and in the *Breviarium Alaricianum* (Breviary of Alaric) (9,25,1). This law from 380 states the following: 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. (27 March 380).²⁹ The *Breviarium Alaricianum* curtly notes that during Lent *pro reverentia religionis* (on account of the reverence for religion) every criminal trial is suspended.

But before proceeding any further it is essential to ask: What did the ancients understand by the term “torture” (*tormenta*) and what do we mean by this term? Modern society is much more attentive to any form of physical violence; ancient society of the period of the Roman Empire, however, did not see things the same way. Violence was an important aspect for the functioning of society. Suffering and tortured bodies and the shedding of blood in public was a usual sight in Roman society, especially in the amphitheater. The shows people loved most were those bloody combats of the gladiators and the condemnation of a person *ad bestias* (that is, when a person was publicly devoured by ferocious beasts).³⁰ Alypius, one of Augustine’s students, when in Rome was obligated by his friends to go to the amphitheater to view a bloody show:

« As he saw the blood he gulped the brutality along with it; he did not turn away but fixed his gaze there and drank in the frenzy, not aware of what he was doing, reveling in the wicked contest and intoxicated on sanguinary pleasure » (cf. Aug., *conf.* 6,8,13).

²⁹ *Cod. Theod.* 9,35,4 [= *Breviarium* 9,25,1]. *Imppp. Grat., Valent. et Theodos. AAA. Albuciano vicario Macedoniae. Quadraginta diebus, qui auspicio cerimoniarum paschale tempus anticipant, omnis cognitio inhibeatu criminalium quaestionum. Dat. VI. Kal. April. Thessalonica, Gratiano A. V. et Theodos. A. I. Coss. Interpretatio. Diebus quadragesimae pro reverentia religionis omnis criminalis actio conquiescat.*

³⁰ Cf. D. Grodzynski, *Tortures mortelles et catégories sociales. Les summa supplicia dans le droit romain aux III e IV siècle*, in: *Du châtement dans la cité : supplices corporels et peine de mort dans le monde antique*, Rome 1984, pp. 361-403; D.S. Potter, *Martyrdom as spectacle*, in *Theater and Society in the classical world*, ed. R. Scodel, Ann Arbor 1993, pp. 53-88.

Today we marvel at how the people of that time were so strongly attracted by the sight of bloody shows.³¹ A variation of those shows, as it were, even if not to the same degree, were the trials (*quaestiones*) held in the forum or in similar places, and the people rushed to see the tortures applied to those accused³² or the witnesses called to testify.³³

In legal trials there existed numerous ways to inflict suffering (*flagella tortorum*: *Martialis* 2,17)³⁴ on the one accused so as to obtain a confession.³⁵ Some ways were bloody and led to the shedding of blood, and easily death; others were lighter, as, for example, the *verberatio*, which occurred with different instruments (*ferula* [a rod], *scutica* [whip], and *flagrum* [scourge]) and to different degrees (*justigatio* [beating], *flagellatio* [flogging] and *verberatio* [scourging]). *L'eculeus* (rack: an instrument of torture on which a body is stretched) was an instrument of torture. *Verberatio*, which could also be bloody according to the intensity and the number of blows, in its lighter form was so common in the ancient Roman schools (*vapulare* “to beat”) that Augustine, not by an improper desire (*pravo affectu*), prayed to God that he might be delivered. And it was also normal for parents to whip their children.³⁶ Some clerics whipped a more

³¹ Cf. C. Vismara, *Il supplizio come spettacolo*, Roma 1991.

³² Cf. J.-Ph. Lévy, *La torture dans le droit romain de la preuve*, in *Collatio iuris romani: études dédiées à Hans Ankum*, Amsterdam 1995, vol. I, pp. 241-255.

³³ Cf. U. Vincenti, *La condizione del testimone nel diritto processuale criminale romano di età tardo imperiale*, in *Atti Accademia Romanistica Costantiniana VIII Convegno internazionale*, Napoli 1990, pp. 309-324.

³⁴ Cf. G. Lafaye, *Tormentum*, in *Dictionnaire des antiquités grecques et romaines*, eds. M.Ch. Daremberg-E. Saglio, Paris 1877, vol. V, pp. 362-372.

³⁵ *Poena, supplicium, flagellum, crux, numullae, nervus, cruciatus, unguulae, fiduculae*, etc. See J. Vergote, *Folterwerkzeuge*, in *Reallexikon für Antike und Christentum* (= RAC), vol. XII, cc. 112-140; see the comments on this point by F. Pio de' Cavalieri in his hagiographic studies.

³⁶ In many texts, Augustine justified physical punishment as a sign of benevolence and correction (*flagellum correptionis* [the whip of correction]): « for a father does not hate his son; and nonetheless, if needs be, a father whips his son: he inflicts pain so that he may guard his well-being » (*non enim pater odit filium: et tamen pater, si opus est, verberat filium; incutit dolorem, ut tueatur salute*) [s. 163,B]; « love and whip » (*dilige et verbera*) [s. 114,5]; « but if perhaps that will be the case, regarding those things as unimportant, you will even use whipping, you inflict punishment you deliver pain, but you are

well-respected man who had raped a consecrated woman; this individual wanted a pardon from the ecclesial authority and did not turn to the civil authorities, perhaps for fear of a harsher punishment.³⁷

The law was issued by Theodosius, likewise in the name of other emperors, even if it first reports the names of the two *seniores augusti* (i.e., the older augustuses), Gratian and Valentinian. It was the usual practice of the *inscriptiones*. The recipient of this law was Albucianus, of whom nothing else is known,³⁸ who at that time was the vicar (*vicarius*) of the diocese of Macedonia, whose capital was Thessalonica. In 379, with the appointment of Theodosius for the East, the *Diocesis Pannonia* (Western Illyricum) became united to the prefecture of Italy as a diocese of Illyricum, although Macedonia and Dacia (Eastern Illyricum) were dependent upon Theodosius who was residing at Thessalonica. In subsequent years they would be joined to the prefecture *Italia* (383-391): the two dioceses made up a distinct prefecture.³⁹ The *Diocesis Macedonia* (Diocese of Macedonia) included the following provinces: *Macedonia Prima* (Thessalonica), *Macedonia Salutaris* (or *Secunda*) (capital Stobi; today Gradsko, in the Eastern Republic of Macedonia);⁴⁰ *Thessalia* (Larissa), *Epirus vetus* (capital Nicopolis, Preveza, Greece), *Epirus nova* (capital Dyrrachium,

seeking [the child's] well-being » (*sed si fuerit forte ista contemnens, adhibes et verbera, incutis poenam ingeris dolorem, sed quaeris salutem*) [s. 13,9]; « Not everyone who spares [another] is a friend; neither is everyone who whips an enemy. Better are the wounds of a friend than the willing kisses of an enemy » (*non omnis qui parcit, amicus est; nec omnis qui verberat, inimicus. Meliora sunt vulnera amici, quam voluntaria oscula inimici*) [ep. 93,2,4]; see also s. 5,2; 56,17.

³⁷ Cf. Aug., ep. 9.

³⁸ See Albucianus, in *The Prosopography of the Later Roman Empire*, eds. A.H.M. Jones-J.R. Martindale-J. Morris, Cambridge 1971, vol. I, p. 38.

³⁹ See E. Demougeot, *Le partage des provinces de l'Illyricum entre la pars Occidentis et la pars Orientis, de la Tétrarchie au règne de Théodoric*, in *La géographie administrative et politique d'Alexandre à Mahomet: Actes du colloque de Strasbourg*, Leiden 1981, pp. 229-253.

⁴⁰ Little is known about this province: C.S. Snively, *Dacia Mediterranea and Macedonia Secunda in the Sixth Century: A Question of Influence on Church Architecture*, in *Niš and Byzantium*, ed. M. Rakocija, Niš 2005, pp. 213-224.

today Durrës [Durazzo] Albania); Achaea (capital Corinth), and *Creta* (capital Gortina).

The date of the issuing of this law is only one month after the more known law titled *Cunctos populos* of February of the same year (*Cod. Theod.* 16,1,2 of February 28th). That year, Easter was celebrated on April 12th;⁴¹ and the law was sent to Albucianus two weeks before the feast (March 27th). It is not stated when it was received by the *vicarius*, who at that time had to reside at Thessalonica. The city for 18 months, that is, until November of 380,⁴² was the capital of the Eastern part (*pars orientis*) of the Empire and the location where other imperial officials went and where the laws were worked out and published.⁴³ Here is the first question one must ask: Did this law pertain only to the diocese of Macedonia or rather to all the provinces subject to Theodosius? We do not have sufficient material to answer this question; in any case, for the year 380, it had no concrete application in other regions because it required more or less time for its diffusion into the remotest provinces and we can say that in the same diocese of Macedonia, where it must have been communicated to the provincial governors, there is no written testimony to its dissemination. Moreover, the expression of “forty days” reflects the practice of Illyricum and Greece for the duration of Lent (see Socr., *h.e.* 5,20,31). For that year, in the event that it was applied with care, it could only contribute to the suspension of an ongoing legal trial here or there in the Macedonian provinces or before the *vicarius*.

Instead, we have a certain testimony that during the Lent of 387 at Antioch an important legal trial was held for the rebellion that broke out at the end of February with the knocking down of the imperial statues, because of the imposition of taxes. The imperial examiners sent by Theodosius started to collect the evidence in charge of the legal trial on March 17th. They ordered that the witnesses be tortured to obtain the accusations. The crowd, which

⁴¹ In certain Western churches, the date is April 9th (A. Cappelli, *Cronologia, cronografia e calendario perpetuo* (editio 7^a), p. 295, n. 48 (on page 490)).

⁴² While Theodosius was at Thessalonica, he fell gravely ill and then received baptism by Acholius (24 November 380). He entered Constantinople with his court composed of Western personnel. The distance was about 600 km.

⁴³ Cf. R.M. Errington, *Church and State in the First Years of Theodosius I*, in *Chiron* 27(1997), pp. 21-72, esp. pp. 23ss.

had gathered outside the tribunal in which Libanius was present, heard the screams of those being tortured. The judges themselves suffer, John Chrysostom wrote, because « they are constrained to be instruments of a terrible tragedy » (cf. Jo. Chrys., *de statutis* 13,137*).⁴⁴ Some people were sentenced to exile, others were given the death penalty; the use of the death penalty was suspended as the officials awaited the emperor's decision and those condemned were locked in prison. Chrysostom encouraged those arrested by stating that the Easter amnesty, which by that time was traditional, would result in their deliverance within a few weeks.⁴⁵ Neither Libanius nor Chrysostom made reference to the existence of the law that suspended the tortures in those days. Theodosius' statement of 380 does not seem to have been well known; even if it was applicable also in Syria, the imperial commissioners committed some abuses.

In the law (*Cod. Theod.* 9,35,4) the Emperor Theodosius decreed that during this period of "fourty days" every type of criminal procedure was to be postponed,⁴⁶ and thus also the investigation for proof, which normally occurred through torture (*quaestio per tormenta*),⁴⁷ because the Roman legal process was inquisitorial. It was not an amnesty given for religious reasons but only a temporary suspension of the legal trial, inasmuch as the Easter amnesty was still in effect, which had been granted by Valentinian I; one could, however, have another type of trial, that did not include *tormenta*, namely a civil trial over patrimonial and personal disputes. John Chrysostom affirmed that during the

⁴⁴ Cf. F. van de Paverd, pp. 76ss.

⁴⁵ Cf. F. van de Paverd, pp. 51; 130; 151.

⁴⁶ Cf. P. Garnsey, *Social Status and Legal Privilege in the Roman Empire*, Oxford 1970, pp. 213ss; M. Bianchini, *Cadenze liturgiche e calendario civile fra IV e V secolo. Alcune considerazioni*, in *Atti Accademia Romanistica Costantiniana VI Convegno internazionale*, Perugia 1986, pp. 241-263, esp. p. 245 with bibliography.

⁴⁷ The *Digesta* (47,10,15,41) explains the question in this manner: " *Quaestionem* " *intelligere debemus tormenta et corporis dolorem ad eruendam veritatem* (« we must understand the *quaestio* as the tortures and bodily pain used for obtaining the truth »); J. Pölonen, *Plebeians and Repression of Crime in the Roman Empire: From Torture of Convicts to Torture of Suspects*, in *RevIntern droits de l'antiquité* 51(2004), pp. 217-257. Cf. *Dictionnaire des antiquités...*, vol. IV, pp. 797s.

“Great Week” the emperors closed the courts of justice (*dikasterion*) and suspended the criminal and civil trials.⁴⁸

The civil trial, as it seems, was at times held in the *secretarium* (a council chamber: cf. *Cod. Theod.* 1,16,9), which had to be open to everyone, although the criminal trial was public; it took place in the civic forum and came to assume a theatrical and bloody form; the sight of tortured bodies, according to Libanius, was a revolting spectacle.⁴⁹ The Emperor Valentinian exhorted the judges who, when presiding over the trial, not to cede to theatrical aspects to please the people, as if it were a show held at the theater (cf. *Cod. Theod.* 1,16,9, from the year 364).⁵⁰ In any case, the legislation required that everything be done in public so as to also avoid the possibility of corruption.⁵¹ John Chrysostom described in detail how the trial took place and how the verdict was read.⁵² Augustine writes:

« The parties do not hear the final judgment which the judge is going to pronounce, going to inscribe in the record with his own hand; it's being written while they are waiting outside. Both parties

⁴⁸ Cf. Jo. Chrys., *hom. in Gen.* 30,1 (PG 53, c. 374).

⁴⁹ Cf. Lib., *or.* 1,208.

⁵⁰ « *ut iudex, popularitati et spectaculorum editionibus mancipatus, plus ludicris curae tribuat quam seriis actibus* ». (so that the judge, given over to popularity and the performance of shows, puts more care in public shows than in serious acts). Cf. F. Grelle, *Canosa Romana*, Roma 1993, see chapter VIII: *Iudices et tribunalia*, pp. 181-192.

⁵¹ Cf. *Cod. Theod.* 1,112,1 of 313 (Costantine); 1,16,6 of 331 (Costantine); 1,16,9 of 364 (Valentinian). See A. Chastagnol, *Les fastes de la préfecture de Rome au Bas-Empire*, Paris 1962, p. 81; Th. Mommsen, *Le droit pénal romain*, Paris 1907, vol. II, pp. 26-27; L. Anglivel de la Beaumelle, *La torture dans les Res Gestae d'Ammien Marcellin*, in *Institutions, société et vie politique dans l'Empire romain au IVe siècle ap. J.-C. : actes de la table ronde autour de l'oeuvre d'André Chastagnol (Paris, 20-21 janvier 1989)*, Rome 1992, pp. 92-113, esp. pp. 103-104; D. Dareggi, *I luoghi dell'amministrazione della giustizia*, in *Atti Accademia Romanistica Costantiniana XI*, p. 384.

⁵² Cf. *In Heliam et viduam* 3 (PG 51, c. 340); *de Lazaro* 2,2 (PG 48, c. 985); *ibidem* 4,1 (PG 48, cc. 1007-8); *incomprehens.* 4,4 (*Jean Chrysostome, Sur l'incompréhensibilité de Dieu*, eds. J. Daniélou-A.-M. Malingrey-R. Flacelière, [SC 28bis], Paris 1951, p. 254); F. van de Paverd, p. 68; see the index, s.v. *dikasterion*.

are frantic with suspense, wondering which of them the judgment will be given for or against. That is the judge's great secret » (s. 47,4).

In special cases, the trial could be held even behind closed doors. This type of trial became more popular at the beginning of the fifth century.

The postponement of the trial was valid for all those accused without distinction of religion or social status; Christians, Jews, pagans, the *humiliores* (lower classes), and the *honestiores* (*honesti homines*; upper classes) benefited from this measure.⁵³ The two aforementioned classes were composed of free persons, but not of slaves; the distinction had legal consequences in criminal and penal law, inasmuch as there existed a difference between persons and punishments.⁵⁴ The latter group, through a tradition established in the fourth century, was normally exempt from torture (the *senatores*, *curiales* [i.e., members of the city *curia*], the *equites* [i.e., the equestrian order] and the *veterani* [i.e., the veteran soldiers]).⁵⁵ The postponement was valid for all crimes (*crimina*), inasmuch as no distinction was made between these groups. Just as the postponement was done by consideration of religion (*intuitu religionis*),⁵⁶ by that point the Christian feasts increasingly modeled the civil society and marked the rhythm of the public time, including civil, judicial and academic time. In fact, even on Sundays the tribunals had to be closed and did not hear trials. Even the pagans willingly followed the Christian feasts, as Augustine says for the feast of John the Baptist:

⁵³ Cf. F.J. Navarro, *La formación de dos grupos antagónicos en Roma: Honestiores y Humiliores*, Pamplona 1994.

⁵⁴ *Digesta* 48,19,9,11: *discrimina esse poenarum neque omnes eadem poena adfici posse* (there are to be distinctions of punishment and all people cannot be smitten with the same punishment).

⁵⁵ See *Cod. Iust.* 9,41,11 from the year 290; *Cod. Iust.* 9,41,8 from the year 286/293; *Cod. Theod.* 9,36,2 from the year 376; *Cod. Theod.* 13,3,1 from the year 321 or 324 for the doctors and professors.

⁵⁶ In law *Cod. Theod.* 2,8,24 (February 4th, for the year 400 or 404) games were prohibited on Sunday on account of consideration for religion (*religionis intuitu*).

« the pagans and the ungodly celebrate the Christian solemnity with the pretext of their various motives that makes this time widely observed » (s. 279,13).

The same phenomenon occurred at Antioch for the feast of Easter, which was honored by nearly everyone.⁵⁷

The criminal trial in late antiquity was almost always connected with different forms of torture (*quaestio per tormenta*),⁵⁸ with which the inquisitors hoped to obtain the culpability of the one charged through a confession of guilt or by the statements of the witnesses. In certain trials, testimony was not accepted without torture (*sine tormentis: Digesta* 22,5,21,2). Ulpian's text, recorded in the *Digesta*, when defining whether something is a *quaestio*, affirmed that his objective was to obtain the truth through the confession of guilt: for eliciting the truth *ad eruendam veritatem* (47,10,15,41; cf. 48,18,1). This must be done because only a guilty person, whose guilt has been demonstrated by means of witnesses or through his or her own non-spontaneous confession, must be condemned. Nevertheless, recourse to torture was a swift method, because we know that often, under the brutality of the various forms of torture, the suspected people preferred to reduce their pain by admitting guilt.⁵⁹ Even those who survived torture continued to bear scars on their body, the "stigma of punishments" *suppliciorum macula* (cf. *Cod. Theod.* 8,4,8).

Augustine became aware of the absurd and deplorable situation of a judge, who, to not condemn an innocent person to death, not knowing whether he was guilty or innocent, applied torture and at times killed an innocent person, and would never know whether he was in fact guilty or innocent. Augustine also added that often the accused died under torture (*civ. Dei* 19,6). Though recognizing the

⁵⁷ Cf. Jo. Chrys., *de statutis* 6,3.

⁵⁸ Ammianus, (*res gestae* 29,1,23) listed some of the instruments used for torture: « the horses are spread out, the lead weights are prepared along with a cord and a broad, whip, everything sounded with horrific, gruesome cries, amidst the noise caused by the chains: "stay still", "shut up", "squeeze" and "hide" were the cries of those suited for terrifying duties ». See 26,10,9; 29,1,40.

⁵⁹ The philosopher Epigonus, an innocent man, confessed to being guilty for fear, although Eusebius, who was also innocent, underwent horrible tortures without acknowledging guilt and was still killed (Ammianus, *res gestae* 18,9,5-6). See 15,6,1; Aug., *civ. Dei* 19,6.

judicial use of punishment, Augustine preferred less harsh forms (*ep.* 104); he even besought the tribune Marcellinus to not be too severe to punish the Donatist clerics and Circumcellions in accord with the terrible crimes they committed against the Catholics in North Africa. He writes to him:

« a very great worry has come over me that your Eminence might perhaps judge that they should be punished with such great severity of the laws that they suffer the sort of punishments they inflicted to the Catholics » (*ep.* 133,1).

« Carry out, O Christian judge, the duty of a loving father (*p̄ii patris officium*). Be angry at wickedness in such a way that you remember to be humane, and do not turn the desire for revenge upon the atrocities of sinners, but apply the will to heal to the wounds of sinners. Do not undo your fatherly diligence that you preserved in the inquiry when you obtained their confession of such great crimes not by limbs stretched upon the rack, not by iron claws furrowing the flesh, not by burning with flames, but by a beating from rods – a form of restraint that is customarily practiced by teachers of the liberal arts, by parents themselves, and often even by bishops in their courts. Do not, then, punish in a more cruel manner what you have discovered in a more gentle manner. The need for inquiry is greater than that for punishment. For even the mildest human beings carefully and persistently examine a hidden crime in order to find out whom they may pardon. Hence it is generally necessary to carry out an inquisition with more severity in order that, once the crime has been made known, there might be room to display gentleness » (*ep.* 133,2).

Marcellinus was praised because once the confession of the crimes had been obtained

« without stretching a person's limbs by a horse, without plowing them with iron hooks, without burning them with flames, but only whipping them with rods » (cf. *ep.* 133,2; *ep.* 134,2).⁶⁰

⁶⁰ Augustine asked, under a solemn promise to the master, that a servant be not punished excessively: cf. *ep.* 14; in a letter to Alypius he asked that a law be amended and that the punishments prescribed be mitigated and that certain forms of torture be avoided for kidnappers and sellers of persons *unde facile moriuntur* (cf. *ep.* 10,4).

Moreover, it is well known that a certain type of flagellation was used by the teachers and, at times, even by bishops in the courts (*episcopalis audientia*). Nevertheless it does not mean that the Church had anything to do with torture (Aug., s. 155,5). Even the rhetorician Libanius maintained that torture was useful for society.⁶¹

The decretal *Ad Gallos* written by Pope Damasus or Pope Siricius (384-399) did not permit men into the episcopate who had exercised the *ius saeculi* (i.e., the legal authority of the world), because during their service, « they practiced torture out of the necessity of legal trials ».⁶² Ambrose, before being elected bishop, « against his custom ordered that torture be applied to certain individuals » (cf. Paul. Med., *Vita Ambrosii* 7,1).⁶³ In 405, Pope Innocent wrote to bishop Exsuperius of Toulouse:

« the question is also raised how to treat those who after baptism were public administrators and used the usual instruments for torture and even pronounced the death sentence. With regard to those people, we did not read anything that has been defined by the ancients (bishops). One indeed should recall that these powers have been granted by God and even the sword has been granted for the punishment of wicked people ».⁶⁴

Ambrose himself, when asked his view, observed that there exist “heretics” who do not allow into their communion a public official who had issued the death penalty (he does not speak of the use of torture, which is a given); but he did not follow this practice, even though he praised those who refrained from it. He introduced a distinction between what *auctoritas* (authority) allows and what *miserericordia* (mercy) suggests. The Christian judge must possibly adhere to this practice; and Ambrose advised the judge to « not exhaust the guilty in the squalor of prison ».⁶⁵ The ancient Church,

⁶¹ Cf. L. De Salvo, *Giudici e giustizia ad Antiochia*, in *Atti Accademia Romanistica Costantiniana XI*, pp. 495s.

⁶² Cf. can. 13: *Tormenta exercentur pro necessitate causarum (I canoni dei concili della chiesa antica*, ed. A. Di Berardino, [SEA 106], Roma 2008, vol. II, p. 46).

⁶³ Cf. Y.-M. Duval, *Ambroise de son élection à sa consécration*, in *Ambrosius episcopus: atti del Congresso internazionale di studi ambrosiani*, Milano, 2-7 dicembre 1974, ed. G. Lazzati, [Studia patristica mediolanensia 7], Milano 1976, pp. 243- 283.

⁶⁴ Cf. *I canoni dei concili della chiesa antica...*, p. 117.

⁶⁵ Cf. Ambr., *ep.* 50,2-3 (Maurini 25).

therefore, did not reject torture in trials, but only, like Augustine, asked that it not be excessive. Pope Nicholas, 866, condemned the use of torture to extract a confession of guilt, which must instead be voluntary (cf. Nicolaus I, *ep.* 97,86: [PL 119, c. 1010]).

According to Ammianus, at the time of the Emperor Valentinian I († 375) there was an increase of the bloody interrogations (*cruentae interrogationes*) (*res gestae* 30,8,3) or bloody questionings (*cruentae quaestiones*) (*res gestae* 26,10,9),⁶⁶ which especially hit the members of the upper classes without any distinction between guilty and innocent.⁶⁷ The *Codex Theodosianus* contains some forty laws and a *titulus* of the ninth book (cf. *Cod. Theod.* 9,35), which treat the topic of torture.⁶⁸

For some crimes, such as *lèse majesté* (*laesa maiestas*), the distinction between the accused and the witnesses was eliminated. It has been observed that in late antiquity the situation for free witnesses worsened as a result of the more frequent recourse to torture, even for people who had been previously exempted.⁶⁹ Augustine noted that

« [the judges] are often constrained to find the truth concerning another legal case with the torture of innocent witnesses »
(cf. *civ. Dei* 19,6,1).

The use of torture was the practice, for certain crimes, even for witnesses, who had been tortured (cf. *Cod. Theod.* 9,40,1), even the lower clergy was tortured (Ammianus, *res gestae* 14,9,7; Socr., *h.e.* 2,38; Thdt. *h.e.* 4,22,26). The presbyters, who had been called upon to offer testimony, were not to be tortured, according to a law after the year 350 (see Thdt., *h.e.* 2,9,9) and confirmed by the Emperor Theodosius in 386 (cf. *Cod. Theod.* 11,39,10 = *Cod. Iust.* 1,38). In the trial held at Rome against Pope Damasus in the year 372, the

⁶⁶ Ammianus also spoke of *funestae interrogationes* i.e., deadly interrogations (*res gestae* 14,9,3).

⁶⁷ Ammianus, *res gestae* 14,9,5-6; 15,3,2. See A. Chauvot, *Ammien Marcellin, les clarissimes et la torture au IV^e siècle*, in *Romanité et cité chrétienne: permanences et mutations, intégration et exclusion du I^{er} au VI^e siècle, mélanges en l'honneur d'Yvette Duval*, Paris 2000, pp. 65-76.

⁶⁸ Cf. G. Carrasco Serrano, *Justicia y poder en Amiano Marcelino*, in *Hispania Antigua* 16(1992), pp. 363-371; Idem, *Corrupción y administración en la Res Gestae de Amiano Marcelino*, in *Hispania Antigua* 19(1995), pp. 363-374.

⁶⁹ Cf. U. Vincenti, pp. 309-324.

judge Maximus also had the clergy tortured.⁷⁰ Maximus made heavy use of torture and counseled the Emperor Valentinian « that only with the most cruel tortures could one unmask and punish harmful criminals » (cf. Ammianus, *res gestae* 28,1,10) even for people who, by law, were exempt “ from bloody inquisitors ”, thus sidestepping the traditional practice.⁷¹ The fact that the laws confirmed that people from some classes could not be tortured is a clear sign of the abuses of the judges.⁷² The Lenten postponement preserved many people from torture, but not from prison, which was very severe and where at times people died. Prison « was a long condemnation to death ».⁷³

Because it was very costly to have recourse to lawyers, the majority of the population was unable to defend itself and was thus at the mercy of the judge. The *humiliores* were unable to enlist lawyers in their defense; the rich, however, were able to have recourse both to capable defenders and to the corruption of the judging court. The so-called *Hermeneumata of Sponheim*,⁷⁴ a text from the end of the third or the beginning of the fourth century, presents a defendant who undergoes various forms of torture in public (*pertransit ordinem tormentorum* – « he passed through a list of tortures »); the defendant continued to deny but was still sentenced to decapitation (*ducitur ad gladium*, « he is led to the sword »). Therefore, this person accused of a crime, which had not yet been proven, was decapitated. Although another defendant made use of a great defense team with brilliant lawyers (*grande patrocinium et viri disertis adsunt illi*: « great protection and those very learned man are beside him »); he was declared innocent (*absolvitur*: « he is

⁷⁰ Sinodale di un concilio romano, cf. Ambr., *ep. extra collectionem* 7,8 (*Sancti Ambrosii Opera*, ed. M. Zelzer, [CSEL 82/3], Vindobonae 1982, p. 195); Ruf., *h.e.* 11,10; R. Lizzi Testa, *Senatori, popolo, papi: il governo di Roma al tempo dei Valentiniani*, Bari 2004, p. 181.

⁷¹ Ammianus spoke of a « *inusitato et illicito more* [uncommon and illicit custom] » (*res gestae* 28,14). Torture for *lèse majesté* (*crimen laesae maiestatis*) was traditional. See R. Lizzi Testa, pp. 214-224.

⁷² Cf. *Cod. Theod.* 9,35,1 (from the year 369); 9,35,2 (from the year 376).

⁷³ Cf. L. De Salvo, pp. 492-495.

⁷⁴ A textbook of Latin and Greek published by A.C. Dionisotti, *From Ausonius Schooldays? A Schoolbook and Its Relatives*, in *Journal of Roman Studies* 72(1982), pp. 83-125. This is an imaginary reconstruction of what could have happened in the forum; it is not a judicial chronicle.

acquitted »).⁷⁵ The administration of justice (the judge and his assistants) was very costly and had to be paid by the defendant.⁷⁶ Justice was not the same for everyone. The postponement of bodily tortures allowed one in the meantime to complete a voluntary confession or rather to find some proof of innocence, or even to find a law that was favorable to him. Because there did not exist a common written code of law easily accessible to all, the judge applied the penal laws that he knew and that, at his discretion; if, however, one had a qualified defense team with competent lawyers, one could use laws that were more favorable to the defendant. Prison time, however, was already an awful torture.

Jerome narrated a case that occurred at Vercelli, Italy, in which a woman was accused of adultery by her husband in front of the Roman consul (*consularis*); the accused male party confessed his crime under torture through fear of the punishments and in hopes of reducing them (cf. Hier., *ep.* 1 [PL 22, cc. 325-331]).⁷⁷ The woman, however, vociferously denied the charges in order to not speak falsehood and to thus not commit sin. She therefore underwent various types of torture: the rack (*eculeus*), prison, chains (*vincula*), she was tied to a post, her feet were brought close to the flame, her sides were pierced and her body torn to pieces.⁷⁸ As a result, the two accused of adultery were sentenced to death by decapitation and taken outside the city. The man died after just one blow; the woman, however, after undergoing many strikes, seemed to be dead. While the clergymen were burying her, they discovered that she was still breathing and saved her life. Jerome's description contains many exaggerations, which are not credible, but his account reflects the practice of that time, beginning with two unfortunate people who did not have lawyers to defend them and thus underwent various forms of torture. This could also consist of multiple mistreatments, as narrated by the martyrdom of Tarracus, Probus and Andronicus

⁷⁵ A.C. Dionisotti, p. 105; see J. Arce, *Su eculeo incurvus: tortura e pena di morte nella società tardo romana*, in *Atti Accademia Romanistica Costantiniana XI*, pp. 354-368, spec. p. 367.

⁷⁶ See J. Arce, pp. 356-366.

⁷⁷ On this letter, see R. Lizzi Testa, pp. 204-206.

⁷⁸ Cf. L. Anglivel de la Beaumelle, pp. 105-108; J. Vergote, *Les principaux modes de supplice chez les Anciens et dans le textes chrétiens*, in *Bulletin de l'Institut historique belge de Rome* 20(1939), pp. 141-163; RAC vol. VII, cc. 111-140.

and their companions from Tarsus and Cilicia; they were hit and pelted with rocks on the mouth and in the face, smashed teeth, a beating with a whip, chains on the neck and the feet, confinement in a dark prison without the possibility of receiving aid for their wounds, a rack, salt on the wounds, a white-hot iron to cause burns, lashings etc. (*Acta Sanctorum Mensis Octobris*, vol. V, pp. 566-584). The martyrs used to repeat: « I am in your power, torment my body as you wish ». Moreover, the torturers in the *quaestio per tormenta* often committed abuses, as seen in the *Acts* of these martyrs. Tarracus, a former soldier, made this known to the proconsul.

By postponing the torture, the death penalty was also postponed, only to be followed once the verdict had been read, which was most likely the case for most crimes;⁷⁹ or rather death was avoided, which often occurred during torture.⁸⁰ At times, torture was part of the punishment because the guilty person was first tortured, then killed.⁸¹ As has been shown above, many times the people who had been killed, whose guilt had not yet been demonstrated, not even under torture, went against the objective of this torture, which was to obtain the truth (*ad eruendam veritatem*). If an innocent person, who had been accused of a crime which had not been proven even under torture, was killed, then the fear of the torture exercised or just the threat of punishment compelled people to declare themselves guilty to spare themselves useless and atrocious sufferings. It was a way to reduce one's suffering and to resist death, which was in each case the outcome for it.⁸² Even suicide was a way to escape torture.

If Theodosius' law was applied, Lent had to become a period void of cruel shows in the forum and not adulterated by the killing of people, who were perhaps innocent. For a brief period of time it

⁷⁹ R. MacMullen, *Judicial Savagery in the Roman Empire*, in *Chiron* 16(1986), pp. 157-161.

⁸⁰ Cf. Aug., *civ Dei* 19,6; Lib., *or.* 54; Ammianus spoke of it often in his summary of the trials.

⁸¹ Ammianus (*res gestae* 29,5,50): two accomplices of Firmus' revolt were first tortured and then burned.

⁸² See Ammianus, *res gestae* 14,9,5.

was not the “garden of punishments”,⁸³ in a Roman society, which, in the fourth century, possessed a “judicial fierceness”.⁸⁴

The motif of the postponement of every legal trial (*cognitio criminalium* [i.e., a judicial trial of criminals])⁸⁵ was the special feature – not the typical characteristic (*qualitas*) of the pagan and Jewish feasts – of the pre-Paschal time, a special time of preparation for Easter. The humanitarian arrangement was on account of the time (*ratione temporis*),⁸⁶ out of reverence for religion (*pro reverentia religionis*), as stated by the *interpretatio*: Lent was a specifically Christian time that continued to be better organized and structured over the course of the fourth century. Just as only a small passage of the original text has been preserved, we do not know all of the reasons for this innovation in relation to Easter and the criminal trial; what has been said is sufficient to account for the postponement. Mariagrazia Bianchini notes that the postponement was not by the consideration of the human person (*intuitu personae*), but by consideration of the time (*temporis*),⁸⁷ or in other words «by consideration of religion» (*religionis intuitu*). As affirmed in the law *Cod. Theod.* 2,8,24 (from the year 400 [405]), which prohibited shows during the week that precedes and follows Easter by consideration of religion (*religionis intuitu*); for the same reason all civil and religious trials were not to be held on Sunday.[27]

The drafter of the law did not use the technical term *quadragesima*,⁸⁸ as was done in the *interpretatio*, but expressed himself in a precise

⁸³ Cf. J.P.Callu, *Le jardin des supplices au Bas-Empire*, in *Du châtement dans la cité. Supplices corporels et peine de mort dans le monde antique*, Paris 1984, pp. 313-359.

⁸⁴ Cf. R. MacMullen, pp. 147-166.

⁸⁵ Cf. S. Giglio, *Il problema dell'iniziativa nella «cognitio» criminale. Normative e prassi da Augusto a Diocleziano*, Torino 2009.

⁸⁶ In law *Cod. Theod.* 2,8,24 (February 4th, for the year 400 or 404) gains were prohibited on Sunday on account of consideration for religion (*religionis intuitu*).

⁸⁷ Cf. M. Bianchini, pp. 241-263, spec. p. 247.

⁸⁸ *Quadragesima*, in Greek *tessaraktê*, refers to a “period of forty days/fortieth day”. The term can also refer to the period that unites Easter to the feast of the Ascension, or the very day of the Ascension. The period of *quingagesima* can also refer to the time before Easter, or rather that time which goes until Pentecost (see *Cod. Theod.* 15,5,5 from the year 425). In this

way with the phrase “forty days” (*quadraginta diebus*) before the Easter ceremonies. In this way, he did not create confusion with the period after Easter until the Ascension. These days now have a special character because the ceremonies that anticipate Easter are carried out, that is, those penitential ceremonies – in particular fasting, which varied in days according to the regions – and all those rites, which were at times dramatic, for the preparation of the catechumens for baptism. In particular, the rites of exorcism, with which one renounces Satan and adheres to Christ.

« It was a new and unusual show for the eyes of a society heavily differentiated into classes to see both the leader and the average person, rich and poor, freemen and slaves in the same condition of spiritual imprisonment. All were indeed considered slaves of the Devil ».⁸⁹

Theodosius intervened again on the same matter in the year 389⁹⁰ (cf. *Cod. Theod.* 9,35,5 of September 6th; 9,35,7). This law was not received by the *Codex Iustinianus*, which instead only reports the first of a more comprehensive character. It decreed that « during the consecrated days of Lent » *sacratibus quadragesimae*⁹¹ *diebus* that there should not be “corporal punishment” (*supplicia corporis*), because of the specificity of those days, which were intended to have a salutary penitence which culminated in the Easter reconciliation.⁹²

case it was called *Quinquagesima Paschae, paschalis, or laetitiae*. Moreover, another way of referring to Lent was to only speak of fastings; for example, others « begin the fast seven weeks before the feast and fast three times for only five days, with intervals, and nonetheless they also call this time (*tessaraktē*). I am amazed that these people, even though they differ on the number of days, call it *quadragesima* » (cf. Socr., *h.e.* 5,22,34-35). Socrates added that there still existed some differences on the foods that could be eaten. Philaster of Brescia spoke of the *quadragesima Paschae* for the pre-Paschal period. (cf. Filastr., *haer.* 149 [PL 12, c. 1287]).

⁸⁹ Cf. SC 50bis, p. 78.

⁹⁰ The *Justinian Code* only adopted the general law and not this one from 389 because it can seem too narrow.

⁹¹ In the law *Cod. Theod.* 2,8,24 mention is made of the *septem diebus quadragesimae* to refer to Holy Week.

⁹² In the year 400, games were prohibited in the week preceding and following Easter, in virtue of the religious rites that were being held during

The text transmitted by the *Codex Theodosianus* is brief: Emperors Valentinian, Theodosius, and Arcadius, Augustuses to Tatianus, Praetorian Prefect. On the consecrated days of the *Quadragesima*, during which time the absolution of the souls is awaited, there shall be no corporal punishment. Given on the eighth day before the ides of September at *Forum Flaminii* in the year of the consulship of Timasius and Promotus (September 6th).⁹³

The law, of which only a small piece has been preserved, was issued at the *Forum Flaminii*, a Roman municipality, today a part of the community of Foligno (San Giovanni Profiamma), on the *Via Flaminia*; it was the way taken by Theodosius on his return to Milan after one of his stays at Rome together with Valentinian II, for the celebration of his victory over Magnus Maximus in the year 388 at Aquileia (July 28th). It was Theodosius' first visit to Rome, where he arrived on June 13th, 389. Issued in the West, the law that has been preserved was sent to the praetorian prefect of the East, Flavius Eutolmius Tatianus (388-392). It notes that while the first law postponed the criminal trial, the second, however, speaks only of the prohibition of the use of torture (*supplicia corporis* "corporal punishment"), but does not postpone the criminal trial.⁹⁴ Already the recipient of the law implies a broader range of applicability, both from the part of the Balkan Peninsula and all the Eastern provinces. Although drafted in the West during the trip, was this law not also sent to the prefect for the praetorian of the West?

To the generic expression of *quadraginta diebus* (for forty days) in the text of 380, use is now made of the technical Christian term *quadagesima* (*tessarakostê*, i.e., Lent), without indicating the number of days. In fact, though varying on the number of days in the various ecclesiastical areas, the term became technical and referred to the days of fasting.⁹⁵ Such days were referred to as sacred: *sacratibus diebus*

those days, *Cod. Theod.* 2,8,24: « *quorum observationibus et ieiuniis peccata purgantur* » (sins are purged by the observances and the fasts of those rites).

⁹³ *Cod. Theod.* 9,35,5 *Imppp. Valentinianus, Theodosius et Arcadius AAA. Tatiano praefecto praetorio. Sacratibus quadagesimae diebus nulla supplicia sint corporis, quibus absolutio expectatur animarum. Dat. VIII Id. Septemb. Foro Flaminii Timasio et Promoto Cons.* (389 sept. 6).

⁹⁴ Cf. M. Bianchini, p. 249.

⁹⁵ At Antioch, Lent lasted eight weeks and John Chrysostom called it *tessarakostê*, see F. van de Paverd, p. 214 (see Index: *Lent*).

(on sacred days). Therefore, they were distinct from other days, which were not sacred; they deserved special consideration through the postponement of those sufferings from the torture of those presumed guilty and therefore of the witnesses. John Chrysostom spoke of “ holy Lent ” *sancta quadragesima* (cf. PG 53, c. 23); Augustine used the phrase “ holy days ” *sancti dies* (cf. s. 211,1); he presented Lent in the following terms:

« The solemn season has arrived, which should remind us to humble our souls and chastise our bodies with prayer and fasting more earnestly and intensely than at other periods of the year. But people are regularly puzzled about why this season should be celebrated as the solemnity of the Lord’s passion is approaching, and why for this mystic number of forty days » (s. 210,1).

The drafter of the law spoke of the *absolutio* of souls. At the end of Lent we have four types of *absolutiones*: the most important was the manumission from slavery to Satan, which was done by renouncing him. The renunciation of Satan was a very solemn act that took place in the presence of the bishop in the vestibule of the baptistery « the entry room into the house of the king » (cf. Cyr. H., *Procatechesis* 1). « The catechumens, barefooted and clothed, as in the exorcisms, with the tunic, bend down with their hands lifted toward heaven ». ⁹⁶ The other *absolutio* was obtained through the deliverance from the slavery to sin through baptism, with which one became a Son of God and “ a fellow citizen of the saints ”. The third delivered one from personal sins through the rite of the reconciliation of penitents; the fourth *absolutio*, lastly, was the deliverance from hatred through reciprocal forgiveness. John Chrysostom considered it absurd how with reverence for the feast of Easter, the Antiochens await forgiveness from the emperor for their rebellion; they, however, neglect the need for reconciling among themselves. ⁹⁷

The application of the imperial norms met much difficulty deriving from the different structuring of Lent in the various regional churches. The dating of Easter worried many churches; highly trained individuals sought to develop systems for knowing way in advance the precise date through the combining of the lunar

⁹⁶ Cf. SC 50bis, p. 80.

⁹⁷ Cf. *Ad finem iuiunii* 7 (cf. PG 7, c. 208).

and solar systems. In the fourth century the following were the points of reference: the Spring equinox,⁹⁸ the first full moon after it and Sunday. The Church of Alexandria calculated the date and communicated it to the other churches; when the proposed date fell after April 21st, however, Rome,⁹⁹ preferred its own date because this church also used the *supputatio romana* (a Roman computation). The disagreement of 387, for which one of Ambrose's letters has been preserved, was famous. In that year Ambrose adopted the Alexandrian dating of April 25th,¹⁰⁰ as did the author of an anonymous homily.¹⁰¹ The date used in other churches is not known (March 21st and 28th and April 18th).¹⁰² On many occasions, however, after the Council of Nicaea of 325, in the Eastern and Western world, Easter was celebrated on different days for the years 326, 330, 333, 340, 341 and 343 on account of a different system of computation. For this reason, the Council of Serdica of the year 343 requested mutual concessions for a period of 50 years.¹⁰³ Even during the years 397, 401-404, 406, 414, etc.¹⁰⁴ the disagreements about the time of Easter continued.¹⁰⁵ For example in Gallia the Resurrection (Easter) was celebrated on March 25th.¹⁰⁶

⁹⁸ The Spring Equinox landed on March 25th; it was then set for March 21st.

⁹⁹ The West generally followed Rome's custom.

¹⁰⁰ cf. Ambr., *ep. extra collectionem* 13 (Maurini 23). Augustine was actually baptized at Milan during the night between April 24th and 25th; whether he would be baptized at Rome or Africa, the day was quite anticipated.

¹⁰¹ Cf. L. Vanyó, *L'omelia anatolica sulla Pasqua nell'anno 387*, in *Aug* 15(1975), pp. 225-228.

¹⁰² Cf. M. Zelzer, *Prolegomena* (CSEL 82/3, pp. CXX-CXXI).

¹⁰³ See *Cyrille d'Alexandrie, Lettres festales*, eds. P. Éviéux-W.H. Burns, [SC 372], Paris 1991, p. 88; V. Peri, *La data della Pasqua. Origine e sviluppo della questione pasquale tra le Chiese cristiane*, in *VetChr* 13(1976), pp. 319-348, here pp. 332-333.

¹⁰⁴ See V. Grumel, *La chronologie*, Paris 1958, pp. 240-242.

¹⁰⁵ See J. Janssens, *Il vescovo Pascasio e la data della Pasqua*, in *Pascasio di Lilibeo e il suo tempo*, eds. M. Crociata-M.G. Griffo, Caltanissetta-Roma 2002, pp. 139-163.

¹⁰⁶ Cf. U. Holzmeister, *Chronologia Vitae Christi*, Romae 1933, pp. 166-167. About the day of the death and Resurrection of Jesus, see *Lactance, de la mort des persécuteurs*, ed. J. Moreau, [SC 39/2], Paris 1954, pp. 194-196). See Martinus Brac., *De pascha* 1 (PL 72, c. 50): *a plerisque Gallicanis episcopis usque ante non*

The civil authorities, however, had to be informed by the local bishops about the beginning of Lent and its duration in the province entrusted to them.

Moreover the length of the pre-Paschal period varied according to the various liturgical areas. The historian Socrates († after 439) described with a few imprecisions the great variety of observances (cf. *h.e.* 7,22). At Alexandria Lent lasted six weeks;¹⁰⁷ the sixth week overlapped Holy Week, as also in Greece and Illyricum; at Jerusalem, however, according to Egeria, Lent lasted eight weeks, for Caesarea, Palestine, Eusebius of Caesarea spoke of six weeks – the symbolism of the creation in six days –, with Holy Week probably included; at Milan a few days less than Rome¹⁰⁸ and at Antioch eight weeks,¹⁰⁹ etc. Egeria observed that meanwhile in her region the lent lasted forty days, in Jerusalem it was observed eight weeks before Easter.

Fifth-century testimonies attest that at Jerusalem Lent lasted seven weeks.¹¹⁰

This difference, however, in the Easter computation and in the festive celebration, which were accompanied by fierce debates in the Church, also had consequences on the civil and social level, as explicitly stated by Cyril in this regard:

« *Cum ... esset ... magna confusio in omni ecclesia praetorio vel palatio* »
(because ... there had been ... a great confusion in every church,
governor residence or imperial palace).¹¹¹

In the year 408,¹¹² Theodosius II made an exception to the current law, for the Lenten and Easter period, in the case of the

multum tempus custoditum est semper VIII die kal. April. Diem Paschae celebrent, in quo facta Christi resurrectio traditur.

¹⁰⁷ Cf. V. Peri, *La cronologia delle Lettere Festali di Sant'Atanasio e la Quaresima*, in *Aevum* 35(1961), pp. 18-26.

¹⁰⁸ Here the fast is for forty days at the time of Leo the Great (see A. Chavasse, *La préparation de Pâques à Rome avant le V^e siècle: jeûne et organisation liturgique*, in *Mémorial J. Chaîne*, Lyon 1950, pp. 61-80, spec. p. 64.

¹⁰⁹ See F. van de Paverd, pp. 210-216; 250-254.

¹¹⁰ See the armenian Lectionary in *Le codex arménien Jérusalem 121*, ed. A. Renoux, [PO 35], Turnhout 1969, pp. 100-103.

¹¹¹ Cf. M. Zelzer, *Zum Osterfestbrief des hl. Ambrosius und zur römischen Osterfestberechnung des 4. Jh.*, in *Wiener Studien* 91(1978), pp. 187-204, text at p. 202.

latrones Isauri “ the Isaurian thieves ” (cf. *Cod. Theod.* 9,35,7), who in those years overran and plundered Cilicia¹¹³ and the nearby provinces.¹¹⁴ The *latrones* were bandits, lawless people, those marginalized from *civilitas*. Thecla, from her sanctuary of Seleucia at Calycadnum (today Silifke, Turkey), was considered the protectress by many Isaurian cities against the raids of the bandits. They were the most hated and feared people, who made traveling outside the city walls unsafe.¹¹⁵ John Chrysostom, when he arrived at Göksun (Lat. Cucusus), in 404, on the road to exile, wrote the following in a letter to Olympias:

« having come to Cucusus, we were healed from all infirmity...and delivered from the fear of the Isaurians, because there are many soldiers near us and there are many well armed men against them » (cf. *ep.* 6,2; see also *ep.* 9,13).¹¹⁶

John Chrysostom was transferred from Cucusus to the nearby Arabissus (today Yarpuz, Afşin, Turkey), a safer and better protected city, toward the end of 404. He could not receive the necessary care there, because

« the continual assaults of the brigands, who have poured onto and blocked the roads which they have cut off at every corner » (*ep.* 15,4).

The *latrones* were the de facto leaders of the territory outside the walls of the city. Symmachus noted that the periphery of Rome

¹¹² The date recorded for the law is April 27th. Since Easter that year fell on March 29th, the exception must have come earlier, perhaps February 26th, for this point, see O. Seeck (pp. 102; 313).

¹¹³ Isauria is also called *Cilicia Tracheia (Aspera)*; it was the mountainous part of Western Cilicia with important cities such as Seleucia ad Calycadnum, the capital, which was home to the Sanctuary of Thecla. In the fourth century it was an autonomous province bearing the name “ Isauria ”.

¹¹⁴ Cf. A. Lewin, *Banditismo e civilitas nella Cilicia Tracheia antica e tardo antica*, in *Quaderni storici* 76(1991), pp. 167-184; Idem, *Studi sulla città imperiale romana nell'oriente tardoantico*, Como 1991, pp. 59-63.

¹¹⁵ Cf. B. Pottier, *Banditisme et révolte en Isaurie au [sic] IV^e et V^e siècles vus par les Isauriens eux-mêmes: la Vie de saint Conon*, in *Mediterraneo Antico* 8(2005), pp. 443-474; see *Vie et miracles de sainte Thècle*, ed. G. Dagron, Bruxelles 1978.

¹¹⁶ Cf. R. Delmaire, *Jean Chrysostome et les brigands Isauriens*, in «*Consuetudinis amor*»: *fragments d'histoire romaine (II^e-VI^e siècles) offerts à Jean-Pierre Callu*, eds. F. Chausson-É. Wolff, Roma 2003, pp. 217-230.

(*suburbanitas*) was dangerous because of the presence of bandits (cf. *ep.* 2,22). The Isaurian pirates were famous from the second century BC onwards; their base was the city of Coracesium (today Alanya); they were really suppressed by Pompey (67 BC) with an effective strategy. In the fourth century the Isaurians of the mountain regions continued their banditry by engaging in combat with the Roman army (see Ammonius, *fragmenta* 14,2,1; 27,9).¹¹⁷ In 404 their activity extended from Caria, to Phoenicia and Cappadocia. The Emperor was confident that this delegation would obtain divine forgiveness (*venia*) inasmuch as many people would be safe from their invasions.

The brutality of the trials and the administration of justice worsened in the fourth century. For this reason the leniency measures the emperors sought for the occasion of Christian feasts was a reflection of Christian values and stood in relation to the organization of the liturgical year. The Fathers of the Church recognized and appreciated this imperial legislation.¹¹⁸

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ABSTRACT

On the 3rd of March 380, Theodosius, moved by the *qualitas* (*pro reverentia religionis*) of the pre-paschal period, a special time of preparation for Easter, mandates the suspension during Christian Lent of all penal trials which normally resulted in torture (*Cod. Theod.* 9,35,4 = *Cod. Inst.* 3,12,5). Lent is a specifically Christian time which developed to a large degree in the course of the fourth century, but which varied in duration and organization in the various churches. The law adapts the judicial calendar for the administration of justice to the rhythms of Christian liturgy. Theodosius in 389 (*Cod. Theod.* 9,35,5; 9,35,7) decrees that during Lent *supplicia corporis* could not take place, due to the sacredness of those days intended as a salutary penance which culminates in Easter reconciliation. Since the duration of Lent varied within the various churches, civil authorities of the provinces were to be informed by local Christians of the beginning and end of Lent.

¹¹⁷ Cf. A. Lewin, *Banditismo e civilista...*, pp. 177ss.; B.D. Shaw, *Bandit Highlands and Lowland Peace: the Mountains of Isauria-Cilicia*, in *Journal of the Economic and Social History of the Orient* 33(1990), pp. 199-233; 237-270.

¹¹⁸ Cf. Jo. Chrys., *hom. in Gen.* 30,1 (PG 53, cc. 273-274); Leo M., s. 40,5; 45,4. See E. Vacandard, *Carême*, in *Dictionnaire d'archéologie chrétienne et de liturgie* vol. I, c. 2152.