

**THE CRIMINAL PROSECUTION OF HERESY
IN THE THEODOSIAN CODE**

Laurette Barnard

*Research dissertation presented for the approval of Senate in fulfillment of the
requirements for the degree of Master of Laws in the Faculty of Law,
University of Cape Town*

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Supervisor: Rev J Hofman SJ

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 LL M dissertation, University of Cape Town, March 1989. (Supervisor: Rev J Hofman SJ)

SUMMARY: This dissertation comprises an examination of the criminalization and prosecution of religious sectarianism during the first century of the Roman Empire's Christian era (the seminal period of the crime of heresy). The antisectarian legislation issued during this period is analysed in order to deduce the concerns informing it. This analysis serves as a basis for an assessment of whether the nature of the antisectarian legislation validates the explanation currently offered by legal historians for the emperors' prosecution of sectarianism, which states that religious dissidence represented a manifestation of social and political discontent in an era when such discontent could not be expressed through more appropriate avenues, and that the antisectarian measures thus represented a reaction to a secular threat.

The foregoing analysis is conducted in three stages. First, the context in which, and the process whereby sectarianism was criminalized, is set out. Secondly, the criminal prosecution of sectarianism is discussed, focusing in turn on the elements of liability, the procedure whereby liability was determined in a given case, and the punishments imposed on conviction. The above aspects are discussed in some detail; as no comprehensive legal analysis of the prosecution of sectarianism during the relevant period exists as yet, it is necessary to create a proper frame of reference for further assessment. Finally, the nature of the antisectarian measures is considered. It is determined that there are no explicit or implicit indications in the legislation supporting the thesis that the emperors perceived sectarianism as an expression of social revolt, and suppressed it on that account. It is further determined that there are no indications validating a nationalist thesis: although some correspondences between the rules relating to the prosecution of sectarianism and of political offences exist, these relate to features encountered more generally in Roman criminal law and thus are not significant; furthermore, there are important differences in the prosecution of sectarianism, and suppression of politically dangerous conduct, which are of such a nature that they indicate that the emperors' concern in the former case, differed fundamentally from that which informed the latter.

It is concluded that the nature of the antisectarian legislation does not validate the socio-political thesis now current among legal historians, but rather serves to confirm the emperors' statement that religious piety informed their antisectarian programme.

OPSOMMING: Hierdie verhandeling behels 'n ondersoek na die kriminalisering en strafregtelike vervolging van akatolisisme tydens die eerste eeu van die Romeinse Ryk se Christelike era (die ontstaanstydperk van die misdaad kettery). Die tersaaklike wetgewing wat in hierdie tysperk uitgevaardig is, word geanaliseer ten einde die oogmerk daarmee bloot te lê. Hierdie analise dien dan as 'n basis ter bepaling of die aard van die wetgewing die verklaring bekragtig wat tans deur regshistorici vir die staatsonderdrukking van akatolisisme gebied word, naamlik dat godsdienstige splintergroepe in wese 'n uitdrukking van sosiale en politieke protes was in 'n tydperk waarin sodanige protes nie op 'n meer geskikte wyse tot uiting gebring kon word nie, en dat die staatsowerhede se onderdrukkingsmaatreëls dus 'n reaksie op 'n sekulêre gevaar was.

Die bostaande ondersoek geskied in drie fases. Ten eerste word die agtergrond waarteen, en die proses waarvolgens akatolisisme gekriminaliseer is, uiteengesit. Ten tweede word die strafregtelike vervolging van akatolisisme bespreek; hier word onderskeidelik die vereistes vir strafregtelike aanspreeklikheid, die prosedure waarvolgens aanspreeklikheid in 'n gegewe geval bepaal is, en die strawwe wat by veroordeling opgelê is, ondersoek. Hierdie aspekte word in besonderhede toegelig, aangesien daar nog geen omvattende juridiese analise van die vervolging van akatolisisme in die betrokke era bestaan nie, en aangesien so 'n analise onontbeerlik is vir 'n geskikte verwysingsraamwerk vir verdere evaluasie. Ten laaste word oorweging geskenk aan die aard van die wetgewing ter onderdrukking van akatolisisme. Daar word vasgestel dat daar geen aanduidings (hetsy uitdruklik, hetsy implisiet) in die wetgewing is dat die owerhede akatolisisme as 'n uitdrukking van sosiale protes beleef het nie. Daar word verder bevind dat dit geen aanduidings bevat ter bekragtiging van 'n nasionalistiese verklaring nie: alhoewel daar sekere ooreenkomste tussen die reëls insake die vervolging van onderskeidelik akatolisisme en politieke oortredings bestaan, word die gemeenskaplike elemente ook elders in die Romeinse strafreg aangetref, sodat die tersaaklike ooreenkomste nie bepalend is nie; en voorts is daar belangrike verskille tussen die vervolging van akatolisisme en die onderdrukking van politieke gevaarlike optrede, wat aandui dat die oorwegings wat eersgenoemde ten grondslag gelê het, fundamenteel verskil het van die oogmerke met laasgenoemde.

Daar word tot die gevolgtrekking gekom dat die aard van die wetgewing nie steun bied vir die sosio-politiese verklaring wat tans gangbaar is onder regshistorici nie, maar eerder dien om die keisers se verklaarde piëteitsoorwegings vir die onderdrukking van akatolisisme, te bekragtig.

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CHAPTER ONE

INTRODUCTION

1. AIMS, SCOPE AND METHOD

This dissertation was inspired by a desire to research the validity of a current explanation which legal historians offer for the criminalization and prosecution of religious sectarianism in the late Roman Empire.

Before, it had been accepted that the emperors' religious intolerance of not only Christian sectarianism, but also paganism, anabaptism, and Jewish proselytism, was a natural result of their confession of the exclusivist Christian religion. In terms of this exclusivism, all persons who did not subscribe to orthodox Christianity were irreligious, and therefore were a threat to both the dominance and purity of the one true faith, and (as they could lead others astray, and were sure to attract divine disfavour) to the community of the faithful. It was therefore not only the right, but also the duty of confessing Christian rulers to defend their faith by the appropriate means at their disposal.¹ Thus, the traditional explanation for the emperors' religious measures, including their antisectarian measures, was sought in essentially religious considerations.

However, a different explanation is now encountered in the literature. The explanation now offered (which is stated with a greater or lesser degree of explicitness by the various authors, all of whose writings nevertheless reflect the same basic notion), is that the emperors' antisectarian programme was inspired by the essentially secular concern of safeguarding the cohesion of the Empire (or, after its division in 395 AD, that of its two parts); and that this concern was occasioned (as may be seen from the statements of those scholars who expound this thesis most fully) by the fact that the sectarian movements of the late Empire were not purely religious phenomena, but that the doctrinal and ecclesiological controversies of this period were in reality a medium for the expression of thwarted nationalism and social discontent. Deviance from Catholic Christianity was therefore not only a threat to religious unity, but also, being indicative of germinating rebellion, threatened the state's unity and stability, and was repressed by the state authorities on these grounds.

On the whole, this explanation has merely been stated as a truism, without further development.² However, in a recent paper,³ Guglielmo Nocera employed this thesis as the

¹ See, e.g., Biondo Biondi *Il Diritto Romano Cristiano* vol 1 (1952) para 90 pp 306-307, vol 3 (1954) para 512 pp 460-461.

² Cf i a G G Archi "Aspetti della libertà religiosa nel V° e VI° secolo - legislazione teodosiana e giustiniana" in JA Ankum et al (eds) *Satura Roberto Feenstra Sexagesimum Quintum Annum Aetatis Complenti ab Alumnis Collegis Amicis Oblata* (1985) 229 at 231; Arnaldo Biscardi "CTh 2,1,10 nel quadro della normativa giurisdizionale d'ispirazione religiosa" in *Atti dell'Accademia Romanistica Costantiniana (VI Convegno Internazionale)* (1986) 213 at 215; Jean Gaudemet *La Formation du Droit Séculier et du Droit de l'Église aux IV^e et V^e Siècles* 2 ed (1979) 211; Jean Gaudemet "Politique ecclésiastique et législation religieuse après l'édit de Théodose I de 380" in *Atti dell'Accademia Romanistica*

starting point for an elaborate political interpretation of the antiheretical legislation in the Theodosian Code. The following excerpts from his paper illustrate the extent to which his analysis of the relevant provisions is influenced by an acceptance of the principle that the Roman authorities' antiheretical programme was based on socio-political concerns:

Che il concetto stesso di eresia, quale si ricava dalle nostre fonti legislative, copra non solo gli aspetti religiosi ma anche quelli sociali (- sul carattere non sempre religioso delle sette ereticali, valga l'esempio dei circumcellioni, ossia di quel gruppo di donatisti...costituito di schiavi fuggitivi e di contadini rovinati, del nord Africa, che associavano nella rivolta motivi religiosi e sociali), di ordine, quindi politici, appare sopra tutto dalla proscrizione, che torna a minacciare con insistenza ogni attività associata e comunitaria degli eretici, ma anche dalla motivazione che condanna l'eresia come pubblico crimine, perché «qualsiasi cosa commessa contro la divina religione ridonda a detrimento di tutti». ⁴

L'idea della eresia come pubblico crimine balza fuori dal tono generale delle costituzioni che trattano, ora esplicitamente ora implicitamente, i reati contro la religione cattolica come reati contro lo Stato, essendo sin troppo evidente che la repressione mira a colpire sopra tutto ogni forma di aggregazione degli eretici, quindi ogni mezzo che favorisce la sovversione politica. ⁵

Le misure repressive non riguardavano soltanto la condizione, *lato sensu*, politica degli eretici, ma anche la loro condizione civile, la capacità patrimoniale, in particolare, circostanza, questa, che lascia chiaramente intendere la direzione nella quale si movevano gli interventi imperiali, decisi a contrastare ogni forma di disgregazione, capace di influenzare in alto e in basso i vari ceti sociali... ⁶

[In seeking to explain the different nature of the measures against the pagans:] In realtà, quale pericolo, in buono sostanza, poteva più rappresentare, per l'unità dell'impero, un paganesimo circoscritto alla modesta osservanza di devozioni domestiche e di riti paesani...? ⁷

What are the foundations for the current socio-political explanation of the emperors' antiheretical programme?

As indicated, most modern legal historians regard this explanation as a truism, to the extent that they cite no authority for their assertion. However, Nocera does record his source: ⁸ the following footnote appended by Clyde Pharr to his 1952 translation of the title *De haereticis* of the Theodosian Code: ⁹

Costantiniana (VI Convegno Internazionale) (1986) 1 at 16, 18, 20; Marta Giacchero "La chiesa armena come etnia religiosa da Diocleziano ad Eraclio" in *Atti dell'Accademia Romanistica Costantiniana (VI Convegno Internazionale)* (1986) 105 at 112.

³ Reported as Guglielmo Nocera " 'Cuius regio eius religio' " in *Atti dell'Accademia Romanistica Costantiniana (VI Convegno Internazionale)* (1986) 303-339.

⁴ Id 308 -309, read with p 309 n 12.

⁵ Id 310 n 14 at 310-311.

⁶ Id 312 n 15 at p 312-313.

⁷ Id 316.

⁸ Id 312 n 15.

⁹ Clyde Pharr (tr) *The Theodosian Code and Novels and the Sirmundian Constitutions* (© 1952 repr 1969) 450 n 1.

In many cases, heresy was not primarily religious dissent but was an expression of social and economic suffering and discontent. Hence, as an expression of latent rebellion, it was all the more sternly repressed by the Emperors.

Furthermore, Nocera seeks to substantiate the statement that the heresy of this period was not a purely religious phenomenon, but also involved social and political issues, by reference to the Donatist Circumcellions. Here, he seems to build on an interpretation of Circumcellionism already encountered in the writings of an earlier generation of Romanists like Jean Gaudemet, who, in a work published in 1958, prefaced his discussion of the emperors' antisectarian measures with the following statement:¹⁰

L'hérésie ne se réduisait pas toujours à un débat intellectuel. Celui-ci peut conduire à des troubles graves qui mettent en péril la paix publique et exigent l'intervention de l'autorité séculière. Dans ses origines même, le conflit revêt parfois un aspect social. Si la crise donatiste troubla aussi profondément pendant un siècle la vie de l'Afrique romaine, c'est qu'au delà du débat doctrinal et des rivalités de personnes il y avait une crise sociale et une manifestation exacerbée du particularisme africain, dont l'église orthodoxe d'Afrique donne également des signes.

Thus, the socio-political explanation for the antisectarian programme currently accepted by Nocera (and by other modern legal historians) is a generalized theory constructed on the basis of information furnished by scholars of the fifties. It is accordingly the scholarship of this latter period which must be examined, to trace the source of the socio-political explanation now current among legal historians.

Pharr cites no authority for his proposition that heresy evoked the added concern of the emperors because it was, in many cases, an expression of social and economic suffering and discontent. Gaudemet does, however, refer to a discussion of the Donatist sect's characteristics of socio-economic and nationalist protest in a number of non-legal historical studies, and notably in the writings of the religious historian W H C Frend.

Frend's works on the Donatist sect as a movement of protest form part of the broader scholarship produced by a debate among theologians and sociologists of religion concerning the true nature, and the actual causes of religious dissent. As against the conventional view, which does not question the essentially theological nature of the causes of religious sectarianism, an opposing view has emerged, which interprets religious dissidence as a veneer for political dissidence, and as essentially a manifestation of socio-political grievances, adopted during periods when such grievances cannot be legitimately expressed through more appropriate avenues.

Much of the debate engendered by this controversy has centered on the period of the later Roman Empire, as representing a period of state totalitarianism accompanied by the

¹⁰ Jean Gaudemet *L'Église dans l'Empire Romain (IV^e-V^e Siècles)* (1958) 598.

eruption of various brands of heresy and schism. It is in this context that the Donatist schism in North Africa, especially, has attracted much discussion.

The cause for the Donatist schism recorded in the ancient histories, was, briefly put, the rigorist approach to lapsed Christians which was adopted by the Numidian Christians. In contrast to the approach which was accepted in the East and ultimately prevailed in the West, they refused to remain in communion with those who had betrayed or compromised the Christian faith during the Diocletianic persecution by surrendering the holy scriptures,¹¹ or even with those who compromised the purity of the Church by subsequently remaining in communion with such traditores.¹² On this view, ecclesiological differences occasioned by a clash between a rigorist outlook and a less exclusive view of the Christian church, lay at the root of the schism.

Wilhelm Thümmel, writing in 1893, was the first scholar¹³ to formulate the thesis that Donatism in reality represented a separatist movement, expressing the lasting hostility of the native Berber populace against the Roman authorities. Many scholars subsequently took up this theme. The researches of Frend (from 1939), especially, and Brisson (ca 1955) revealed much new evidence thought to support this thesis. Brisson adduced considerations which suggested that the Circumcellions - a highly militant faction of Donatists - consisted of Numidian peasants bent on social liberation and revenge; while Frend, whose writings have arguably had the biggest impact in this field, advanced the opinion that Donatism served in an even broader sense to express the aspirations of the dispossessed. Basing his conclusions on a study of the archaeological evidence of the schism's geographical spread, Frend argued that Donatism was largely confined to Numidia (the modern eastern and central Algeria), and that its sphere of dominance there corresponded to the inland, comparatively un-Romanised areas; this distribution, he argued, indicated that Donatism was primarily supported by the un-Romanised rural populace, that is to say, the under-privileged and impoverished native Berber population. Thus, once ecclesiological dispute had sparked controversy, the schismatic church must have served as a rallying point for these people, and must have been sustained by the latent aspirations of Berber nationalists and those agitating for socio-economic reform.

¹¹ Or books accepted as such by the authorities.

¹² For a full discussion of the causes and development of the Donatist schism, see the account of Augustine of Hippo in *Aug Ep 185* (Al Goldbacher (ed) *S. Aureli Augustini Hipponiensis Episcopi Epistulae* in *Corpus Scriptorum Ecclesiasticorum Latinorum* (vol 57) 1911).

¹³ The following discussion of the historical development of the Donatist controversy is, except for the section on Jones' reply, based on W H C Frend "The Donatist church - forty years on" in C Landman & D P Whitelaw (eds) *Windows on Origins/Oorsprong in Oënskou* (1985) 70-78 (hereafter referred to as Frend I).

After this, the notion that the ancient heretical movements could not be explained in purely religious terms, but also bore a nationalist and (in the case of Donatism) a social revolutionary aspect, came to be generally accepted. However, at this stage a reaction to the socio-political approach to religious dissidence, both in its nationalist and in its socio-economic variants, began to set in. A H M Jones, writing in 1959, was the first to challenge this approach, denying that Donatism, or any of the other ancient heresies, such as the Melitian movement and the Coptic church in Egypt, or the monophysite Jacobite church of Syria represented the revolt of dispossessed Christians.¹⁴ As far as the nationalist thesis was concerned, he pointed out that there was no real evidence for a separatist interpretation for Donatism: the Donatists' conduct in their dealings with the emperors clearly showed that Donatism was not informed by anti-imperialism; there was no foundation for the identification of the Catholic church with Latin, and Donatism with Berber culture; and although it was true that this movement was essentially confined to Africa, this fact was easily explained by an analysis of the historical circumstances in which it developed, so that its admittedly regional character should not be regarded as denoting a nationalist character. Similarly, he contended that the arguments supporting a separatist interpretation of the other relevant ancient heresies were unconvincing: the only sect whose national identity could, he stated, stand up to scrutiny, was the Armenian church in Persia, but this was simply due to the isolation of the Armenians and dogmatic developments among the Romans after Armenia (which had until then been an independent state) came under Persian domination. Jones also questioned the socio-economic interpretation of Donatism. While agreeing that there was strong patristic evidence that the Circumcellions in some instances protected tenant farmers against landlords, debtors against creditors, and slaves against their masters, he argued, first, that the Circumcellions were merely a faction within the Donatist movement, whose militancy could thus not be used as evidence for the views of the ordinary majority of Donatists; and secondly, that the Circumcellions' militant attacks on members of the established order (attacks on the Catholic clergy aside) seemed to be confined to Catholic landlords who had attempted to convert to Catholicism the Donatist tenants and serfs on their properties, so that the primary intent for their attacks would have been religious concern rather than social protest. Having established the weakness of the factual basis on which the nationalist interpretation of the ancient heresies, and probably the socio-economic interpretation of Donatism, rested, he argued that the nationalist and socialist theories were based on a radical misapprehension of the mentality of the later Roman Empire. It was, as all the extant evidence shows, an intensely religious age; but there is no real evidence of nationalism and socialism as policy considerations in the ancient world. Modern historians, to whom nationalism and secular socialism are

¹⁴ A H M Jones "Were ancient heresies national or social movements in disguise?" (1959) 10 *Journal of Theological Studies* 280-295.

socialism are dominant ideological concerns, were, he charged, "retrojecting into the past the sentiments of the present age when they argue that mere religious or doctrinal dissension cannot have generated such violent and enduring animosity as that evinced by the Donatists, Arians or Monophysites ...".¹⁵ By seeking to substitute the essentially doctrinal causes stated for sectarianism by the ancient authors, the modern adherents of the socio-political theories were thus guilty of anachronistic interpretation.

The case against a socio-political interpretation of specifically, Donatism, was thereafter developed by Emin Tengström. According to Tengström, a scrupulous examination of the ancient texts brought into question both the distribution maps for Donatism central to Frensdorff's view, and the inferences he sought to draw from these. The literary sources contradicted the view that a sharp economic distinction existed between Catholics and Donatists, and that Donatism prevailed among the poor peasants of Numidia while Catholicism predominated among the rich and landowning classes; similarly, the main arguments for the Circumcellions' being social revolutionaries would not stand up to critical examination. Generally, the whole basis for the socio-economic interpretation of Donatism rested on very fragile foundations.¹⁶

After the appearance of Tengström's study, interest in Donatism as a socio-economic or nationalist phenomenon abated for a while. It came to be accepted that Donatism should not be viewed as a movement of protest which had developed in opposition to Catholicism during the reign of Constantine the Great, but rather as the continuation of an already existing rigorist tradition in the face of a different imported approach. In Africa, it was not the rigorist tradition, but the more liberal ideology of the Catholic church which represented a new movement; and which assisted the advance of Catholicism in the face of an indigenous tradition. Seen from this perspective, considerations earlier thought to indicate a socio-political basis for Donatism, such as its concentration in the less Romanized and rural, poorer districts, were simply ascribable to the slower penetration of transmarine culture, and therefore Catholicism in these areas.¹⁷

However, Frensdorff has not been willing to abandon his interpretation of Donatism as a movement of protest, and although conceding that some of the detail of Jones and Tengström's criticisms was valid, has continued to assert the validity of a socio-political interpretation. In a paper published in 1972, he argued that the Donatists' activities indicated the movement's eschatological character; and that this character must have

¹⁵ Id 295.

¹⁶ Emin Tengström *Donatisten und Katholiken: soziale, wirtschaftliche und politische Aspekte einer nordafrikanischen Kirchenspaltung* (1964).

¹⁷ See R A Markus "Christianity and dissent in Roman North Africa: changing perspectives in recent work" in Derek Baker (ed) *Schism, Heresy and Religious Protest* (1972) 21 at 28-31.

meant that the Donatists adopted revolutionary aspirations, as certain medieval heresies which had held social revolutionary ideals had had a similar eschatological nature. Then, as recently as 1985, he sought to reassert his thesis in even stronger terms by indicating certain gaps in Tengström's refutation of strong Donatist support for the rebel Firmus, and by pointing out the support for his original argument concerning the spread of Donatism to be found in the (recently published) Acta of the Conference of Carthage of 411 AD - though accepting that his original argument had to be revised and qualified in certain respects, Frend insisted that the nationalist interpretation of Donatism remains valid.¹⁸ However, the eschatological argument raised by Frend in 1972 seems open to the criticism of anachronism already raised by Jones. Furthermore, the three arguments which Frend advances in his more recent discussion of 1985 are hardly compelling: first, Jones had already refuted the argument that any possible support some Donatists might have given Firmus, would offer a clear indication of nationalist aspirations on their part; the question whether the Circumcellions were bands of olive harvesters turned religious activists (as argued by Tengström) or simply activist members of an inherently religious order (as argued by Calderone¹⁹ and, though with some qualification,²⁰ Frend) is surely not central to the issue of the Circumcellions' social origins, the degree to which their militancy was informed by social protest, and the extent to which they reflected general Donatist socio-political aspirations; and thirdly, the significance of the point that the Acta demonstrate a clearer concentration of Donatists in rural Numidia than Tengström admitted, may easily be countered by the arguments set out in the previous paragraph. Therefore, Frend's statement that Tengstrom's study had only amended a number of details in the work of scholars in the fifties, and had not succeeded in the discrediting the socio-political interpretation of Donatism, seems highly arguable.

The above discussion of the development of the theological debate on the nature of the ancient heresies shows that, while the socio-political thesis has continued to be advanced in some theological circles, its soundness has been increasingly questioned since the end of the fifties, and that the majority of scholars of the history and sociology of religion would now either not support it, or at the very least regard it with the greatest reserve.²¹

¹⁸ Frend I 78-80.

¹⁹ Salvatore Calderone "Circumcelliones" (1967) 22 *La Parola del Passato* 94-109.

²⁰ W H C Frend "Circumcellions and monks" (1969) 20 *Journal of Theological Studies* 542-549.

²¹ See, e.g., Jean Daniélou & Henri Marrou *The Christian Centuries. Vol 1. The First Six Hundred Years* (1964 repr 1983) 247 (negative regarding the nationalist thesis; cautious regarding the socio-political thesis); Henry Chadwick *The Early Church* (1967 repr 1984) 219-220 (negative). The religious comparativist Kurt Rudolph is careful to cite only medieval and modern sects in his discussion of the social causes of religious sectarianism, avoiding all reference to the ancient sects in this context (in Mircea Eliade (ed) *The Encyclopedia of Religion* vol 6 (1987) s v "Heresy: An Overview" 273).

Therefore, the current acceptance by Nocera and other legal historians of the view that sectarianism in the late Empire represented movements of protest threatening the unity and stability of the Empire, and on this account attracted hostile reaction by the emperors, ignores recent trends in the way in which historians and sociologists of religion have come to view sectarianism in the late Empire.

The fact that the modern legal historical view is based on an outdated theological thesis which is no longer generally supported in the disciplines in which it was originally developed, warrants criticism, and offers a sufficient cause for being very wary of accepting its validity. However, the theological scholarship on which it is based has not been *wholly* discredited, and it will not suffice finally to resolve the question whether the modern legal historical explanation of the emperors' antiheretical measures is sound, by pointing out that the theological opinions on which it is based, no longer reflect the views of the majority of theological scholars.

The ultimate purpose of this dissertation will therefore be to contribute to the resolution of this issue, by determining whether a non-aprioristic analysis of the antisectarian legislation issued by the Roman emperors supports a socio-political thesis, either explicitly or by indicating a correspondence between the way in which they reacted to religious sectarianism, on the one hand, and to socio-political threats, on the other.

I shall primarily confine myself to the question of legal history: whether the current explanation for the criminalization of sectarianism, which is insufficiently supported by theological authority, finds any validation or support in the legal sources, or whether it does not, and should therefore be regarded as unsubstantiated speculation on the part of legal historians. However, this legal analysis will hopefully also, to some extent, contribute to the ongoing theological debate on the nature of the ancient heresies. As indicated above, the arguments employed by the scholars in the theological debate are based on, first, evidence offered by archeological remains, indicating the geographical correspondence between a given dissident sect and a given social or national group; and, secondly, the textual evidence, which is used to reveal the actions and policies of a given sect, in order to reconstruct its experience of social disorientation (or absence of this) and its perception of its schism, as well as the way in which contemporaneous Catholic writers perceived the relevant sect. To my mind, the evidence concerning contemporaneous perceptions is of crucial importance, since the whole validity of the research (as indicated by Jones) depends on whether the interpretation of the evidence truly reflects ancient thought, or whether the modern scholars, to whom nationalism and socialism are dominant concerns, are guilty of interpreting an intellectually and ideologically alien past in the light of modern sentiments. Until now, the enquiry into contemporaneous perceptions of religious dissent has been

conducted on the level of the sectarians themselves, and of the individuals who opposed them. As yet, no consideration has been given to the perception of religious dissidence at the countervailing level of the authorities reacting to it. In my view, this is an important omission; in studying the perception of religious sectarianism in a given period, an examination of the perceptions of *all* engaged in, or concerned with the process, would be relevant, to gain a comprehensive impression of contemporaneous experiences. Accordingly, by assessing whether there is any evidence in the antiheretical legislation for holding that the state authorities reacted to sectarianism as though they perceived it to be a socio-political threat, I hope to make an interdisciplinary contribution, as called for by some theologians,²² and to furnish a further, fresh perspective on this resurgent controversy among historians of religion and sociology on the nature of the ancient heresies.

In establishing whether the antisectarian legislation contains any evidence supporting the socio-political interpretation accepted by modern legal historians, I shall adopt an approach consisting of three stages. First, I shall, in chapter two, give a brief outline of the process by which sectarianism was criminalized, placing this in the context of the then current theological approach to state involvement in religious matters, and to sectarianism. In this way, it will be possible to subsequently determine whether or not the antisectarian programme as a whole, and the specific aspects of the antisectarian measures corresponded to theological demands. During the second stage, I shall focus on the product of this process of criminalization, viz sectarianism as a criminal phenomenon. Here, I shall systematically examine the contents of the antisectarian legislation, in order to determine the precise nature, contents and theoretical implications of the criminal measures which were introduced, investigating in turn the requirements for liability (in chapter three), the procedure by which sectarianism was prosecuted (chapter four) and the penalties prescribed for sectarianism (chapter five). These aspects will be dealt with as fully as possible, for two related reasons. First, I consider that a clear and comprehensive understanding of the antisectarian measures instituted by the emperors creates a proper, and indeed, indispensable frame of reference for any useful assessment. Secondly, there are (to my knowledge) no general, detailed surveys of liability for religious dissidence in Roman criminal law. The few²³ Romanists who have dealt with heresy and schism, have done so either within the confines of general textbooks, in which it is not possible to truly reflect the complex detail of the antisectarian legislation; or within the compass of contributions to

²² E.g. Markus op cit 35.

²³ The Romanists' neglect of religious dissidence in Roman criminal law may be explained by their traditional concern with Roman private law, and by their preoccupation with the law of the Classical, rather than the post-Classical period. - Given the burgeoning interest in recent years in the social regulation of absolutist states, including the late Roman Empire, as well as in the sociology of religious crimes, the need for a more comprehensive, specific description of criminal liability for religious dissidence in Roman law has become apparent; for that reason too, as full a discussion of the measures as possible is called for.

journals, thus limiting their discussion to some or other particular aspect. A comprehensive, specific description of criminal liability for religious dissidence in Roman law will thus fill an existing general need, and also establish a clear basis for discussion of the issue with which this dissertation is ultimately concerned. Having established this basis, I shall, in the third and final stage (in chapter six), assess whether the socio-political thesis may be said to be validated by the nature of the antisectarian measures, or whether the antisectarian legislation (as determined inductively, from noting the effect it had, and what purpose it was thus designed to achieve)²⁴ does not reflect socio-political considerations, and thus serves to refute the explanation now being accepted by legal historians.

For the above purposes, I shall concentrate on a specific portion of the post-Classical period, limiting my investigation to the criminal legislation contained in the *Codex Theodosianus*, or *Theodosian Code*, of the early fifth century. The primary reason for this is, first, that this Code comprises the legislation issued from the reign of Constantine the Great to that of Theodosius II (ca 306-428 AD), and therefore covers the first century of the Roman state's Christian period; as such, the Code relates to the seminal period of state involvement in, and criminal legislation concerned with the suppression of sectarianism. The fact that its provisions constituted the *terminus a quo* for the entire future development of the crime of heresy, and conceivably exercised a decisive influence on the direction of this development, lends a special interest to this Code. Secondary considerations supporting this choice are, first, that the era from which the constitutions contained in the Code date, corresponds to the period of the great Church fathers, and more especially to the careers of Ambrose of Milan, generally considered the architect of state suppression of sectarianism, and of Augustine of Hippo, whose writings contained fairly extensive discussions of the issues raised by state repression of heretics and schismatics; this correspondence creates an excellent opportunity for assessing the convergence or divergence of theological and legal notions. Secondly, the theological debate on which the socio-political thesis is based, has (in so far as it concerns the late Roman Empire) predominantly related to Donatism, and more specifically Donatism in the time of Augustine of Hippo - that is to say, in the era from which the legislation contained in the *Theodosian Code* dates.

2. SOURCES

Since the *Theodosian Code* will, then, constitute the principal source for the present research topic, its compilation, contents and application as a source of law must now briefly be discussed.

²⁴ As the antisectarian legislation contained in the *Theodosian Code* covers a time-span of approximately fifty years, and there was therefore abundant opportunity to correct any unintended consequences, the potential problems posed by the possibility of unintended effects may be discounted.

The Codex Theodosianus was produced by a commission appointed on 20 December 435 AD by Theodosius II, with the following terms of reference:²⁵

CTh 1.1.6 (Theodosius II & Valentinianus III, 435) Omnes edictales generalesque constitutiones vel in certis provinciis seu locis valere aut proponi iussae, quas divus Constantinus posterioresque principes ac nos tulimus, indicibus rerum titulis distinguantur, ita ut non solum consulum dierumque supputatione, sed etiam ordine compositionis apparere possint novissimae. Ac si qua earum in plura sit divisa capita, unumquodque eorum, diiunctum a ceteris apto subiciatur titulo et circumcisis ex quaque constitutione ad vim sanctionis non pertinentibus solum ius relinquatur. 1. Quod ut brevitate constrictum claritate luceat, adgressuris hoc opus et demendi supervacanea verba et adiciendi necessaria et demutandi ambigua et emendandi incongrua tribuimus potestatem, scilicet ut his modis unaquaeque inlustrata constitutio emineat. 2. Erunt contextores huius Theodosiani codicis... 3. ... [A]bsolutionem codicis in omnibus negotiis iudiciisque valituri nullumque extra se novellae constitutioni locum relicturi, nisi quae post editionem huius fuerit promulgata, nullum [potest] inhibere obstaculum.²⁶

"All the edictal and general constitutions that have been ordered to be valid or to be posted in definite provinces or districts and that have been issued by the sainted Constantine and the later emperors and by Us shall be distinguished by titles indicating their contents. Furthermore, it shall be apparent which constitutions are the most recent, not only from a computation of the year of the consulships and of the day, but also from their order of arrangement. If any of the constitutions should be divided into several headings, each heading shall be separated from the rest and shall be placed under the proper title, the words which do not pertain to the force of the sanction shall be removed from each constitution, and the law alone shall be left. 1. In order that the law may be constrained by brevity and may be lucid with clarity, We grant to those men who are about to undertake this work the power to remove superfluous words, to add necessary words, to change ambiguities, and to emend incongruities. By these methods, of course, each constitution shall stand forth illuminated. 2. The compilers of this Theodosian Code shall be ... 3. ... [N]o obstacle shall inhibit the completion of this code, which shall be valid in all cases and in all courts and shall leave no place for any new constitution that is outside itself, except those constitutions which will be promulgated after the publication of this code."²⁷

As appears from this constitution, the commission was instructed to collect, in a single compendium, the salient sections of all extant constitutions (issued in the Empire (or its two parts)) which were *leges generales* and *edictales* - that is to say, according to the theory of sources applicable during the post-Classical period, all imperial legislation²⁸ - which had been issued from the reign of Constantine the Great onwards (and of which copies could still be found).²⁹ It has been suggested that the reason why Theodosius II

²⁵ For a discussion of the pre-history of the compilation of the Codex Theodosianus, and of the nexus between it and the envisaged programme of a prior codification commission appointed in 429, see Gian Gualberto Archi *Teodosio II e la sua Codificazione* (© 1976) 6-24, 32-37 (hereafter cited as Archi I); Lucio De Giovanni *Il Libro XVI del Codice Teodosiano: alle Origini della Codificazione in Tema di Rapporti Chiesa-Stato* (© 1985) 9-12, 15.

²⁶ Text taken from Th Mommsen (ed) *Theodosiani Libri XVI cum Constitutionibus Sirmondianis* vol 1(2) 3 ed (1962). All citations of texts from the Theodosian Code appearing in this dissertation, will be taken from this edition.

²⁷ Text taken from the translation of Pharr op cit. All translations of texts from the Theodosian Code appearing in this dissertation, will be taken from this work.

²⁸ Cf Wolfgang Kunkel *An Introduction to Roman Legal and Constitutional History* 2 ed (tr J M Kelly) (1973 repr 1975) 155.

²⁹ Cf text to p 13 n 32 below, and references cited in n 32.

directed a compilation under these terms, was that he desired a code reflecting the legislation of the *Christian* period to be drawn up; that piety was thus the driving force behind it.³⁰ However, this view is not persuasive, the more so since constitutions issued by Julian the Apostate were also incorporated in the Code.³¹ The true reason for Theodosius II's direction should be sought in the facts that the Theodosian Code was ordered in an attempt to make accessible to legal practice the imperial legislation, which was in a state of disorganization;³² and that only the constitutions issued from Constantine the Great on needed to be collected in an authoritative, exclusive compendium, as imperial legislation issued prior to this period had already been collected in two private codes, the Gregorian and Hermogenian Codes.³³

The commission appointed by Theodosius II completed their assignment within a period of two years. The Code compiled by them, consisted of sixteen books, each of which was divided into a number of titles relating to specific topics. As ordered by the emperor, the germane parts of all constitutions dealing with a given subject were inserted under the appropriate title, in chronological order. Thus, while the Code also contained constitutions already abrogated by the time of compilation,³⁴ it was easy to apply the rule of statutory construction whereby earlier legislation was repealed by later inconsistent legislation, thus rendering it a simple matter to determine which constitutions represented valid law and which did not.³⁵ The arrangement of the material was, in all likelihood, modelled on that adopted in the Gregorian and Hermogenian Codes. Since the latter codes concerned legislation issued in the Roman state's pagan period, matters relating to the Christian religion and Christian institutions could, generally speaking,³⁶ not be accommodated within the traditional system; for this reason, the commission found it necessary to deal with these matters in a separate book, which they appended to the Code as the final book, Book 16.³⁷

³⁰ Cf Franca de Marini Avonzo *La Politica Legislativa di Valentiniano III e Theodosio II* 2 ed (1975) 110. The alternative explanation offered at 110 n 1 for the Code's commencing with the legislation of Constantine, viz that it was really only from this date that Roman legislation acquired an absolute character, is also unconvincing, since legislation had already acquired an absolute character during the era of the later Principate.

³¹ Cf Mommsen's list of the emperors whose constitutions appear in the Code, in Mommsen op cit 26.

³² Cf Kunkel op cit 156-157; A H M Jones *The Later Roman Empire 284-602* vol 1 (1964) 471-475.

³³ These codes, and their contents, are discussed in Kunkel op cit 158.

³⁴ Cf Archi op cit 230; De Giovanni op cit 15, 15 n 28.

³⁵ It may be noted that, although Romanist research has identified a few errors of dating by the codification commission, any divergence discovered is of practical importance for the period preceding the Codex Theodosianus' promulgation only, and does not affect the overriding validity of constitutions erroneously placed at a later position in the Code. Where modern research indicates a different original date for a constitution than that given in the Code, the date indicated by such research will be inserted after the Code's date when quoting a constitution.

³⁶ An exception would, for example, be the position of monks regarding succession, which could be dealt with in CTh 12.1 as a matter of succession.

³⁷ So too Gian Luigi Falchi "Legislazione e politica ecclesiastica nell'impero romano dal 380 d.C. al Codice Teodosiano" in *Atti dell'Accademia Romanistica Costantiniana (VI Convegno Internazionale)* (1986) 196-198, who also refers to, and rejects, the hypothesis (advanced in Archi I 174) that religious

On 15 February 438, Theodosius II promulgated the Theodosian Code for the Eastern Roman Empire, giving it statutory force there.³⁸ As a result, all the constitutions contained in it became generally applicable throughout his part of the Empire, regardless of any previous geographical limitations³⁹ on their effect.⁴⁰ Possibly (as recent research now suggests),⁴¹ the Code was never promulgated in the Western Roman Empire as well, as required for its formal statutory force there; nevertheless, it is clear that, in practice at least, it was given full effect, so that it attained the status of an authoritative source of law in the West, too.⁴²

The Theodosian Code has been transmitted virtually in entirety, with only some minor lacunae. It has come down to us partly in a direct manuscript tradition, and partly via the *lex Romana Visigotorum*, a vulgar code largely based on it,⁴³ and is generally accessible in the scientific edition thereof by Theodor Mommsen.⁴⁴ In the result, the Theodosian Code may reliably be used as a source for modern research.

In studying the Theodosian Code, and in discussing its provisions, it is at all times necessary to bear in mind that, as stated, the constitutions contained in it were originally subject to some territorial limitation;⁴⁵ but that they acquired general validity subsequent to the Code's promulgation (if, of course, they had not already been abrogated, and had been included for the sake of completeness and historical interest only).⁴⁶ Furthermore, it must be borne in mind that, although some constitutions were originally issued with regard to specific problems, these were often framed in non-specific terms, as the persons receiving them would have grasped their exact tenor. This meant that the subject matter of such constitutions would originally have been restricted (e.g., to specific groups of people), whereas it would have been understood in a general sense after the Code's promulgation. The significance of the foregoing considerations, is that the constitutions in the Code can be read in one of two ways. First, it is possible to interpret the individual constitutions in the

matters were dealt with in Book 16 to give them special prominence, and to give expression to a hitherto unknown distinction between *ius humanum* and *ius divinum*.

³⁸ NovTh 1.

³⁹ See Jones *op. ult. cit.* 472-473.

⁴⁰ Contra: Boudewijn Sirks "From the Theodosian to the Justinian Code" *Atti dell'Accademia Romanistica Costantiniana (VI Convegno Internazionale)* (1986) 273-275, who is of the opinion that the constitutions collected in the Code formally retained their original territorial application, and (at 295-302) that their subsequent extension and general application was only due to the interpretative work of the jurists. To my mind, this view does not take sufficient account of CTh 1.1.5.3.

⁴¹ As argued by Sirks *id.* 275-284.

⁴² Its acceptance in practice is discussed by Sirks *id.* 284, 286.

⁴³ Kunkel *op. cit.* 158 read with 161.

⁴⁴ Mommsen *op. cit.* For other editions, see the bibliography in Pharr *op. cit.* 601.

⁴⁵ See the reference cited at p 14 n 39 above.

⁴⁶ But see the author cited at p 14 n 40 above.

same way as they would have been understood at their various dates of issuance, noting the particular circumstances which gave rise to them, and according them the restricted applicability they may originally have had with regard to both territorial validity and subject matter. Secondly, it is possible to regard the Theodosian Code as a cohesive whole, as it would have been after its promulgation, and to interpret all valid constitutions contained in it, as uniformly applicable and as having no limitations of subject matter other than those stated in the constitutions themselves. To illustrate this with an example: CTh 16.2.31 states, in very general terms, that the judges could initiate inquisitorial proceedings against any person who had been reported to them as having invaded a Catholic church or inflicted any violence on Catholic priests, and that such a person was to be capitally punished; and that it was even permissible to call in military aid to arrest such a person, if the normal procedures were inadequate for certain reasons. The last line of this constitution contains a reference to "the African judges"; this, coupled with a number of other indications, enables one to establish that the measures prescribed in it were originally intended to apply to the Donatist Circumcellions. However, due to its general formulation the measures concerned would have been generally applicable to all violent sectarians after the promulgation of the Theodosian Code, in all regions where the Code was in force - a point borne out by the fact that, in the Justinianic Code of the sixth century, the reference to "the African judges" had been replaced with the expression "the governors of provinces" to reflect the changed practice.⁴⁷

The interpretation adopted in this dissertation is a compromise between the above two possibilities. Since the historical background to, and the original application of the individual constitutions have already been canvassed at length by Iacobus Gothofredus,⁴⁸ and more recently Lucio de Giovanni,⁴⁹ and since the sheer number of the antisectarian constitutions precludes a meaningful consideration of the original background of each of them within present confines, I have preferred to consider the original application of individual constitutions only when this would add to the analysis; and, for the rest, to study general trends emerging from the antisectarian legislation before the promulgation of the Theodosian Code, and the general principles which applied thereafter.

⁴⁷ See C 1.3.10.

⁴⁸ Iacobus Gothofredus *Codex Theodosianus cum Perpetuis Commentariis* vol 6(1) (ed Marvillius-Ritter) (1743 repr 1975).

⁴⁹ De Giovanni op cit.

CHAPTER TWO

THE CRIMINALIZATION OF HERESY

As indicated in the Introduction, the later Roman Empire's response to deviance from Catholic Christianity will be analysed in this dissertation. In this chapter, I shall investigate, as an initial step, first, the theological context in which the state response to sectarianism occurred, and, secondly, the form this response took, noting the factors determining such form and the process whereby it received expression.

1. THEOLOGICAL CONTEXT

1.1. Religious Orientation of Roman Empire

The fourth century AD marked a revolution in the religious orientation of the Roman state. Before, Rome had officially venerated its ancient national pantheon, though permitting most foreign cults and suppressing only those religious systems which, like Christianity,¹ denied the validity of the Roman pantheon and subverted Roman morals and ideals. Indeed, at the turn of that century, Christianity was the subject of the most extensive persecution ever undertaken by the pagan emperors. The first change occurred in 313 AD when, under Constantine the Great's influence, the persecution of the Christians was finally ended and an Edict of Toleration issued. In terms of this edict, the Christians were now granted the same right to practice their faith as that accorded the adherents of the ancient pantheistic cults.² With this, a period of religious tolerance was introduced, which would last more than sixty years until the death of Valentinian I, and end when, in 379/380 AD, the Roman emperors finally decreed that Catholic Christianity would henceforth be the state religion, to which all their subjects would be required to adhere.³ Thus, by the last quarter of the fourth century AD, Christianity had experienced the transformation from persecuted to permitted, and then to the official religion of the Roman Empire.

1.2. Ecclesiastical Attitude to State Involvement in Religious Matters

The growing recognition accorded to the Christian church by the emperors, was mirrored by developments in the way in which the Church authorities viewed their relationship with the state, and the degree to which they were prepared to acknowledge the state's right to concern itself with religious discipline.

During the era of persecution, Christian thinkers had insisted that religious conviction was a matter of private conscience, and that the secular authorities were not entitled to interfere

¹ Cf G E M de Ste Croix "Why were the early Christians persecuted?" (1963) 26 *Past and Present* 24-31.

² Cf Eusebius of Caesarea's account in *HE* 10.5.1-8 (in J E L Oulton (tr) *Eusebius: The Ecclesiastical History* vol 2 (1938)).

³ CTh 16.5.5, CTh 16.1.2; cf also pp 27- 29 below.

in spiritual matters at all. This non-interventionist view was, generally speaking, maintained by the theologians of the period immediately after 313 AD, when Christianity was recognised as a permitted religion by the side of the ancient pagan systems. Church fathers such as Hosius of Cordova, Athanasius of Alexandria, Lucifer of Cagliari, and Hilarius of Poitiers, repeated and confirmed the view that the Church was a wholly independent institution, which should be subject only to divine governance; and that the Church and the state had separate functions, with the Church alone having jurisdiction in matters concerning the Christian religion, and the state as a consequence having no right or authority to intervene in such matters.⁴

However, a new approach was introduced by Ambrose, bishop of Milan (374-397 AD). He succeeded in gaining considerable influence over Gratian, and subsequently over the latter's co-emperor in the East, Theodosius I - both of whom were noted for their devoutness - and utilized this influence to the full to promote the Church's cause, persuading these emperors that, although they had no authority to interfere in internal Church matters, as confessing Christian rulers they were required to assist the Church's apostolate by placing their secular authority in the Church's service when called upon to do so. In this way, Ambrose laid the foundation for the doctrine of collaboration between Church and Empire - an approach which would be readily endorsed by the theologians of the time.⁵ Accordingly, a stage had now been reached where the Church was able, and prepared to invoke state assistance to implement and secure its religious programmes in appropriate cases.

1.3. Ecclesiastical Attitude to Sectarianism

At this stage, the most important problem facing the Church in consolidating its position and in fulfilling its apostolate, was sectarianism.

By now, there were various strands of sectarianism which threatened the unity of the Church. First, there were those sects which differed from the Catholics culturally, but not in the tenets of the faith, and which may therefore be described as non-credal schisms. On the whole, these sects were inspired by rigorist beliefs, and represented a continuation of the earlier ecclesiology that viewed the church as an exclusive community of saints, which could make no concession to human frailty. It is possible to draw a further distinction within this

⁴ See Jean Gaudemet *L'Eglise dans l'Empire Romain (IV^e - V^e Siècles)* (1958) 497-499 (hereafter referred to as Gaudemet I); Jean Gaudemet "L'eglise et l'etat au IV^e siècle" in Franco Pastori et al (eds) *Studi in Onore di Arnaldo Biscardi* (1982) 82-83 (hereafter referred to as Gaudemet II).

⁵ Cf Francesco de Martino *Storia della Costituzione Romana* vol 5 (1967) 485-487; Gaudemet I 499-500; Gaudemet II 83-84. For Ambrose's character and his influence over the emperors of the period, see Henry Chadwick *The Early Church* (1967 repr 1984) 166-168. For the elaboration of Ambrose's approach by Augustine of Hippo into the doctrine of collaboration, see De Martino op cit 487-490; Gaudemet I 501-502.

category. On the one hand, there were the Donatists, whose schism, as stated in chapter one, originated from a rigorist refusal to remain in communion with those who had either betrayed the Christian faith in any way during the Great Persecution, or (in the case of the Catholics) were polluted by remaining in communion with such *traditores*, but whose separation from the Catholic church was not expressive of any radical differences of religious culture, in a broader sense. On the other hand, there were the archaizing, ascetic sects, such as the Apotactites, Encratites, Hydroparastatae, Marcianists, Montanists, Novatians, Priscillianists, Protopaschites, Sabbatians and Saccophori, all of whom in various ways represented an anachronistic continuation of early antiseccularism and antimaterialism. The second strand of sectarianism encompassed groups produced by the Trinitarian and Christological controversies of the period, such as the Apollinarians, Macedonians, Nestorians, Paulianists, Photinians, Arians and Eunomians. Since their beliefs as to the nature of the deity differed from the accepted dogma enunciated in the Nicene creed, these groups may be described as doctrinal or credal sectarians. Thirdly, there were certain sects whose Christianity was coloured by Gnostic dualist beliefs: the Marcianists and Spanish Priscillianists, to some extent, and the Ophites, Porphyrians, Simonians and Valentinians. These sects displayed the characteristics of both preceding categories, in that the adherents adopted ascetic, renunciatory practices and that their beliefs did not fully correspond to the Nicene creed; on balance, their adherents may be regarded as credal sectarians rather than as schismatics.⁶

The Catholic heresiologists of the period under consideration adopted a syncretic approach with regard to all the forms of sectarianism outlined above. That is to say, they did not distinguish in principle between those groups who were merely sectarians, and those groups who differed from them in the articles of faith, the credal sectarians; in their view, *all* sectarians were heretics. In this, their approach was a continuation of the interpretation previously developed by Irenaeus and Tertullian, in response to the Gnostic sects' claims of access to certain arcane Christian knowledge. Rejecting the orthodoxy of such arcane knowledge, Irenaeus and Tertullian had argued that only those teachings which had been transmitted by the apostles (whether through their scriptures, their summary of true doctrine in the "Rule of Faith", or their instruction) bore the hallmark of authentic Christianity; and as the apostles would have passed their teachings, in their complete form, on to those whom they had appointed over churches they had founded, who would in turn have transmitted the entire corpus of apostolic teachings to their successors, and so on, it followed that the true and entire Christian faith was that expounded by the bishops of the apostolic sees, and by those bishops and priests whose doctrine accorded with theirs.

⁶ See, generally, Chadwick *op cit* 33-41, 85-90, 129-130; Jean Daniélou & Henri Marrou *The Christian Centuries. Vol I. The First Six Hundred Years* (tr Vincent Cronin) (1964 repr 1983) 55-66, 97-108, 243-248, 249-253, 255-267; Justo L González *A History of Christian Thought* vol 1 (© 1970 repr 1983) 123-149, 269-272, 287-292, 344-362.

Thus, the accepted touchstone of authentic Christianity came to be apostolic succession and unity of doctrine, expounded by the Universal Church, outside of which there could be no salvation. Those groups who were in communion with the bishops of apostolic sees and the latter's colleagues, and who subscribed to the latter's teachings, were true Christians; all others were - regardless of the basis of their dissent - heretics.⁷

The syncretic approach of the Catholic theologians was further manifested in their failure to draw any distinction between those sectarians who professed to be adherents of pure Christianity, and those who belonged to a Gnostic or eclectic tradition, and whose systems therefore incorporated elements derived from other religions. They even regarded as Christian heresies distinct religious systems containing some minor Christian elements. The most important example here was Manichaeism; a dualist, antimaterial religion which regarded the great religious teachers of previous ages - Buddha, Zoroaster, and Jesus - as precursors of its founder, Manes,⁸ and which on this account absorbed inter alia some Christian elements. To Christian theologians of the period, Manichaeism was a heretical sect on the outermost fringe of Christianity; and, indeed, served as an extreme category to which they then assigned legitimate Christian sects manifesting antimaterial tendencies, thereby further marginalizing the latter groups.⁹ Thus, due to this syncretic approach Manichaeism was classified as a Christian sect, and Gnostic and ascetic Christian sects tended to become identified with Manichaeism.

To the Catholic theologians, heresy was thus a monolithic concept encompassing all teaching involving some Christian doctrine and occurring outside the Universal Church, and was synonymous with sectarianism in whatever form. It now remains to be determined what response they advocated to groups identified by them as heretical.

Christian thinkers who had lived during the era when Christianity had been a persecuted religion, had accepted that one should attempt to persuade straying brethren of their error by discussing Christian doctrine with them in a spirit of brotherly love, in order to reconcile them to the true Church and apostolic faith. If they repented of their error, they were to be

⁷ For apostolicity as the criterion for authentic Christianity, and for the elaboration of this concept, see Chadwick op cit 41-45; González op cit 149-159, 173, 180-181, 249; S L Greenslade "Heresy and schism in the later Roman Empire" in Derek Baker (ed) *Schism, Heresy and Religious Protest* (1972) 3-5, 6-7, 12, 14-17. - For the syncretic approach of early heresiologists as regards credal heresy and schism, see Greenslade op cit 7-8. This represented the dominant approach. Some theologians such as Origen had sought to define heresy in terms of differences regarding "beliefs essential to salvation" (cf Greenslade op cit 10; Gerhard Müller (ed) *Theologische Realenzyklopädie* (1985) s v "Häresie" II 2), but this did not correspond to the approach adopted by the Church.

⁸ See Chadwick op cit 169; Daniélou & Marrou op cit 192-194.

⁹ Cf Ambrose's letter to Pope Siricius, in which he arraigns the Jovinians for being Manichaeans, on the grounds that "Manichaeus est qui abnegat veritatem, qui carnem Christi negat" (*Ep* 42.13 in J-P Migne (ed) *Patrologiae Cursus Completus, Series Prima* vol 16 (1845) col 1128). Similarly, a connection was thought to exist between the Priscillianists of Spain and the Manichaeans - cf Gaudemet I 604 n 1.

received back; but if they persevered, they were to be excommunicated from the rest of the Christian community, to protect the latter from their corruptive influence.¹⁰ This was the most extreme reaction envisaged by the early fathers: consistent with their view that faith should be voluntary and that there should be no compulsion in religious matters, they at no stage thought that heretics should be coerced into recanting their beliefs.

This non-coercive approach was also maintained by the theologians of the era of religious toleration between 313 AD and the death of Valentinian I.

However, when, under Ambrose's influence, the Roman emperors declared Christianity the compulsory state religion and acknowledged their obligation to collaborate with the Church in promoting the Christian cause, the Church's approach to religious tolerance changed. The ecclesiastical authorities could now envisage conversion by legitimate coercion, if needs be; and in the circumstances of the fourth century, when sectarian controversy was rife and not only challenged, but indeed threatened the Catholic church, it was natural enough that church authorities would move towards an acceptance of the coercive powers the state was willing to put at its disposal. In this way, Ambrose became convinced by the seeming lack of any other effective solution to the suppression of Arianism that compulsory conversion was a necessary evil, which had to be employed in the overriding interests of safeguarding the true Church. Initially, this thesis still met with some resistance in Catholic circles; but ultimately it prevailed. This process of acceptance of the Ambrosian approach may be clearly traced in the writings of Augustine of Hippo, who struggled with the concept of coerced conversion as no other early theologian had. Initially, Augustine found the notion of coercion in religious matters repugnant; in his early view, the correct response to sectarianism (in the case with which he was then concerned, Donatism) was to take such measures as would prevent the sectarians' being able to corrupt the Catholics; no more. However, when the emperors subsequently introduced coercive measures against the Donatists in response to a different theological opinion, and Augustine noticed the large number of (as he thought) true conversions to Catholicism which occurred virtually immediately or at least eventually, following the sectarians' exposure to Catholic doctrine, he changed his mind. According to his later view, it was still preferable to persuade sectarians to convert by reasoning with them; but if they proved recalcitrant, Christian charity and Christian duty required their forced conversion, on the chance that their subsequent exposure to the true faith would in time result in their genuine inner conversion, and in their salvation - the notion of *compelle intrare*.

¹⁰ Cf Biondo Biondi *Il Diritto Romano Cristiano* vol 1 (1952) para 82 pp 258-259.

Thus, from the time of Ambrose of Milan the Church sought to justify compulsion against sectarians on the grounds that it could ensure the preservation of the Catholics, and hopefully the salvation of heretics; and, provided that it served the purposes legitimating it, were prepared to admit a response of coercion.¹¹

2. STATE REACTION TO THEOLOGICAL CONCERNS

2.1. Characterization of State Response to Religious Dissidence: Historical Determinants

State action against those dissenting from the dominant interpretation of the national religion was not encountered before the Roman state's Christian era. The first reason for this relates to the very nature of heresy. As comparative religion shows, the concept of heresy can arise only in the context of those religions which have an individual founder whose teachings are regarded as containing revealed truth, or a canonical document containing a revelation (confessional religions), since it is only in this context that deviance from the doctrinal nucleus holds any significance for the validity of one's beliefs; in the ancient popular religions which are not explicitly traced back to an authoritative revelation, divergent views are not of account.¹² Accordingly, in the Roman state's pagan period, heresy was not a significant concept, and it follows that it was not addressed by the authorities in any way. Secondly, pagan Rome did not insist on adherence to its national pantheon; it recognised the equal validity of all forms of religion and did not regard religious difference in any form, including religious dissidence, as a transgression meriting state reaction.¹³

However, the religious tolerance which characterized pagan Rome merely meant that religious affiliation per se would not attract state suppression. If a given religious system advanced socially dangerous teachings or practices, or threatened social stability, the authorities would act to combat this influence. In the historical period, two methods were employed by the state to suppress disruptive religions. The first of these related to the

¹¹ See, generally, Lucio de Giovanni "Ortodossia, eresia, funzione dei chierici - Aspetti e problemi della legislazione religiosa tra Teodosio I e Teodosio II" in *Atti dell'Accademia Romanistica Costantiniana (VI Convegno Internazionale)* (1986) 70-72; Gaudemet I 602-605. For Ambrose's approach, see Biondi op cit vol 1 para 92 pp 311-312, para 94 pp 322-323; Gaudemet I 603. For Augustine's approach, see *Aug Ep* 185 (Al Goldbacher (ed) *S. Aureli Augustini Hipponiensis Episcopi Epistulae in Corpus Scriptorum Ecclesiasticorum Latinorum* vol 57 (1911)); H Berkhof *De Kerk en de Keizer* (1946) 89-93.

¹² See the entry by Kurt Rudolph in Mircea Eliade (ed) *The Encyclopedia of Religion* vol 6 (1987) s v "Heresy: An Overview" 271-272.

¹³ Last in Theodor Klauser (ed) *Reallexikon für Antike und Christentum* vol 2 (1954) s v "Christenverfolgung II (juristisch)" 1209, 1216-1217 (hereafter cited as *RAC*). Contra Th Mommsen *Römisches Strafrecht* (1899 repr 1955) 36, 567 (hereafter cited as Mommsen I), followed by Contardo Ferrini *Diritto Penale Romano: Esposizione Storica e Dottrinale* (1976) 343-350, who proceeds from the hypothesis that apostasy from the national religion at all times constituted a crime against the state.

exercise by higher executive magistrates of their general power to maintain public order and discipline by informally and summarily determining whether a given activity was disruptive, and what punitive measures should be taken to combat it (*coercitio*).¹⁴ This extra-legal executive response was employed in the vast majority of instances in which control was exercised over the practice of new religions.¹⁵ Indeed, it is now accepted that the persecutions of the Christians were, for the most part, conducted in accordance with the arbitrary, executive power of *coercitio*: this would explain certain anomalous features of these persecutions.¹⁶ Because these persecutions proceeded from the arbitrary power of *coercitio*, no legal basis was necessary; at the authorities' discretion, the mere fact of being a Christian, the *nomen ipsum*, sufficed.¹⁷ The second method which could be used to suppress unacceptable religions, was to prosecute the members thereof in terms of the regular criminal law. According to Roman notions, conduct constituting an established crime was always subject to criminal prosecution, regardless of the motive for its commission; therefore, where adherents of a given sect were perceived to perform certain acts which would normally constitute criminal conduct, their religious motive did not excuse them, and they could be prosecuted for the crimes concerned according to the regular criminal procedure. The foregoing reasoning also applied to the Christians, who were on occasion charged with their *flagitia nomini cohaerentia*, the crimes they were supposedly induced to commit through their adherence to Christianity; which, by the time of Tertullian, principally

¹⁴ See, generally, Max Kaser *Römische Rechtsgeschichte* 2 ed (1967 repr 1986) 41-42, 43. For the essentially arbitrary nature of the power of *coercitio*, see Fritz Schulz *Principles of Roman Law* (tr Marguerite Wolff) (1936) 173-175; for the limited restrictions subsequently placed on its exercise, see N G L Hammond & H H Scullard (eds) *The Oxford Classical Dictionary* 2 ed (1970 repr 1978) s v "Provocatio" (hereafter cited as *OCD*); Kaser op cit 42, 43, 47; Theodor Mommsen "Der Religionsfrevl nach römischem Recht" (1890) repr in *Gesammelte Schriften, Dritter Band: Juristische Schriften* vol 3 (1907) (hereafter cited as Mommsen II).

¹⁵ For examples, see Mommsen I 578-579; Mommsen II 397-398, 404-405; H J Rose *Religion in Greece and Rome* (© 1959) 273-274. Cf also Liv 39.16.8-9 in Guillelmus Weissenborn & Mauritius Mueller (ed) *Titius Livius: Ab Urbe Condita Libri* vol 3 2 ed (1938); Cic *De Leg* 2.19 in Clinton Walker Keyes (tr) *De Re Publica, De Legibus* (1948).

¹⁶ E g the fact that there is absolutely no evidence of any general statutory instrument legally outlawing the Christian religion; the fact that the persecutions were not consistently carried out, but occurred sporadically in reaction to the strength of public feeling against the Christians in a given locality, evidently to quell public unrest; and the fact that, here alone, repentance (in the form of apostasy, or at least of agreeing to participate in pagan rites) could secure an immediate acquittal, in contradiction to the general principle of the criminal law that punishment attached to a crime at the moment of its commission, and could not be avoided by subsequent regret. See *RAC* 1223; De Ste Croix op cit 13-15, 20; Mommsen II 394, 410-411.

¹⁷ Cf Mommsen II 394.

related to *maiestas*, crimes committed against the state.¹⁸ By such acts as their refusal to participate in the pagan cults or to do homage to the statue of the emperor, or their disobedience to the state officials ordering them to do so, they offended against the inviolable greatness of Rome; and, for this reason, they could be held liable of conduct subversive of the state order, and of treasonable activities.¹⁹

In sum, therefore, the Roman authorities of the Principate could avail themselves of either the extra-legal, executive power of *coercitio* to suppress any socially disruptive religions, or the machinery of the criminal law to suppress acts committed by adherents of a given religion which were perceived as constituting established crimes.

During the third century, however, these two bases for state action merged. This was caused by certain procedural developments, brought about in turn by the constitutional changes of the period and the move to totalitarianism. On the one hand, the regular criminal courts of the Principate, the *quaestiones perpetuae*, disappeared due to ever-increasing encroachment by the imperial administration.²⁰ The emperor and his delegated officials gradually placed all criminal-law matters within the scope of the *cognitio extra ordinem*, an essentially administrative trial procedure adopted by them in terms of their power of *coercitio*.²¹ On the other hand, the *cognitio* procedure employed by the imperial officials had absorbed many of the criminal and procedural characteristics of the proceedings applied earlier by the *quaestiones*.²² Moreover, *cognitio* proceedings had become so regulated by imperial constitutions that they had lost their erstwhile arbitrary character; only the emperor still retained an absolute discretion.²³ The unitary penal system which resulted from the merging of the criminal and the executive disciplinary systems previously

¹⁸ See pp 159-160 below, and cf Ferrini op cit 337 et seq; Mommsen I 537 et seq on *crimen maiestatis*. Contra RAC 1216-1217 where Last argues that the Christians were persecuted *only* in terms of the *coercitio* power, and never in terms of the criminal law. While it is true that there is no clear evidence of Christian beliefs being regarded as criminal in the early years, this does not mean that such an approach did not develop; and that such a development did indeed occur, is evidenced by a number of sources (cited in Ferrini op cit 344, 347-348), most importantly by various writings of Tertullian, who discusses charges of *maiestas* against the Christians (cited in Mommsen I 569 n 2). In rejecting Tertullian's authority, Last argues that "... diejenige Stellen, die nicht bloß rhetorische Phrasen sind, nennen je nur die Vorwürfe, die von der feindseligen Mengen erhoben wurden, aber nicht die Rechtsgründe, die zur Verurteilung der Christen geführt hatten". I do not find his interpretation persuasive. - In earlier times, the Christians were widely suspected of ritual crimes such as infanticide (See, generally, Norman Cohn *Europe's Inner Demons* (1976) 1-15; De Ste Croix op cit 20-21; Mommsen II 393) but it is not clear whether, or to what extent they were criminally prosecuted on such charges.

¹⁹ Mommsen II 393, 396.

²⁰ By the time of the Severan emperors, the only *quaestio* still in existence was the *quaestio de adulteriis*, and this, too, would have become obsolete soon afterwards. Kaser op cit para 29 IV 5; *OCD* s v. "Law and procedure, Roman" III 8. See also Mommsen II 409.

²¹ The emperor enjoyed the power of *coercitio* by virtue of his perpetual proconsular imperium, and his delegates derived their power of *coercitio* from him. For the constitutional basis of this, see Wolfgang Kunkel *An Introduction to Roman Legal and Constitutional History* 2 ed (tr J M Kelly) (1973 repr 1975) 71-72.

²² See RAC 1214-1215.

²³ Cf RAC 1223.

applicable, was therefore, despite some residual arbitrary characteristics, sufficiently defined by objective norms to be classified as criminal law.²⁴

As a result of this merger of the two disciplinary systems, the various methods for combatting unacceptable religious practices also became merged. In the future, an emperor could still decree extra-legal coercive action against malefactors. However, any such direct imperial action would be of fairly limited application, affecting only certain persons, or a certain locality, or applying for a certain time. If any general and sustained measures were to be taken, it would be necessary to do so within the scope of the general criminal law. The historical development therefore predicated that any general response taken by the Christian state to combat religious deviance would take the form of acting against the latter in terms of the criminal law.

2.2. State Response to Sectarianism during the Period of Religious Toleration

As stated above, Constantine and Licinius in 313 AD in principle confirmed a policy of the equal toleration of all religions, by ordering that Christians would in future be exempt, as the adherents of the ancient cults had always been, from the general prohibition of any association and assembly by subjects.

In reality, however, the emperors (with the obvious exception of Julian the Apostate) soon moved from an approach of equal toleration to one of actively favouring Christianity: they granted the Christian church not only exemption from the prohibition against association, but also significant privileges, such as exemption of the clergy from the duties exacted of citizens by the state, liberal donations, and the capacity to own and to inherit property.²⁵

However, it was precisely the fact that the Christian church was accorded special concessions not meant to benefit any other organizations, which led to a need to delineate the exact ambit of the privileges concerned. Since these privileges were bestowed by the favour of the emperors, the power to define the scope of legislation instituting the privileges and the ambit of the special benefits concerned also vested in them. Put differently, the emperors could define what they were prepared to acknowledge as "Christianity" in order for a given group to qualify for the special concessions and privileges bestowed on Christian congregations.²⁶

²⁴ Cf Mommsen I 56 for the distinction between a system of criminal law and a police penal system on the basis of whether the nature of its provisions is essentially objective or arbitrary.

²⁵ See the constitutions collected in the Codex Theodosianus under CTh 16.2 *De episcopis, ecclesiis, et clericis* (in Th Mommsen (ed) *Theodosiani Libri XVI cum Constitutionibus Sirmondianis* vol 1(2) 3 ed (1962)); Daniélou & Marrou op cit 235-236; Gaudemet II 85-88.

²⁶ Cf Mommsen I 595, 601.

This power to determine the scope of their exemptions and concessions afforded the emperors the mechanism by which sectarianism was initially suppressed. As a general measure, the emperors of the period of religious toleration simply excluded those who, in their view, did not qualify as true Christians, from the benefits they had granted the latter, thereby in effect withholding from them the right of congregation, owning churches or graveyards, and other privileges. This emerges clearly from the following Constantinian constitution, the first to appear in the Theodosian Code under the title *De haereticis* :

CTh 16.5.1 (Constantinus, 326) *Privilegia, quae contemplatione religionis indulta sunt, catholicae tantum legis observatoribus prodesse oportet...*²⁷

"The privileges that have been granted in consideration of religion must benefit only the adherents of the Catholic faith... "

Conversely, even groups who were regarded as sectarians by the Catholic authorities could at this stage be allowed the benefits accorded to Christians. So, for example, Constantine the Great was prepared to permit the Novatian congregations to own churches and burial grounds, a right otherwise reserved for the Catholics, evidently on the grounds that the former subscribed to the homoousion doctrine adopted at Nice;²⁸ while Valentinian I provided that the freedom of assembly and of association would henceforth be extended to all religious groupings, bar those whose practices involved black magic,²⁹ a general grant of privilege which also benefitted Christian sectarians; but which was restricted again in 378 AD by Gratian, who provided that the Photinians and the Eunomians could not enjoy these benefits.³⁰ Thus, the emperors could manipulate the scope of the privileges granted by them to the Christians in accordance with their own perceptions, and by so doing regulate the practice of sectarianism.

If congregations not recognised by the emperors attempted to arrogate to themselves the right to form an association by purporting to own communal property, such as church buildings, the authorities would ignore this illicit attempt and would confiscate the "communal" property concerned as a penal measure.³¹ Similarly, if congregations arrogated

²⁷ This constitution continues by providing that sectarians are not only to be excluded from all the privileges concerned, but are moreover to be subjected to the various munera (compulsory public services). However, as indicated in Mommsen I 603 n 1, this constitutes an administrative provision (based on coercitio) only, and should not be interpreted as introducing a legal sanction.

²⁸ Cf Wilhelm Enßlin *Die Religionspolitik des Kaisers Theodosius d. Gr.* (1953) 45. Cf also Biondi op cit vol 1 para 84 p 268, where a statement by Eusebius to the effect that Constantine subsequently withdrew this privilege from the Novatians, is also recorded; Mommsen I 601 n 5 at 601-602. (This vacillating attitude towards the Novatians probably reflects the ambivalence towards non-credal sectarianism sometimes encountered in the patristic writings - cf p 20 n 7 above.)

²⁹ Cf CTh 9.16.9.

³⁰ Cf Biondi op cit vol 1 para 89 p 297; Enßlin op cit 9 (who, however, discuss Gratian's provision as a liberalizing measure, failing to study it in the context of Valentinian I's earlier general grant).

³¹ Cf p 59 below.

to themselves the right to assemble, this contravention of the general prohibition against assembly by subjects constituted an established crime, and those attending the congregation could therefore be punished accordingly.³²

It is true that there is some evidence that steps of more active coercion were on occasion taken against some sectarians. However, it seems clear that any such measures were sporadic and occurred in isolated cases only, and represented cases of the emperors' exercising their extra-legal power of coercion.³³ It seems certain that no antisectarian legislation of a general nature was issued during the era of toleration.

In sum, it is clear that the state authorities during the period of religious toleration only suppressed sectarianism in its communal aspects, and indirectly at that. There were no specific measures prohibiting sectarianism as such, and compelling individual sectarians to recant under pain of criminal prosecution.

2.3. State Response to Sectarianism after the Acceptance of Christianity as the Compulsory State Religion: Criminalization of Heresy

A change in the above position was heralded on 3 August 379 AD. On that date, Gratian, under Ambrose's influence,³⁴ explicitly repealed the freedom of religion in terms of the following constitution:

CTh 16.5.5 (Gratianus, Valentinianus II & Theodosius I, 379) Omnes vetitae legibus et divinis et imperialibus haereses perpetuo conquiescant. Quisquis opinionem plectibili ausu dei profanus inminuit, sibi tantummodo nocitura sentiat, aliis obfutura non pandat. Quisquis redempta venerabili lavacro corpora reparata morte tabificat, id auferendo quod geminat, sibi solus talia noverit, alios nefaria institutione non perdat. Omnesque perversae istius superstitionis magistri pariter et ministri, seu illi sacerdotali adsumptione episcoporum nomen infamant seu, quod proximum est, presbyterorum vocabulo religionem mentiuntur, seu etiam se diaconos, cum nec Christiani quidem habeantur, appellant, hi conciliabulis damnatae dudum opinionis absterneant. Denique antiquato rescriptuo, quod apud Sirmium nuper emersit, ea tantum super catholica observatione permaneant, quae perennis recordationis pater noster et nos ipsi victura in aeternum aequae iussione mandavimus.

"All heresies are forbidden by both divine and imperial laws and shall forever cease. If any profane man by his punishable teachings should weaken the concept of God, he shall have the right to know such noxious doctrines only for himself but shall not reveal them to others to their hurt. If any person by a renewed death should corrupt bodies that have been redeemed by the venerable baptismal font, by taking away the effect of that ceremony which he repeats, he shall know such doctrines for himself alone, and he shall not ruin others by his nefarious teaching. All teachers and ministers alike of this perverse superstition shall abstain from the

³² Cf Mommsen op cit 877.

³³ Cf Biondi op cit vol 1 para 86 p 282, para 88 p 293 regarding the measures taken by Constans and Valens against those they regarded as sectarians (i.e. the Nicene party, since these emperors were Arians).

³⁴ Cf id vol 1 para 90 p 303.

gathering places of a doctrine already condemned, whether they defame the name of bishop by the assumption of such priestly office, or, that which is almost the same, they belie religion with the appellation of priests, or also if they call themselves deacons, although they may not even be considered Christians. Finally, the rescript that was recently issued at Sirmium shall be annulled, and there shall remain only those enactments pertaining to the Catholic doctrine which were decreed by Our father of eternal memory and which We ourselves commanded by an equally manifest order, which will survive forever."

In this constitution, Gratian provided that it would once again be an offence for all sectarians to assemble or associate, as it had been before Valentinian I's blanket grant of freedom of association.³⁵ However, he went further than this: the terms of his prohibition did not outlaw *omnes coetus haereticorum* ("all heretical congregations"), but *omnes haereses* ("all heresies").³⁶ Thus, Gratian now outlawed heresy in itself, regardless of the manifestation it might take; not only assembly, but also such acts as mere adherence to a non-Catholic sect, or the propagation of heretical doctrines would henceforth be forbidden at law. With this, Gratian opened the way for the active suppression of heresy.

In 380 AD, Gratian's lead was taken up by his new colleague in the East, Theodosius I (the Great).³⁷ On 28 February, while en route to his new capital, Theodosius I sent the following advance edict to all his subjects:³⁸

CTh 16.1.2 (Gratianus, Valentinianus II & Theodosius I, 380) *Cunctos populos, quos clementiae nostrae regit temperamentum, in tali volumus religione versari, quam divinum Petrum apostolum tradidisse Romanis religio usque ad nunc ab ipso insinuata declarat quamque pontificem Damasum sequi claret et Petrum Alexandriae episcopum virum apostolicae sanctitatis, hoc est, ut secundum apostolicam disciplinam evangelicamque doctrinam patris et filii et spiritus sancti unam deitatem sub parili maiestate et sub pia trinitate credamus. 1. Hanc legem sequentes Christianorum catholicorum nomen iubemus amplecti, reliquos vero dementes vesanosque iudicantes haeretici dogmatis infamiam sustinere nec conciliabula eorum ecclesiarum nomen accipere, divina primum vindicta, post etiam motus nostri, quem ex caelesti arbitrio sumpserimus, ultione plectendos. (& CTh 16.2.25) Qui divinae legis sanctitatem aut nesciendo confundunt aut neglegendo violant et offendunt, sacrilegium committunt.*

"It is Our will that all the peoples who are ruled by the administration of Our Clemency shall practice that religion which the divine Peter the Apostle transmitted to the Romans, as the religion which he introduced makes clear even unto this day. It is evident that this is the religion that is followed by the Pontiff Damasus and by Peter, Bishop of Alexandria, a man of apostolic sanctity; that is, according to the apostolic discipline and the evangelic doctrine, we shall believe in the single Deity of the Father, the Son, and the Holy Spirit, under the concept of equal majesty and of the Holy Trinity. 1. We command that those persons who follow this

³⁵ Cf p 26 above.

³⁶ Cf Biondi op cit vol 1 para 90 p 302.

³⁷ For the link between this constitution of Theodosius the Great and the policies of Gratian and (via the latter) Ambrose of Milan, cf id vol 1 para 90bis pp 304-305.

³⁸ The *cunctos Populos* was divided into two sections by the compilers of the Theodosian Code, the two parts then being included in the Code under different titles. The jurist Jacobus Gothofredus first argued that CTh 16.1.2 and CTh 16.2.25 belonged together (Iacobus Gothofredus *Codex Theodosianus cum Perpetuis Commentariis* vol 6(1) (ed Marvilius-Ritter) (1743 repr 1975) 63, 64; this has since been generally accepted - cf Enßlin op cit 17; Giorgio Barone-Adesi "Eresie «sociali» ed inquisizione teodosiana" in *Atti dell'Accademia Romanistica Costantiniana (VI Convegno Internazionale)* (1986) 129 n 18.

rule shall embrace the name of Catholic Christians. The rest, however, whom we adjudge demented and insane, shall sustain the infamy of heretical dogmas, their meeting places shall not receive the name of churches, and they shall be smitten first by divine vengeance and secondly by the retribution of Our own initiative, which We shall assume in accordance with the divine judgment. (*Continues in CTh 16.2.25:*) Those persons who through ignorance confuse or through negligence violate and offend the sanctity of the divine law commit sacrilege."

Theodosius I here confirmed the principle that all Christians were required to subscribe to the Nicene creed and to adhere to the Catholic Church. In addition, he provided that any person who transgressed this provision would be guilty of sacrilege, an ancient crime which properly related to the theft of sacred cult objects,³⁹ and for which one of the forms of capital punishment known to Roman criminal law⁴⁰ (usually, not the death sentence) could be imposed.⁴¹

It has been argued that, by extending the scope of the crime of sacrilege to include heresy, Theodosius I first sought to establish a criminal sanction for sectarianism. The torture and execution of Priscillian of Avila (the leader of an ascetic sect, exhibiting Gnostic tendencies)⁴² and some of his followers has been portrayed as the first time the provisions of CTh 16.2.25 were implemented, and as the first instance when Christians were put to death on account of their sectarian beliefs.⁴³ However, it is incorrect to state that these Priscillianists were executed in terms of the Theodosian provisions; on the contrary, the charge on which they were condemned, was that of magic,⁴⁴ following Priscillian's denunciation as a Manichaeon.⁴⁵ Thus, the prosecution of the Priscillianists provides no authority for holding that sectarians were first prosecuted on the grounds of sacrilege, as envisaged in CTh 16.2.25; instead, it illustrates how the anti-Manichaean legislation already in force since before the period under consideration, could serve to suppress Christian dissidents and to subject Gnostic and ascetic sects to criminal prosecution. Indeed, it was precisely the anti-Manichaean legislation which was the historical starting point for the criminal prosecution of heretical sects generally, as will now be shown.

As indicated above, Manichaeism was a distinct religious system, which had attracted the hostility of the Roman authorities since its introduction into the Empire towards the last years of the pagan era. In ca 320 AD, Diocletian had outlawed this new religion on the

³⁹ Cf Mommsen I 760, 776.

⁴⁰ Cf pp 133-139 below.

⁴¹ See Mommsen I 776.

⁴² Cf Sulpicius Severus *Chronica* 2.46 in Carolus Halm (ed) *Sulpicii Severi Libri qui Supersunt* (1866); Daniélou & Marrou op cit 293.

⁴³ See Edward Gibbon *The Decline and Fall of the Roman Empire* vol 3 (1910 repr 1977) 85-86; Guglielmo Nocera " 'Cuius regio eius religio' " in *Atti dell'Accademia Romanistica Costantiniana (VI Convegno Internazionale)* (1986) 321 n 31 at 323, 330; Clyde Pharr (tr) *The Theodosian Code and Novels and the Sirmondian Constitutions* (© 1952 repr 1969) 583-584 s v "Priscillianists".

⁴⁴ Sulpicius Severus *Chronica* 2.50.8.

⁴⁵ Chadwick op cit 169.

grounds of its supposed Persian origin: first, because the Romans were then at war with the Sassanid Empire, and it was feared that the introduction of Manichaeism represented a Persian plot to subvert the Roman populace, and secondly because the Persians enjoyed widespread notoriety as exponents and practitioners of black magic, and it was thought that the Manichaeans indulged in this dreaded practice.⁴⁶ After the end of the pagan era, the suppression of Manichaeism had been continued without interruption by the Christian emperors: here, too, the persecution had been inspired by the fear that the Manichaeans were practitioners of black magic. During the height of the era of religious toleration, Valentinian I, who considered that only cults promoting the practice of magic were to be excluded from the general recognition he accorded all religions,⁴⁷ had issued the following legislation:

CTh 16.5.3 (Valentinianus I & Valens, 372) *Ubicumque Manichaeorum conventus vel turba huiusmodi repperitur, doctoribus gravi censione multatis his quoque qui conveniunt ut infamibus atque probrosis a coetu hominum segregatis, domus et habitacula, in quibus profana institutio docetur, fisci viribus indubitanter adsciscantur.*

"Wherever an assembly of Manichaeans or such a throng is found, their teachers shall be punished with a heavy penalty. Those who assemble shall also be segregated from the company of men as infamous and ignominious, and the houses and habitations in which the profane doctrine is taught shall undoubtedly be appropriated to the resources of the fisc."

Valentinian I had here provided that Manichaean teachers were to be subjected to a capital punishment,⁴⁸ that the houses in which they taught their doctrine were to be confiscated, and that all who assembled in a Manichaean congregation were to suffer the penalty of *infamia*, or loss of worthiness.⁴⁹

In 381, Theodosius the Great confirmed and elaborated on the above constitution by providing that, in addition to being declared infames, Manichaeans were to be prevented from succeeding their parents *ab intestato*, and exiled from all cities, municipalities or even small towns.⁵⁰ He furthermore provided that these punishments were to apply to not only those Manichaeans who practiced their religion under that name, but also those who attempted to avoid prosecution by masquerading as members of the ascetic sects⁵¹ of the Encratites, Apotactites, Hydroparastatae, or Saccophori.⁵² Within a year, Theodosius followed up this constitution with a further anti-Manichaean decree. In it, he provided that

⁴⁶ Cf Coll 15.3.4.

⁴⁷ Cf CTh 9.16.9. For Valentinian I's fear of magic, see Chadwick op cit 160.

⁴⁸ Cf pp 133-139 below on the forms of capital punishment known to Roman criminal law.

⁴⁹ Cf p 146 below on *infamia*.

⁵⁰ Cf pp 139-140 below on banishment.

⁵¹ Cf p 19 above.

⁵² CTh 16.5.7.

those Manichaeans who were hermits, would be intestable, as provided earlier; but the others, who called themselves Encratites, Saccophori, or Hydroparastates, were to suffer the death penalty; and that all persons who did not celebrate Easter on the day observed by the Catholics, would be subject to these anti-Manichaean provisions.⁵³

The important point which emerges from a study of Theodosius' constitutions of 381 and 382 AD, is the way in which the ascetic Christian sects (the Encratites, Apotactites, Saccophori and Hydroparastatae) were gradually identified with the Manichaeans.⁵⁴ In the first constitution, the latter sects were still regarded as distinct from the Manichaeans, although it was stated that some persons who professed to be members of these sects were in fact Manichaeans; but by the time the second constitution was issued, the relevant ascetic Christian sects were simply described as Manichaean sects, without any qualification. This identification was easily established on the basis of the external correspondences between the practices of the relevant groups: the ascetic Christian sects manifested an antimaterial approach also characteristic of the Manichaeans; in addition, because of the ascetic sects' continued adherence to the ancient Syriac tradition of computing the date for Easter according to the Jewish quartodeciman method (already abolished at the Council of Nicaea), the date of their Easter celebration corresponded to that of the Manichaean Bêma feast.⁵⁵

Here, the legislation reflected the patristic tendency of the period to identify antimaterial Christian sects and Manichaeism, thereby marginalizing the former.⁵⁶ By these means, those non-credal sectarians who differed from the Catholics simply in their adherence to archaic ritual forms or practices, or in their perpetuation of the ascetic tendencies of early Christianity, were brought within the scope of the measures against Manichaeism.

Theodosius was slower to develop effective measures against the credal sectarians. It is thought that this restraint was caused by his hope of reconciling the relevant sects at the councils which he called at Constantinople in 381 and in 383 AD.⁵⁷ But by mid-383, it was clear to Theodosius that this ideal was unattainable; it is therefore no coincidence that the legislation issued against those who did not subscribe to the Nicene creed now assumed a harsher tone.⁵⁸ In July 383, he directed that the Eunomians, Arians, Macedonians and

⁵³ CTh 16.5.9.

⁵⁴ This process has been discussed in detail by Barone-Adesi op cit 119-166.

⁵⁵ This fact explains Theodosius' provision that all who celebrated Easter on a different day, would be considered Manichaeans. For the Manichaean Bêma feast, see id 145 n 65.

⁵⁶ Cf p 20 above.

⁵⁷ See Enßlin op cit 44 - 45. Cf also Barone-Adesi op cit p 130 n 23.

⁵⁸ Contra: Tony Honoré "The making of the Theodosian Code" (1986) 103 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanistische Abteilung)* 152, who links the greater religious austerity

Pneumatomachi were not to enjoy any right of assembly or of owning churches, and granted all communities the right to defend themselves against heretics by driving the latter away;⁵⁹ while a few months afterwards, he directed that all sectarian priests were to be returned to and confined in an isolated locality in their districts of origin.⁶⁰ However, it is noticeable that even these measures were restrained, and by no means provided for the general prosecution of heretics on the mere grounds of their religious affiliation.

Presumably, Theodosius was constrained by the fact that his co-emperor in the West, Gratian's successor Valentinian II, was at that stage an adherent of Arianism.⁶¹ However, the latter converted to Nicene Christianity sometime during 387 AD, while seeking refuge with Theodosius after having been ousted temporarily by the usurper Maximus. By 388 AD, when Valentinian II had been restored, the emperors were therefore united in their religious beliefs. Moreover, Theodosius I's spiritual mentor, Ambrose of Milan, who had previously been hesitant to admit enforced conversion, had by now become reconciled to the need for coercive measures by the late resurgence of Arianism at the Western court.⁶² Conditions were therefore ripe for the active suppression of heresy. The period following Theodosius I's declaration of war against Maximus and his restoration of Valentinian II accordingly saw the institution of an intensive antiheretical legislative programme: all heretics were to be expelled from the cities;⁶³ their bishops were to be exiled to desolate places;⁶⁴ those who were discovered congregating or practising the mysteries by official spies, were to be punished by the courts as severely as possible;⁶⁵ a crippling fine was to be imposed on anyone who ordained a cleric, or was ordained as one;⁶⁶ those who connived with heretics to enable the latter to congregate, were to face criminal prosecution;⁶⁷ and there was to be some extension of the instability already imposed on the Manichaeans and sects identified as such,⁶⁸ to other sects.⁶⁹

By 395 AD, when Theodosius the Great died, heresy in whatever form had therefore been brought squarely within the scope of the criminal law. In the East, his successors would in effect merely confirm the criminal measures he had instituted; while in the West, these

which was now manifested to the character of the quaestor sacri palatii (the official responsible for formulating imperial constitutions) Maternus Cynegius, who took office in 383 AD.

⁵⁹ CTh 16.5.11.

⁶⁰ CTh 16.5.12, 16.5.13.

⁶¹ See Lippold *op cit* 128.

⁶² See Biondi *op cit* vol 1 para 94 p 322.

⁶³ CTh 16.5.14, 16.5.20.

⁶⁴ CTh 16.5.14.

⁶⁵ CTh 16.5.15.

⁶⁶ CTh 16.5.21

⁶⁷ *Ibid.*

⁶⁸ Confirmed in CTh 16.5.18.

⁶⁹ CTh 16.5.17, which concerned the Eunomians (repealed by CTh 16.5.23, but confirmed again at subsequent stages by Theodosius I's successors).

would be expanded in scope, in a continuation of principles already inherent in his legislation, to include the hitherto unaffected Donatist schismatics of Africa.⁷⁰ Theodosius' successors thus at most extended the scope of his antiheretical measures, adapted the punishments which he had instituted in conformance with their perceived need for greater or lesser severity, and in general consolidated the position.⁷¹

In the result, when the Theodosian Code was compiled on the orders of Theodosius II, a mere fifty years after it had first been announced that the Roman emperors would act against those subjects who were not Catholic Christians, the criminalization of heresy was complete, and the main characteristics of the criminal prosecution of religious sectarianism, which will now be discussed, were already clearly delineated.

⁷⁰ Before this, Donatism was sporadically suppressed in terms of the power of *coercitio* (cf p 25, read with 23 above) - see W H C Frend "The Donatist church - forty years on" in C Landman & D P Whitelaw (eds) *Windows on Origins/Oorsprong in Oënskou* (1985) 76, citing Grasmück's analysis of the fourth-century measures against the Donatists.

⁷¹ Cf the summaries of the legislation concerned in Gaudemet I 611-613; Jean Gaudemet "Politique ecclésiastique et législation religieuse après l'édit de Théodose I de 380" in *Atti dell'Accademia Romanistica Costantiniana (VI Convegno Internazionale)* (1986) 18-20.

CHAPTER THREE

ELEMENTS OF CRIMINAL LIABILITY FOR HERESY

In the preceding chapter, I discussed the circumstances and the manner in which heresy was criminalized by the Christian emperors. In the present chapter, I intend analysing the product of this process, viz the crimes of heresy, against the backdrop of the general principles regarding criminal liability at Roman law.

1. THE CONCEPT OF HERESY IN THE THEODOSIAN CODE

On reading through the numerous constitutions on heresy appearing in the Theodosian Code, one is struck by the fact that the emperors for the most part made no attempt to describe the basic contents of the beliefs which they sought to curb; they contented themselves with simply using the term "heretic",¹ or, in the vast majority of cases, with mentioning the affected sects by name, without further definition. An example of the latter usage is:

CTh 16.5.8 (Gratianus, Valentinianus II & Theodosius I, 381) Nullum Eunomianorum atque Arrianorum vel ex dogmate Aeti in civitate vel agris fabricandarum ecclesiarum copiam habere praecipimus ...

"We direct that none of the Eunomians and the Arians or the adherents of the dogma of [Aetius] shall have the right to build churches in the municipalities or in the country ..."

On occasion, though, some attempt was at least made to define the general term "heresy" more precisely. The following constitutions illustrate the way in which this was done:

CTh 16.5.6 (Gratianus, Valentinianus II & Theodosius I, 381) 1. Arceantur cunctorum haereticorum ab illicitis congregationibus turbae. Unius et summi dei nomen ubique celebretur; Nicaenae fidei dudum a maioribus traditae et divinae religionis testimonio atque adsertione firmatae observantia semper mansura teneatur ... 2. Is autem Nicaenae adsertor fidei, catholicae religionis verus cultor accipiendus est, qui omnipotentem deum et Christum filium dei uno nomine confitetur, deum de deo, lumen ex lumine: qui spiritum sanctum, quem ex summo rerum parente speramus et accipimus, negando non violat: apud quem intemeratae fidei sensu viget incorruptae trinitas indivisa substantia, quae Graeci adsertione verbi *ousia* recte credentibus dicitur ... 3. Qui vero isdem non inserviunt, desinant adfectatis dolis alienum verae religionis nomen adsumere ...

"1. Crowds shall be kept away from the unlawful congregations of all heretics. The name of the One and Supreme God shall be celebrated everywhere; the observance, destined to remain forever, of the Nicene faith, as transmitted long ago by Our ancestors and confirmed by the declaration and testimony of divine religion, shall be maintained... 2. [T]hat man shall be accepted as a defender of the Nicene faith and as a true adherent of the Catholic religion, who confesses that Almighty God and Christ the Son are One in name, God of God, Light of Light, who does not violate by denial the Holy Spirit which we hope for and receive from the Supreme Author of things; that man who esteems, with the perception of inviolate faith, the undivided substance of the incorrupt Trinity, that substance which those of the orthodox faith call, employing a Greek word, *ousia* ... 3. Those persons, however, who are not devoted to the aforesaid doctrines shall cease to assume, with studied deceit, the alien name of true religion ..."

¹ Eg CTh 16.5.1, 16.5.5. Occasionally, circumlocutions such as "perverse dogma" (CTh 16.5.19) or "new superstition" (CTh 16.11.2.3) are used, likewise without further definition.

CTh 16.1.2 (Gratianus, Valentinianus II & Theodosius I, 380) Cunctos populos, quos clementiae nostrae regit temperamentum, in tali volumus religione versari, quam divinum Petrum apostolum tradidisse Romanis religio usque ad nunc ab ipso insinuata declarat quamque pontificem Damasum sequi claret et Petrum Alexandriae episcopum virum apostolicae sanctitatis, hoc est, ut secundum apostolicam disciplinam evangelicamque doctrinam patris et filii et spiritus sancti unam deitatem sub parili maiestate et sub pia trinitate credamus. 1. Hanc legem sequentes Christianorum catholicorum nomen iubemus amplecti, reliquos vero dementes vesanosque iudicantes haeretici dogmatis infamiam sustinere ...

"It is Our will that all the peoples who are ruled by the administration of Our Clemency shall practice that religion which the divine Peter the Apostle transmitted to the Romans, as the religion which he introduced makes clear even unto this day. It is evident that this is the religion that is followed by the Pontiff Damasus and by Peter, Bishop of Alexandria, a man of apostolic sanctity; that is, according to the apostolic discipline and the evangelic doctrine, we shall believe in the single Deity of the Father, the Son, and the Holy Spirit, under the concept of equal majesty and of the Holy Trinity. 1. We command that those persons who follow this rule shall embrace the name of Catholic Christians. The rest, however, whom we adjudge demented and insane, shall sustain the infamy of heretical dogmas ..."

CTh 16.4.6 (Arcadius, Honorius & Theodosius II, 404) Rectores provinciarum moneantur, ut conventus eorum arceantur illiciti, qui orthodoxarum religione subfulti spretis sacrosanctis ecclesiis alio convenire conantur: his, qui ab Arsacii Theofili Porfyri reverentissimorum sacrae legis antistitum communionem dissentiunt, ab ecclesia procul dubio repellendis.

"Governors of provinces shall be admonished that assemblies shall be forbidden as illicit if such assemblies are held by persons who rely on the religion of the orthodox churches, but spurn the sacrosanct churches and attempt to convene elsewhere. Persons who dissent from the communion of Arsacius, Theophilus, and Porphyrius, Most Reverend Bishops of the sacred law, shall undoubtedly be driven from the Church."

CTh 16.5.38 (Arcadius, Honorius & Theodosius II, 405) ... Una sit catholica veneratio, una salus sit, trinitas par sibique congruens sanctitas expetatur ...

" ... There shall be one Catholic worship, one salvation; equal sanctity within the Trinity, harmonious within itself, shall be sought ... "

CTh 16.5.66.1 (Theodosius & Valentinianus II, 435) Nec vero impios libros nefandi et sacrilegi Nestorii adversus venerabilem orthodoxorum sectam decretaeque sanctissimi coetus antistitum Ephesi habiti scriptos habere aut legere aut describere quisquam audeat ...

"Nor shall any person dare to have or to read or to copy the impious books of the nefarious and sacrilegious Nestorius, written against the venerable sect of the orthodox and against the decree of the most holy synod of bishops held at Ephesus ... "

The description to be abstracted from these, and similar constitutions is that heresy denoted deviance from the Catholic faith, according to the criteria of adherence to the Nicene creed,² communion with the bishops of apostolic sees³ and other representative

² CTh 16.5.6; 16.1.2 and 16.5.38 (although the creed is not named, it is clearly its contents which are being restated in the latter two constitutions) above; cf also CTh 16.1.3.

³ Cf CTh 16.1.2; 16.4.6 (Theophilus was bishop of Alexandria and Porphyrius bishop of Antioch - see Iacobus Gothofredus *Codex Theodosianus cum Perpetuis Commentariis* vol 6(2) (ed Marvillius-Ritter) (1743 repr 1975) 114; and although Constantinople, of which Arsacius was bishop, had not been founded by an apostle, it was regarded as the virtual equivalent of an apostolic see due to its position as the New Rome) above.

⁴ Cf CTh 16.1.3.

adherence to the dogma accepted by synods of orthodox bishops;⁵ obedience to the apostolic tradition,⁶ and maintenance of the unity of the Church.⁷

In examining these criteria by which the emperors assessed orthodoxy and heterodoxy, one may deduce three significant points:

First, it emerges that these criteria correspond to the anti-heretical arguments which had been developed by Catholic heresiologists. As has been shown above, the theologians of the period saw the touchstone for authentic Christianity in the concept of apostolic authority, as manifested in the traditions and teachings which were propagated by the bishops of the apostolic sees, and accepted everywhere by a universal Church.⁸ This correspondence suggests, very strongly, that the criteria stated in the legislation were directly derived from the theological doctrines in point. Moreover, it may be noted that some of these criteria were not fixed and absolute in content, but were subject to future dogmatic developments: for example, the notion of the faith of the Universal Church was open to a variable interpretation, dependant on changing theological trends. These considerations show that the emperors accepted the exclusive authority of the recognized Church to determine the content of the concept of heresy, and did not seek to introduce a specifically secular notion of heresy in their criminal legislation.

Secondly, it should be noted that the last-mentioned criterion for heresy, which was based on the theological argument of the Universal Church, outside of which there could be no salvation, implied that the secular authorities (following the ecclesiastical authorities)⁹ in principle regarded all sectarianism, including non-credal sectarianism, as a form of heresy. The emperors' failure to distinguish clearly between credal and non-credal dissidence may be observed in the following constitution:

CTh 16.6.4 (Arcadius, Honorius & Theodosius II, 405) *Adversarios catholicae fidei extirpare huius decreti auctoritate prospeximus. Ideoque intercidendam specialiter eam sectam nova constitutione censuimus, quae, ne haeresis vocaretur, appellationem schismatis praeferebat. In tantum enim sceleris progressi dicuntur hi, quos Donatistas vocant, ut baptismum sacrosanctum mysteriis recalcatis temeritate noxia iterarint et homines semel, ut traditum est, munere divinitatis ablutos contagione profanae repetitionis infecerint. Ita contigit, ut haeresis ex schismate nasceretur ...*

⁵ Cf CTh 16.5.66.1 above. (Cf also CTh 16.1.4, which sanctioned Arianism by stating that all who adhered to the creed pronounced at Rimini would enjoy the right of assembly - see Biondi vol 1 para 93 pp 316-320.)

⁶ Cf CTh 16.1.2 cited above. Cf also CTh 16.6.2.

⁷ Cf CTh 16.4.6, 16.5.38 above.

⁸ See pp 19-20 above.

⁹ See pp 19, 20 above.

"We provide, by the authority of this decree, that the adversaries of the Catholic faith shall be extirpated. By this new constitution, therefore, We especially decree the destruction of that sect which, in order not to be called a heresy, prefers the appellation of schism. For those who are called Donatists are said to be so far in wickedness that with criminal lawlessness they repeat the sacrosanct baptism, thus trampling under foot the mysteries, and they have infected with the contagion of a profane repetition men who have been cleansed once for all by the gift of divinity, in accordance with religious tradition. Thus it happened that a heresy was born from a schism ..."

Accordingly, one finds that the line between heresy and schism was never clearly drawn in the constitutions, and that these concepts remained fluid: at times, the emperors might mention heresy and schism separately, while subjecting both to the same penalties;¹⁰ at other times, they might classify certain non-credal schismatics as heretics;¹¹ and then again use only the term "heretic",¹² leaving the issue of schisms a matter of interpretation. On balance, it may be stated that schism was generally¹³ regarded as tantamount to heresy, and equally punishable.¹⁴

Thirdly, heterodoxy was described in purely negative terms in the legislation, with the result that *any* system of belief deviating from the recognized Catholic faith was potentially capable of being regarded as heresy - including such a system outside the sphere of Christianity. Nevertheless, this did not generally occur; although there was a tendency for other, distinct religious systems increasingly to be regarded as doctrines inimical to the faith (as appears from certain constitutions of Theodosius II, in which pagans are mentioned as enemies of the faith alongside heretics),¹⁵ they were nowhere classified as heretical. However, this is only true for the wholly non-Christian religious systems: the syncretistic religions which combined pagan or Judaic elements with Christian ones (viz Manichaeism¹⁶ and Caelicolism¹⁷) were described as heresies in the constitutions and

¹⁰ Eg CTh 16.5.1.

¹¹ Eg CTh 16.5.11, where the Hydroparastatae and Apocrites are described as heretics, along with the Eunomians, Arians, etc.

¹² Eg CTh 16.5.4.

¹³ The case of the Novatians and the Sabbatians to some extent represents an exception to the foregoing. Constantine the Great had permitted the Novatians to retain churches and burial grounds already in their possession before their schism, on the grounds that they were not "praedamnati". However, Eusebius states that Constantine withdrew this permission (cf p 26 n 28 above); and a constitution issued in 423 AD (CTh 16.5.59) confirmed that the Novatians and their splinter group, the Sabbatians, enjoyed none of the privileges accorded the Catholics, though the right to retain their existing churches was once again conferred on the Novatians and Sabbatians in 428 AD (CTh 16.5.65.2). The position regarding these two sects thus vacillated, and may reflect the occasional ambiguity regarding sectarianism on the part of heresiologists referred to in the previous chapter - cf p 20 n 7 above. It is nevertheless clear that (if Eusebius is correct) these two sects were, for the greater part of the period under consideration, treated on an equal footing with credal sectarians.

¹⁴ Contra Francesco de Martino *Storia della Costituzione Romana* vol 5 (1967) 494, who states that schismatics were not persecuted to the same degree as heretics. Schism was viewed in a less serious light, and not penalised so vigorously in only a few, very exceptional cases. See n 13 on this page for the more lenient treatment sometimes accorded the Novatians.

¹⁵ Eg CTh 16.5.63, quoted on p 63 below.

¹⁶ See p 20 above.

¹⁷ See Clyde Pharr *The Theodosian Code and Novels and the Sirmundian Constitutions* (© 1952 repr 1969) 582.

persecuted as such, despite their not being essentially Christian sects. In this regard, too, one finds a reflection of the syncretic approach adopted by the theologians of the period.¹⁸

Having determined the meaning which the central concept of heresy bore in the Theodosian Code, I shall now examine the prohibitions on heretics contained in it.

2. CATALOGUE OF PROHIBITED CONDUCT

There is no general, unitary crime of heresy in the Theodosian Code. Instead, there are diverse prohibitions of heresy in the numerous ad hoc constitutions incorporated in the Code,¹⁹ with each of these various constitutions specifying the nature of the conduct that it prohibits. It follows that it is impossible to give a general description of criminal heresy; the only way to determine the principles of criminal liability for heresy, is to note the prohibitions stated in the individual constitutions of the Theodosian Code, and to analyse these.

The various forms of conduct prohibited in the constitutions relating to heresy may be catalogued as follows:

¹⁸ See p 20 above.

¹⁹ Cf Carl Ludwig von Bar et al *A History of Continental Criminal Law* (tr Thomas S Bell et al) (1916 repr 1968) 21, 55 concerning the nature of post-Classical legislation.

TABLE A
PROHIBITED CONDUCT

HERETICAL SECT	CONSTITUTION	PROHIBITED ACTIVITY
General/all heretics ^a	16.5.5 (379), 16.1.2 (380), 16.5.42 (408), 16.5.48 (410), 16.5.62 (425), 16.5.63 (425), 16.5.64 (425), 16.5.65.3 (428); 16.5.29 (395)	adherence to heresy - by member of imperial service
	16.5.4 (376/378), 16.5.6.1 & 3 (381), 16.5.12 (383), 16.5.14 (388), 16.5.15 (388), 16.5.20 (391), 16.5.24 (394), 16.5.26 (395); cf 16.5.65.3 (428)	assembly
	16.6.2 pr (377), 16.1.3 (381), 16.5.6 pr (381), 16.5.12 (383), 16.5.15 (388), 16.5.30 pr (396/402), 16.5.45 (408), 16.5.54.1 (414); cf 16.5.65 pr (428)	having churches/erecting church buildings
	16.5.6.3 (381)	participation in a public disturbance
	16.5.12 (383), 16.5.15 (388), 16.5.30.2 (396/402)	congregation & participation in a religious service
	16.5.12 (383), 16.5.14 (388), 16.5.21 (392), 16.5.65.1 (428); 16.5.24 (394)	ordination of clergy - by bishop
	16.5.12 (383)	assembly over Easter by teachers/ministers
	16.4.1 (386); 16.2.35 (400/405)	provoking agitation - by deposed bishop
	16.5.14 (388), 16.5.22 (394)	ordination of bishops
	16.4.2 (388), 16.5.15 (388), 16.5.45 (408)	disputing about or discussing religion
	16.5.19 (389), 16.5.26 (395), 16.5.30.1 (396/402), 16.5.54.1 (414)	being a cleric
	16.5.19 (389), 16.5.26 (395), 16.5.54.1 (414)	being a bishop

General/all heretics ^a (contd)	16.4.3 (392); 16.4.4 (404); 16.4.5 pr (404)	participating in a tumultuous conventicle - by a member of the magister officiorum's staff - by a slave
	16.5.21 (392)	performance of religious mysteries - by a cleric
	16.5.24 (394)	teaching or learning doctrines of sect
	16.2.31 (398, 409)	invading Catholic churches & inflicting outrage on Catholic priests, places of worship or services
	16.5.38 (405)	participation in any unlawful practices
	16.5.44 (408)	attempting to do anything opposed to the Catholic sect's sanctity
	16.5.51 (410), 16.5.56 (415/410)	assembly in a public place
	16.5.58.1 (415), 16.5.65.4 (428)	rebaptism
Apollinarians ^b	16.5.12 (383)	congregation & participation in a religious service
	16.5.12 (383)	establishing public or private churches
	16.5.13 (384)	being a cleric
	16.5.14 (388)	being a bishop
	16.5.33 (397)	preaching
	16.5.65.2 (428)	having churches within municipal territory
Apotactites ^{bc}	16.5.11 (383)	assembly; attracting a multitude
	16.5.11 (383)	having public or private buildings which are used as churches
	16.5.11 (383)	attempting to do anything opposed to the Catholic sect's sanctity

Arians ^{bd}	16.5.11 (383), 16.5.12 (383), 16.5.59 (423)	building churches, having public or private places of worship/residence for clerics
	16.5.8 (381), 16.5.13 (384)	being a cleric
	16.5.11 (383)	assembly; attracting a multitude
	16.5.11 (383)	attempting to do anything opposed to the Catholic sect's sanctity
	16.5.12 (383)	congregation & participation in a religious service
	16.5.60 (423)	any form of conduct already prohibited
	16.5.65.2 (428)	having churches within municipal territory
Audians ^{be}	16.5.65.2 (428)	congregation & participation in a religious service
Borborians ^b	16.5.65.2 (428)	congregation & participation in a religious service
Caelicolists ^{be}	16.5.43 (408/407)	having church buildings
	16.8.19 (409)	adherence to heresy
Donatists ^{bf}	16.6.4 pr (405), 16.6.4.3 (405)	rebaptism
	16.6.4.3 (405)	presence at ceremony of rebaptism
	16.5.43 (408/407), 16.5.54.1 (414)	having church buildings
	16.5.52.5 (412)	donation of landed estates to sect's churches
	16.5.52 pr (412), 16.5.54 pr (414); 16.5.52.4 (412), 16.5.54.8 (414); 16.5.54.7 (414)	adherence to heresy - by slaves or serfs (coloni) ^g - by the office staff of judicial officials

Donatists ^{bf} (contd)	<p>16.5.54.3 (414); 16.5.54.4 (414);</p> <p>16.5.52.3 (412); 16.5.54.3 (414); 16.5.54.7 (414); 16.5.54.8 (414)</p> <p>16.5.52.5 (412)</p> <p>16.5.54.1 (414)</p> <p>16.5.65.2 (428)</p>	<p>congregation</p> <ul style="list-style-type: none"> - by a proconsul, vicar or count of the first order^g - by senators, persons of sacerdotal rank and municipal decurions^g <p>continued adherence after punishment</p> <ul style="list-style-type: none"> - by a proconsul, vicar or count of the first order^g - by the office staff of judicial officers^g - by coloni^g <p>being a cleric or priest</p> <p>being a bishop or priest</p> <p>congregation & participation in a religious service</p>
Easter; all who disagree about date ^{bh}	<p>16.5.9.2 (382), 16.6.6.1 (413)</p> <p>16.10.24 pr (423)</p>	<p>convening to celebrate Easter on a different day</p> <p>disagreeing about date for celebrating Easter</p>
Encratites ^{bc}	<p>16.5.9.1 (382)</p> <p>16.5.9.1 (382)</p> <p>16.5.11 (383)</p> <p>16.5.11 (383)</p> <p>16.5.11 (383)</p>	<p>adherence to heresy</p> <p>assembly</p> <p>attracting a multitude</p> <p>having public or private buildings which are used as churches</p> <p>attempting to do anything opposed to the Catholic sect's sanctity</p>
Eunomians ^{bif}	<p>16.5.8 (381), 16.5.11 (383), 16.5.12 (383), 16.5.59 (423)</p> <p>16.5.13 (384), 16.5.32 (396), 16.5.34 pr (398)</p> <p>16.5.11 (383)</p> <p>16.5.11 (383)</p>	<p>building churches, having public or private places of worship/residence for ministers</p> <p>being a cleric</p> <p>attracting a multitude</p> <p>attempting to do anything opposed to the Catholic sect's sanctity</p>

Eunomians ^{bif} (contd)	16.5.12 (383), 16.5.65.2 (428)	congregation & participation in a religious service
	16.5.17 (389), 16.5.25.1 (395), 16.5.49 (410), 16.5.58.4 & 7 (415)	adherence to heresy
	16.5.31 (396), 16.5.32 (396)	being an author/doctor of religion, especially a teacher of doctrine
	16.5.34 pr (398)	attendance at or conducting religious service by exiled cleric at his place of exile
	16.5.34 pr (398)	presence of exiled cleric in city
	16.5.34 pr (398)	entering a house by an exiled cleric to conduct a service
	16.5.34.1 (398)	hiding and keeping Eunomian books
	16.5.36.1 (399), 16.6.7 (413), 16.5.58.5 (415)	assembly
	16.5.36.2 (399)	participation in an assembly by a bishop
	16.6.7 (413)	presiding over an assembly by a bishop, cleric or minister
	16.5.58 pr & 6 (415)	rebaptism
	16.5.58 pr (415)	assembly in a cleric's house
	16.5.58.3 (415)	holding of an assembly by a cleric
	16.5.58.3 (415)	ordination of clerics
Hydroparastatae ^{bc}	16.5.9.1 (382)	adherence to heresy
	16.5.9.1 (382), 16.5.11 (383)	assembly
	16.5.11 (383)	attracting a multitude
	16.5.11 (383)	having public or private buildings which are used as churches
	16.5.11 (383)	attempting to do anything opposed to the Catholic sect's sanctity
	16.5.65.2 (428)	congregation & participation in a religious service

Jovinians ^{bj}	16.5.53 (412/398)	congregation
Macedonians ^{bk}	16.5.11 (383) 16.5.11 (383), 16.5.12 (383), 16.5.59 (423) 16.5.11 (383) 16.5.12 (383) 16.5.13 (384) 16.5.60 (423) 16.5.65.2 (428)	assembly; attracting a multitude having public or private buildings which are used as churches attempting to do anything opposed to the Catholic sect's sanctity congregation & participation in a religious service being a cleric any form of conduct already prohibited having churches within municipal territory
Manichaeans ^{bl}	16.5.3 (372), 16.5.7.3 (381), 16.5.11 (383), 16.5.35 (399) 16.5.3 (372), 16.5.7.3 (381), 16.5.11 (383), 16.5.59 (423), 16.5.65.2 (428) 16.5.7 pr, 1 & 3 (381), 16.5.9 pr (382), 16.7.3 pr (383), 16.5.35 (399), 16.5.40.2-5 (407), 16.5.64 (425), 16.5.65.2 (428), 16.10.24 pr (423) 16.7.3 pr (383) 16.5.11 (383) 16.5.11 (383) 16.5.18 (389) 16.5.43 (408/407) 16.5.62 (425)	assembly having places where cult is practised adherence to heresy being a leader or teacher attracting a multitude attempting to do anything opposed to the Catholic sect's sanctity disturbance of the public peace having church buildings withdrawal from the communion of the Pope (i e by the Montenses)
Marcellians ^b	16.5.65.2 (428)	congregation & participation in a religious service

Marcianists ^b	16.5.65.2 (428)	congregation & participation in a religious service
Messalians ^b	16.5.65.2 (428)	congregation & participation in a religious service
Montanists ^{bfm}	16.5.34 pr (398)	being a cleric
	16.5.34 pr (398)	attendance at or conducting religious service by exiled cleric at his place of exile
	16.5.34 pr (398)	presence of exiled cleric in city
	16.5.34 pr (398)	entering a house by an exiled cleric to conduct a service
	16.5.34.1 (398)	hiding and keeping Montanist books
	16.6.5 (405)	rebaptism
	16.5.57 pr (415)	presiding over an assembly by a cleric, bishop, priest or deacon
	16.5.57 pr (415)	ordination of clerics
	16.5.57.2 (415)	having church buildings & property
	16.5.65.2 (428)	congregation & participation in a religious service
Nestorians ^b	16.5.66.1 (435)	possession, reading or copying of Nestorian books
	16.5.66.2 (435)	assembly
Novatians ^{bef}	16.5.2 (326)	obtaining new churches ⁿ
	16.5.59 (423)	arrogating <i>any</i> of the privileges accorded the Catholics (including possessing churches)
	16.5.65.2 (428)	obtaining new churches
	16.6.6.1 (413)	celebration of Easter on a different day

Paulians ^b	16.5.65.2 (428)	congregation & participation in a religious service
Pepyzites ^{bo}	16.5.59 (423) 16.10.24 pr (423)	congregation & participation in a religious service adherence to heresy
Photinians ^b	16.5.65.2 (428)	congregation & participation in a religious service
Phrygians ^{bo}	16.5.40.2-5 (407) 16.5.59 (423) 16.5.65.2 (428)	adherence to heresy possessing churches congregation & participation in a religious service
Pneumatomachi ^{bp}	16.5.11 (383) 16.5.11 (383) 16.5.11 (383)	assembly; attracting a multitude having public or private buildings which are used as churches attempting to do anything opposed to the Catholic sect's sanctity
Priscillianists ^{bo}	16.5.43 (408/407), 16.5.59 (423) 16.5.40.2-5 (407) 16.5.65.2 (428)	having church buildings adherence to heresy congregation & participation in a religious service
Protopaschites ^{beq}	16.6.6.1 (413)	celebration of Easter on a different day
Rebaptizing sects ^{br}	16.6.2 pr (377) 16.6.5 (405), 16.6.6 pr (413), 16.5.58.1 & 2 (415), 16.5.65.4 (428)	having church buildings rebaptism

Sabbatians ^{be}	16.5.59 (423)	arrogating <i>any</i> of the privileges accorded the Catholics (including the right to have churches)
	16.5.65.2 (428)	obtaining new churches
Saccophori ^{bc}	16.5.9.1 (382)	adherence to heresy
	16.5.9.1 (382), 16.5.11 (383)	assembly
	16.5.11 (383)	attracting a multitude
	16.5.11 (383)	having public or private buildings which are used as churches
	16.5.11 (383)	attempting to do anything opposed to the Catholic sect's sanctity
Tascodrogitae ^b	16.5.10 (383)	convening at a church
	16.5.65.2 (428)	congregation & participation in a religious service
Valentinians ^b	16.5.65.2 (428)	congregation & participation in a religious service

- ^a See also specific sects. Constitutions which are framed in general terms and do not mention the affected sects by name have been included in this general category, for the reasons stated at p 15 above.
- ^b See also "General/all heretics".
- ^c See also "Manichaeans". (For the identification, cf p 31 above.)
- ^d See also "Eunomians".
- ^e See also "Easter; all who disagree about date".
- ^f See also "Rebaptizing sects".
- ^g See Gerhard Dulceit, Fritz Schwarz & Wolfgang Waldstein *Römische Rechtsgeschichte* 6 ed (1975) para 38 pp 246-249; Francesco de Martino *Storia della Costituzione Romana* vol 5 (1967) 53-90 on the social order during the post-Classical era.
- ^h See also "Caelicolists", "Novatians" and "Protopaschites".
- ⁱ See also "Arians".
- ^j Identified as Manichaeans (q v) by Ambrose in *Ep* 42.13-14. See p 20 n 9 above.
- ^k See also "Pneumatomachi".
- ^l See also "Encratites", "Saccophori" and "Hydroparastatae" (for the identification, cf CTh 16.5.7.3) and "Jovinians" (for the identification, cf Ambrose *Ep* 42.13-14 at p 20 n 9 above).
- ^m See also "Priscillianists" (for the identification, cf CTh 16.5.65.2), "Phrygians", "Pepyzites" and "Tascodrogitae".
- ⁿ This constitution appears to have been abrogated soon after: see p 26 n 28 above.
- ^o See also "Montanists".
- ^p See also "Macedonians" (for the identification, cf Gothofredus (n 3 below) 140 ad CTh 16.5.11).
- ^q See also "Novatians".
- ^r See also "Donatists", "Eunomians", "Montanists" and "Novatians".

3. REQUIREMENTS FOR CRIMINAL LIABILITY

3.1. Act

The first requirement for criminal liability in terms of the antiheretical legislation in the Theodosian Code, was the commission of one of the forms of prohibited conduct, as identified above. The relevant forms of conduct will now be discussed under broad headings.

3.1.1. Adherence to heresy

The above conspectus of prohibitions shows that the basic form of conduct which was prohibited in terms of the antiheretical legislation, was adherence to sectarian beliefs or to a dissident religious sect.

Ferrini denies that such adherence constituted a criminal transgression.²⁰ Whilst admitting that prohibitions against heresy existed, and that adherents of heresy were subjected to grave disabilities, he asserts that the disabilities concerned were not imposed in consequence of criminal trials (the only exception being the criminal prosecution of Manichaeism), and on that basis denies that the prohibitions against adherence to heresy (other than Manichaeism) belonged to the sphere of the criminal law. However, I cannot agree with Ferrini's interpretation. Apart from the fact that he does not give sufficient weight to the heavy fines and proprietary penalties imposed at times on adherents of sects, the sanctions emphasized by him - the diminution of sectarians' capacity to participate in legal transactions (intestability), their exclusion from the imperial service, and their being prohibited from entering or living in the cities, or the environs thereof - were not, as he suggests, necessarily disabilities which were automatically applicable to all heretics, but were often imposed as punishments as a consequence of criminal proceedings. The language of the legislation providing that heretics were to be driven from the cities, is generally such that it clearly indicates the criminal sanction of exile by *relegatio*;²¹ and while intestability could come into effect *ex lege* in many cases, it is clear that, in the case of religious sectarianism, it was also imposed as a consequence of a criminal trial. This emerges from an examination of the following constitution:

CTh 16.5.40 (Arcadius & Honorius, 407) ... *Praecipue tamen Manichaeos vel Fyrigas sive Priscillianistas meretissima severitate persequimur ... 1. Ac primum*

²⁰ Prof Contardo Ferrini *Diritto Penale Romano - Esposizione Storica e Dottrinale* (1976) vol 3 para 285 pp 355-356, read with para 284 pp 354-355. Cf also Von Bar et al *op cit* 53, where it is stated that individuals were not put on trial for their personal beliefs until the Middle Ages, and it is thus in effect denied that criminal-law prohibitions against adherence to heresy existed during the Late Empire.

²¹ See pp 139-140 below on this punishment.

quidem volumus esse publicum crimen ... 4. Praeterea non donandi, non emendi, non vendendi, non postremo contrahendi cuique convicto relinquimus facultatem. 5. In mortem quoque inquisitio tendit ... Ergo et suprema illius scriptura inrita sit ... qui aut Manichaeus aut Fryga aut Priscillianista convincitur ...

"Especially, however, do We prosecute with the most deserved severity the Manichaeans and the Phrygians and [Montanists]²²... 1. In the first place, indeed, it is Our will that such heresy shall be considered a public crime ... 4. Furthermore, We do not leave to any person so convicted the power to make gifts, to buy, to sell, or finally to make contracts. 5. Moreover, the inquisition shall extend beyond death ... Wherefore, if any person is convicted of having been a Manichaeus or a Phrygian or [Montanist], the document of his last will shall be void ... "

This constitution deals with not only Manichaeism, but also Montanism, and it is here clearly stated that intestability is to be imposed on those convicted of adherence to these sects, and can also be imposed subsequent to the alleged Manichaeus's or Montanist's death, after conviction in a post mortem inquisitio, or criminal trial.²³ This suffices to show that the disability of intestability could indeed be imposed as a consequence of conviction in a criminal trial, and constituted a criminal penalty *stricto sensu* in the case of religious sectarianism.²⁴ I cannot, therefore, accept the argument that adherence to sectarianism, though prohibited, did not constitute a criminal transgression.

Having established the criminality of adherence to heresy, the next point to be determined is what constituted "adherence to heresy" for the purposes of criminal cognizability.

In essence, adherence to heresy was an intellectual phenomenon. For obvious reasons, however, the criminal law could not attempt to regulate unexpressed inner convictions; for criminal liability to ensue, some perceptible manifestation of these convictions was required,²⁵ as is also evidenced by the following constitution:

CTh 16.5.5 (Gratianus, Valentinianus II & Theodosius I, 379) ... *Quisquis opinionem plectibili ausu dei profanus inminuit, sibi tantummodo nocitura sentiat, aliis obfutura non pandat. Quisquis redempta venerabili lavacro corpora reparata morte tabificat, id auferendo quod geminat, sibi solus talia noverit, alios nefaria institutione non perdat ...*

"If any profane man by his punishable [audacity] should weaken the concept of God, he shall have the right to know such noxious doctrines only for himself but shall not reveal them to

²² Pharr op cit 583 identifies this group as the followers of Priscillian of Avila. However, Gothofredus op cit 178 argues that they were the followers of the Montanist prophetess Priscilla. I would consider Gothofredus correct, in view of the identification of the Priscillianists and Montanists here and in CTh 16.6.59.

²³ Cf also CTh 16.7.3, which deals with the (in this respect) analogous case of the post mortem imposition of intestability upon apostates, and which also refers to the employment of criminal proceedings to secure the imposition of this in a given case.

²⁴ So too Th Mommsen *Römisches Strafrecht* (1899 repr 1955) p 993, who states that intestability usually came into effect *ex lege*, but then states that it could also be imposed in consequence of criminal proceedings, appending a crossreference to heresy to this latter statement. Cf also id 67, 896.

²⁵ Cf id 95, 97. Contrast with the theological approach, in terms of which inner thoughts which were irreligious, sufficed to attract retribution - see Biondo Biondi *Il Diritto Romano Cristiano* (1952-1954) vol 2 para 274 pp 305-306, where the scriptural and patristic authority for this view is also cited.

others to their hurt. If any person by a renewed death should corrupt bodies that have been redeemed by the venerable baptismal font, by taking away the effect of that ceremony which he repeats, he shall know such doctrines for himself alone, and he shall not ruin others by his nefarious teaching."

The degree to which, and form in which sectarian convictions had to be made manifest in order for an adherent of a given sect to be considered as such by the secular authorities, must now be determined.

With regard to the *form* in which adherence to heresy could be manifested: it should be noted that an express declaration of heretical beliefs was not a requirement for criminal liability. The law required a manifestation of heretical beliefs, but this could even occur tacitly, i.e. by conduct, as is shown by the following constitution:

CTh 16.5.9.1 (Gratianus, Valentinianus II & Theodosius I, 392) Ceterum quos Encratitas prodigiali appellatione cognominant, cum Saccophoris sive Hydroparastatis refutatos iudicio, proditos crimine, vel in mediocri vestigio facinoris huius inventos summo supplicio et inexpiabili poena iubemus adfligi ...

"But those persons who are entitled Encratites, with a monstrous appellation, together with the Saccophori, and the Hydroparastatae, when they have been convicted in court, betrayed by crime, or discovered in a slight trace of this wickedness, We order to be afflicted with the supreme penalty and with inexpressible punishment ... "

This constitution moreover offers evidence as to the *degree* of adherence required for criminal liability: it is clear that the least manifestation of heretical convictions (note the words "in mediocri vestigio facinoris huius") sufficed to attract liability for adherence to heresy, even to the fullest extent of the law. This is also borne out by the following constitution:

CTh 16.5.28 (Arcadius & Honorius, 395) Haeticorum vocabulo continentur et latis adversus eos sanctionibus debent subcumbere, qui vel levi argumento iudicio catholicae religionis et tramite detecti fuerint deviare. Ideoque experientia tua Heuresium haeticum nec in numero sanctissimorum antistitum habendum esse cognoscat.

"Those persons who may be discovered to deviate, even in a minor point of doctrine, from the tenets and the path of the Catholic religion are included under the designation of heretics and must be subject to the sanctions which have been issued against them. Your Experience, therefore, shall recognize that Heuresius shall be considered a heretic and not among the number of most holy bishops."

From the above constitution, it is clear that general constitutions concerning adherence to heresy were interpreted in such a way that their provisions (including sanctions imposed in terms of them) were applied to all who were discovered to deviate in even the slightest degree²⁶ from the representative beliefs and views of the Catholic church.

²⁶ For the interpretation of "levi argumento" as "a minor point of doctrine" rather than "slight evidence", see Gothofredus op cit 161.

3.1.2. Association

This category includes the following prohibited forms of conduct by sectarians: assembly, congregation and participation in a religious service, and having communal church property.

The prohibition of these forms of conduct should be viewed in the broader context of the restrictions on association applicable during this period. In terms of these restrictions, freedom of association (and the concomitant rights of assembly, holding property in the name of a corporation, and so forth) was restricted exclusively to organizations specifically recognized and allowed by the authorities (*collegia licita*).²⁷

Once the Christian Church had been recognized by the Roman emperors, the congregations of the episcopal churches (each of which functioned as a *collegium* at that stage)²⁸ were exempted from the general restrictions on association. Henceforth, such congregations could be constituted as *collegia licita*, and accorded the privileges of lawful assembly for their members, and of being allowed to own corporate property (such as the churches and burial grounds). However, as indicated, this concession was extended only to those Christian churches recognized by the emperors.²⁹ The only sect which was granted ongoing imperial recognition in the era of the Theodosian Code was the Catholics;³⁰ a very limited number of other sects was granted restricted recognition for short periods only.³¹ Sects which were not recognized and afforded privileges by the emperors continued to be subject to the limitations on association, and their congregations continued to be regarded as *collegia illicita*; in their case, therefore, assembly or attempting to hold corporate property constituted an infringement of the general prohibition against association.³²

One result of the withholding of the right of association from these sects, was that they were not allowed to hold any corporate property. In this regard, it may be noted that the concept of corporate property, and more specifically of a church, was accorded a very wide meaning. Not only were communal buildings exclusively reserved for cult practice, regarded

²⁷ Max Kaser *Das römische Privatrecht* vol 1 2 ed (1971) para 72 V 2 p 308, vol 2 (1975) para 214 IV 2 p 156; Mommsen op cit 876-877.

²⁸ Kaser op cit vol 2 para 214 V p 156.

²⁹ Cf pp 25-26 above.

³⁰ Cf CTh 16.5.1, 16.1.2; Mommsen op cit 601, 603. The earlier Arianizing emperors had, of course, permitted the Arian church in preference to the Catholic church; however, their measures to this effect are not incorporated in the Code.

³¹ For the *Novatians* and *Sabbatians*, see p 38 n 13 above. CTh 16.1.4 (386 AD, revoked after Valentinian II's conversion), which stated that all who adhered to the creed of Rimini (a creed capable of an Arian interpretation) were allowed to congregate, may have briefly accorded the *Arians* a right of assembly - see the reference at p 37 n 5 above. CTh 16.5.65.2 (428 AD) furthermore appears to have permitted the *Arians*, *Macedonians* and *Apollinarians* to have churches in the rural areas.

³² Cf Mommsen op cit 603.

as churches, and thus as corporate property; but the use of privately erected buildings and private estates or private houses belonging to adherents of the relevant sects as places of worship generally also brought such buildings within the scope of the term "churches".³³ The reason for this is doubtless that private dwellings were always used as churches in the first three Christian centuries, either by placing some rooms at the disposal of the community, or by consecrating the entire house and placing it at the disposal of the congregation.³⁴ It seems logical that this practice would have continued in the case of sects which were not permitted to hold special church buildings. If the prohibition against the possession of corporate property was to be effectively enforced against unrecognized sects, it was therefore necessary to also make provision in the prohibitions for corporate property masquerading as private property.

A further result of the withholding of the right of association from unrecognized sects, was that they enjoyed no right of assembly. As regards the scope of the resultant restriction, it should be noted that the prohibition against assembly by a *collegium illicitum* could be transgressed where as few as two members of that *collegium* convened.³⁵ Thus, in interpreting the relevant provisions in the Theodosian Code, it may be accepted that the convening of even two heretics could constitute an assembly, and render those convening criminally liable. However, not every case of factual proximity on the part of two or more persons constituted an assembly, as emerges from a consideration of the following general definition of a *conventio* in the Digest: "*convenire dicuntur, qui ex diversis locis in unum locum colliguntur et veniunt*".³⁶ The logical consequence of the requirement that the persons concerned should come from various places, would be that the meeting of persons normally living in physical proximity, such as the members of a particular household, would not have been regarded as an assembly in the eyes of the law, and that such practices as family worship by a heretical household would not have fallen under the prohibition against assembly; whether this accords with the way in which the relevant prohibition was actually interpreted and applied, is a moot question.

³³ Cf CTh 16.5.12, 16.5.14, 16.5.30 pr.

³⁴ See Jean Daniélou & Henri Marrou *The Christian Centuries. Vol 1. The First Six Hundred Years* (1964 repr 1983) 165-167.

³⁵ While the involvement of at least three members was required for the formation of a *collegium* (Kaser op cit vol 1 p 309 n 58); (i) a meeting did not require the presence of all (for argument's sake, only three) members, and (ii) the number of members could thereafter decline to even one, without this affecting the existence of the *collegium* (Kaser *ibid*), so that the meeting of just two persons could constitute an assembly by a *collegium illicitum*. - It should be noted that Mommsen's reference to a *magna multitudo* (op cit 562 n 7 at 562-563) occurs in the specific context of the required size of an assembly for the purposes of its constituting a *seditionary* mob, and is not applicable to illicit assemblies generally.

³⁶ D 2.14.1.3.

3.1.3. Performance of the rites and sacraments

This category relates to prohibited forms of conduct such as the ordination of clergy, being a cleric, conducting a religious service, and so forth. There is no need to discuss these forms of conduct, since their descriptions are self-explanatory.³⁷

3.1.4. Profanation of the mysteries

This category relates to the prohibited forms of conduct of rebaptism of converts from Catholicism or one of the other Christian sects who had already been baptized, and of celebrating Easter on a different day than the orthodox Church. Once again, the descriptions of these acts are self-explanatory.

3.1.5. Propagation of heretical doctrines

This category includes such forms of prohibited conduct as discussing heterodox religious beliefs, gathering a crowd and preaching such beliefs to them, and teaching another person heretical doctrines; and, furthermore, listening to a heretical discourse, and possessing or reading heretical books.

While the descriptions of the first number of forms of prohibited conduct mentioned are self-explanatory and do not require comment, the last two - listening to a heretical discourse, or possessing or reading heretical writings - are paradoxical. It may be asked why forms of conduct which were not necessarily proof of even latent (and therefore uncognizable) heretical leanings, were not regarded as circumstantial evidence of sectarianism only, but in themselves constituted criminal conduct. The explanation for this paradox is that (as has been shown) the starting point for the criminal prosecution of sectarianism was Manichaeism,³⁸ and that the latter was, in turn, interwoven with the prosecution of the crime of magic.³⁹ To some extent, principles regarding liability for magic thus found their way into the prosecution of heresy; the forms of conduct under consideration corresponded to the acts of "imbibing noxious knowledge" or "possessing noxious books", two of the forms of conduct attracting liability for the crime of magic.⁴⁰ Thus, these forms of conduct were prohibited despite their not necessarily being indicative of heretical convictions,

³⁷ For an account of the clerical hierarchy during this period, see Daniélou & Marrou op cit 239-240. On the liturgy and the sacraments, see Daniélou & Marrou op cit 311-314; Henry Chadwick *The Early Church* (1967 repr 1984) 258-272.

³⁸ Cf pp 29-31 above.

³⁹ Cf p 30 above.

⁴⁰ Cf Mommsen op cit 641, 641 n 2.

because of their historical link with the crime of magic. The following constitution is in line with the foregoing:⁴¹

CTh 16.5.34.1 (Arcadius & Honorius, 398) *Codices sane eorum scelerum omnium doctrinam ac materiam continentes summa sagacitate mox quaeri ac prodi exerta auctoritate mandamus sub aspectibus iudicantium incendio mox cremandos. Ex quibus si qui forte aliquid qualibet occasione vel fraude occultasse nec prodidisse convincitur, sciat se velut noxiorum codicum et maleficii crimine conscriptorum retentatorem capite esse plectendum.*

"We command that the books containing the doctrine and matter of all their [sc. the Eunomians' and Montanists'] crimes shall immediately be sought out and produced, with the greatest astuteness and with the exercise of due authority, and they shall be consumed with fire immediately under the supervision of the judges. If perchance any person should be convicted of having hidden any of these books under any pretext or fraud whatever and of having failed to deliver them, he shall know that he himself shall suffer capital punishment, as a retainer of noxious books and writings and as guilty of the crime of magic."

The possession of heretical writings therefore constituted both a crime of heresy and the crime of magic, and could be prosecuted as such.⁴²

3.1.6. Violence or tumult

This final category includes those forms of prohibited conduct by sectarians which entailed a tumultuous or violent element, such as provoking agitation, attracting a multitude, participation in a tumultuous assembly, disturbance of the public peace, and assault on Catholic churches or Catholic priests.

These crimes of heresy could, in certain circumstances, correspond to the crime of sedition and the crime of violence. *Sedition* was generally committed when an assembled crowd resisted the state authorities, whether actively or passively.⁴³ Although all members of the crowd were, properly speaking, guilty of *maiestas* (a crime against the state),⁴⁴ the practice was to regard only the leaders of the insurrection as perpetrators of this crime, and to treat mere followers as committing the lesser crime of violence (*vis*).⁴⁵ The crime of *violence*⁴⁶ covered various cases involving unlawful duress,⁴⁷ including riot, i.e. assembly by a violent crowd (*hominibus armatis coactisve*). Although it could overlap with sedition in some instances, *vis* by way of riot did not bear the added connotation of insubordination to

⁴¹ Cf also CTh 16.5.66 pr-1.

⁴² Cf p 89 below.

⁴³ Ferrini op cit para 273 p 342; Mommsen op cit 562-563.

⁴⁴ See the discussion of *maiestas* at pp 159-160 below.

⁴⁵ Mommsen op cit 564-565.

⁴⁶ A distinction between *vis publica* and *vis privata* does not seem to have been drawn at this period: cf CTh 9.10 *Ad legem Juliam de vi publica et privata*, which contains no differentiation; and although the distinction is still referred to in CTh 2.1.8.1, it is accorded no substantive differentiation.

⁴⁷ Cf Mommsen op cit 652.

state authorities.⁴⁸ Vis furthermore extended to damage to non-state property⁴⁹ and injury to private persons by a riotous mob.⁵⁰ The violent or tumultuous transgression of the prohibition against assembly by members of *collegia illicita*, i.e. tumultuous assembly, was regarded as tantamount to vis and was treated as the latter offence.⁵¹

Offences of the above nature which were perpetrated by heretics could therefore simultaneously constitute crimes against the state and/or crimes of violence, on the one hand; and crimes of heresy, on the other.⁵²

3.1.7. Attempt

Before concluding the discussion of the nature of the conduct attracting criminal liability for crimes of heresy, it must be determined whether the ineffectual attempt to commit such crimes also entailed liability. Of course, the possibility of attempt does not arise in the context of mere adherence to heresy; however, the question still remains of whether an attempt to commit any of the other crimes of heresy was punishable.

While Roman law never abandoned the principle that mere voluntas was not cognizable, and that only the concrete manifestation of internal purpose could constitute criminal conduct,⁵³ post-Classical law (probably under the influence of Christian ideals, in terms of which the importance of inner thoughts was stressed)⁵⁴ nevertheless saw a confirmation and a broadening of the Classical trend towards the recognition of the criminality of abortive attempts. Analysis of post-Classical legislation shows a clear progression of the idea that any manifestation of the intention to commit a given crime (in any act conducive to the consummation of such crime) should be punishable. While this development was not regular and uniform, it is at least clear that any concrete attempt was generally punishable as regards crimes newly created by post-Classical imperial legislation.⁵⁵ It may thus be accepted that any concrete manifestation of the intention to commit a crime of heresy such as rebaptism, rendered criminally liable the person who attempted to commit that crime.

⁴⁸ Id 657.

⁴⁹ Cf PS 5.3.3, quoted in Mommsen op cit 662 n 3.

⁵⁰ Cf D 48.6.10.1, quoted in Mommsen op cit 657 n 6 at 657-658; PS 5.3.1, quoted in Mommsen op cit 662 n 3.

⁵¹ Mommsen op cit 663 n 1, 877.

⁵² For antiheretical constitutions dealing with conduct constituting sedition, see e.g. CTh 16.1.4, 16.4.1, 16.5.38; for conduct corresponding with violence, see e.g. CTh 16.2.31; and for tumultuous assembly by sectarians, which would simultaneously have constituted the crime of violence, as explained in the text above, see e.g. CTh 16.4.4, 16.4.5.

⁵³ Cf p 51, 51 n 25 above.

⁵⁴ Cf Carlo Gioffredi *I Principi del Diritto Penale Romano* (1970) 105.

⁵⁵ For a discussion of the criminality of attempt in post-Classical law, see, generally, Biondi op cit vol 2 para 276 p 308-313; Ferrini op cit para 76 pp 104; Gioffredi op cit 105-110; and cf Mommsen op cit 96-97.

An aspect which is related to the above, is voluntary desistance before the consummation of a crime. Such voluntary desistance could result in either the avoidance of all liability (if the desistance was due to repentance coupled with conversion to Catholicism),⁵⁶ or mitigation⁵⁷ of punishment.⁵⁸

3.2. Person

Having discussed the various forms of conduct to which the crimes of heresy related, I shall now investigate who could be prosecuted for such crimes.

The general principle of Roman criminal law was that only human beings could be criminally liable.⁵⁹ It should be noted that slaves were also regarded as human beings, despite their general legal status as objects, and that they were accordingly also capable of committing crimes.⁶⁰ All human beings could therefore, in principle, be charged with the crime of heresy.

There are two points which are important in this context.

First, only individuals, and not associations of human beings or corporations, could be held criminally liable.⁶¹ Where a company of people committed a crime jointly, all were punished individually;⁶² corporate liability was unknown. This point is worth stressing here, since the view that an episcopal church functioned as a legal entity had already developed by the time of the compilation of the Theodosian Code.⁶³ There are constitutions in the Theodosian Code which, if read in the light of this development, might at first glance seem to suggest that heretical and schismatic churches could be punished in their own right. These are the constitutions which provide for the dissolution of heretical congregations, and confiscation of their church property.⁶⁴ Such constitutions should, however, be viewed in the context of the rules concerning the limitations on freedom of association which became prevalent from the beginning of the Classical period.⁶⁵ As set out above, the right of association was generally subject to approval by the authorities; if associations were constituted without the

⁵⁶ Cf pp 113-114 below.

⁵⁷ See p 148 below.

⁵⁸ Cf Biondi op cit vol 2 para 276 p 313; Ferrini op cit para 77 p 106; Mommsen op cit 98.

⁵⁹ Cf Mommsen op cit 65; Ferrini op cit 59. The noxal liability for the "wrongdoing" of animals mentioned by these authors is not relevant in the context of criminal law.

⁶⁰ Mommsen op cit 81-82. For the criminal liability of slaves for acts of heresy, cf CTh 16.5.54.8.

⁶¹ Mommsen op cit 73; Ferrini op cit 59.

⁶² Cf the discussion of co-perpetration at p 64 below.

⁶³ See p 53 above.

⁶⁴ Cf CTh 16.5.3, 16.5.4, 16.5.12.

⁶⁵ Cf p 53 above.

necessary permission, they were (qua collegia illicita) accorded no legal recognition, and had to disband. The usual consequences of the dissolution of collegia illicita are stated as follows in the Digest:

D 47.22.3 (*Marcianus 2 iudiciorum publicorum*) Collegia si qua fuerint illicita, mandatis et constitutionibus et senatis consultis dissolvuntur: sed permittitur eis, cum dissolvuntur, pecunias communes si quas habent dividere pecuniamque inter se partiri.

"If there should be any illicit associations, they are dissolved in terms of the mandates, constitutions and decisions of the senate: but, at their dissolution, they are allowed to divide any common property⁶⁶ they may have and to share out such property amongst themselves."

According to Marcian, the supposed communal assets were, as a rule, divided up among the members upon the dissolution of a collegium illicitum. It may therefore be deduced that, if such property was confiscated, this in effect constituted a confiscation of the individual members' shares in it, and amounted to a penalty imposed on such members. It follows that confiscation of sectarian church property - the church building, burial ground, and so forth - constituted a form of punishment of the individual heretics or schismatics, and not of their church in its own right. This bears out the point that only individual human beings could be liable for criminal punishment on the grounds of heresy.

The second point to be made is that while Roman criminal law, as a rule, adhered to the principle that only *living persons* could be charged with the commission of a crime,⁶⁷ the position was different with regard to charges of heresy.⁶⁸ Contrary to the norm, a charge of heresy could be instituted against persons who were already deceased. This aspect will be dealt with in more detail in the context of the criminal procedure applicable to heresy trials.⁶⁹

It should further be noted that in terms of Roman criminal law not only Roman citizens, but also non-citizens who committed an act of heresy in Roman territory could be held criminally liable.⁷⁰

⁶⁶ "Pecunia" is normally translated as "money", but also bears a wider sense of "any asset". See H Heumann & E Seckel *Handlexikon zu den Quellen des römischen Rechts* 10 ed (1958) s v "Pecunia".

⁶⁷ Mommsen op cit 66-67. However, the death of an accused *after* the institution of a trial did not interrupt the proceedings - see p 110 below.

⁶⁸ See also pp 87-88 below. - For a general description of post-mortem accusability, see Edoardo Volterra "Processi penali contro i defunti in diritto romano" (1949) 3 *Revue Internationale des Droits de l'Antiquité* 485-500.

⁶⁹ See pp 87-88, 112-113 below.

⁷⁰ Cf Mommsen op cit 104, 107-108.

Other aspects concerning the qualities of persons capable of being charged with heresy, and which are of a more subjective nature (such as the influence of age) will be discussed in the section which follows.

3.3. Volition

By post-Classical times, it was a firmly entrenched principle that criminal liability could only ensue if there had been guilt on the part of the wrongdoer; it was accepted that those who could not be blamed for their actions were not to be punished in terms of the criminal law.⁷¹ The criminal law recognized two elements which constituted the required guilt, viz *dolus malus* (intention) and *culpa* (negligence). In the sphere of public-law crimes, *dolus malus* was the appropriate form of guilt required for liability.⁷² It is accordingly the requirement of *dolus* which must be investigated in the context of crimes of heresy.

Literally translated, *dolus malus* signifies "evil intention". This is misleading, for *dolus malus* did not denote personal moral guilt, but rather referred to an abstract and theoretical standard of guilt. It merely denoted a consciousness of the fact that one's conduct was prohibited,⁷³ and did not bear the added connotation of an acceptance of the correctness of such prohibition. The actual motives or personal morality of a person who committed a prohibited action did not derogate from the presence of *dolus malus*.⁷⁴

The point that personal guilt was not the deciding factor in assessing *dolus malus* is of special importance in the context of crimes of conscience, such as crimes of heresy, where the accused is, by definition, convinced of the innocence and rectitude of his conduct. For, in accordance with the above line of reasoning, a lack of intention to do wrong on the part of heretics did not detract from the fact that they acted *dolo malo*. The requirement of *dolus malus* was complied with if they merely knew that their beliefs or activities were prohibited. In this regard, it should be pointed out that a knowledge of the actual legislation which created a specific crime was not required for the purposes of *dolus malus* where such a crime would have been ethically wrong in any event;⁷⁵ and since offences against the Catholic Church would (according to the perceptions of the period) necessarily have been in conflict with prevailing ethical norms, this in effect meant that *dolus malus* with regard to

⁷¹ Mommsen *op cit* 85; Biondi *op cit* vol 3 para 502 p 429. This principle was reinforced by the acceptance of the Christian ethos, which stressed personal sin.

⁷² Mommsen *op cit* 89-90. The two exceptions to this rule were culpable homicide, and culpable arson. *Culpa* may also have been regarded as the basis for vicarious liability of persons in control, for which provision was sometimes made (eg the vicarious liability of masters and guilds for their slaves' or guild-members' attendance of tumultuous heretical conventicles, prescribed in CTh 16.4.5) - cf CTh 9.21.4.

⁷³ Cf Mommsen *op cit* 86-87.

⁷⁴ *Ibid*; Ferrini *op cit* para 41-42 pp 54-59.

⁷⁵ Cf Mommsen *op cit* 92; Ferrini *op cit* para 53 p 70.

acts of heresy simply entailed a realization that one's personal beliefs or practices were in conflict with those advanced by the recognized church. It may be seen from this how abstract the notion of subjective blameworthiness was, when applied to crimes of heresy.

In practical terms, this meant that anyone charged with adherence to heresy (or one of the other crimes predicated upon this) who did not recant upon being charged, would be presumed to have the requisite *dolus malus*, for his knowledge of the unorthodoxy of his views or practices would be evident at this stage. In effect, therefore, *dolus malus* was established by the refusal to be convinced of one's error.⁷⁶

In order for *dolus* to commit a given crime of heresy to be present, however, the prerequisite of criminal capacity had to be complied with; for if there were circumstances which so affected or impaired the accused's volition that there could be no adequate cognition, *dolus malus* was not present.

The first factor which has to be investigated in this regard, is the influence of age. This matter is expressly dealt with in the following constitution:⁷⁷

CTh 16.6.6 (Honorius & Theodosius II, 413) ... Quod licet fidamus metu severissimae interminationis a nullo penitus, ex quo interdictum est, fuisse commissum, tamen, ut pravae mentis homines ab illicitis temperent vel coacti, volumus renovari, ut, si quis rebaptizasse, ex quo lex lata est, quempiam de mysteriis catholicae sectae fuerit detectus, una cum eo, quia piaculare crimen commisit, si tamen criminis per aetatem capax sit cui persuasum sit, statuti prioris supplicio percellatur ...

" ... Although We trust that from fear of a most severe threat no person whatever has committed such a crime from the time that it was interdicted, nevertheless, in order that men of depraved minds may abstain from unlawful acts even under duress, it is Our will that the regulation shall be renewed that if after the time that the law was issued any person should be discovered to have rebaptized anyone who had been initiated into the mysteries of the Catholic sect, he shall suffer the penalty of the former statute, along with the person rebaptized, because he has committed a crime that must be expiated, provided, however, that the person so persuaded is capable of crime by reason of his age ... "

Here, it is stated that only those persons who had undergone rebaptism who were old enough to be *doli capax*, would be punished. This is in line with the general principle that children who were too young to appreciate the nature of their actions were not to be held criminally liable. Whether or not a young person had attained the age of reason was considered a question of fact; no fixed criteria existed in this regard, and every case was determined in the light of the intellectual development of the particular child.⁷⁸

⁷⁶ Cf also CTh 16.5.54.3, 16.5.60 and 16.5.62 for references to intransigence. Cf further Von Bar et al op cit 92.

⁷⁷ So, too, CTh 16.6.7.

⁷⁸ Mommsen op cit 75-76; Ferrini op cit para 47 pp 62-65.

The second factor to be considered is the influence of coercion. In this regard, Roman criminal law proceeded from the idea that *dolus malus* could only be present if an accused had acted voluntarily; if he had acted under absolute compulsion, he would not be held criminally liable. This is shown by CTh 16.5.58.2, in which it was provided that those who participated voluntarily in rebaptism were to be subjected to the prescribed penalties; from the explicit reference to *voluntary* conduct, it may be deduced that involuntary, wholly coerced transgression would not expose a transgressor to punishment. However, coercion which did not amount to a total deprivation of the power to act voluntarily did not nullify one's volition, so that conscious compliance with illegal orders under duress but, nevertheless, of one's own accord, could be regarded as having occurred *dolo malo*.⁷⁹ Thus, persons such as *filiifamilias* who were commanded to participate in heretical activities by those having authority over them, and who obeyed the latter's illegal orders out of fear or compulsion but, nevertheless, on their own decision, were not regarded as having acted involuntarily. The circumstance of their having acted under orders would be taken into account as a mitigating factor in the determination of their punishment, but it did not suffice to free them from criminal liability. The position of slaves acting under their owners' illegal orders is, however, more complex; since the peculiar vulnerability of slaves who refused to obey illegal orders was realized, Roman criminal law accommodated slaves to the extent that they were held personally liable for crimes committed under orders in cases of *crimina atrocita* only.⁸⁰ Thus, a slave who committed a very grave act of heresy under duress (such as violence against a Catholic priest) would nevertheless have been held criminally liable (although such duress could be a mitigating factor);⁸¹ but for lesser crimes, the fact of his having acted under illegal orders would have nullified any *dolus malus* on his part, and would have freed him from criminal liability. The following constitution suggests that rebaptism was not regarded as an *atrox crimen* in this context, and that a slave ordered by his owner to undergo rebaptism was not held liable:

CTh 16.5.65.4 (Theodosius II & Valentinianus III, 428) *Nulli haereticorum danda licentia vel ingenuos vel servos proprios, qui orthodoxorum sunt initiati mysteriis, ad suum rursus baptismum deducendi, nec vero illos, quos emerint vel qualitercumque habuerint necdum suae superstitioni coniunctos, prohibendi catholicae sequi religionem ecclesiae. Quod qui fecerit vel, cum sit ingenuus, in se fieri passus sit vel factum non detulerit, exilio ac decem librarum auri multa damnabitur, testamenti et donationis faciendae utrique deneganda licentia.*

"None of the heretics shall be given permission to lead again to their own baptism either freeborn persons or their own slaves who have been initiated into the mysteries of the orthodox Church, nor indeed shall they be allowed to prevent from following the religion of the Catholic church those persons whom they have bought or have possessed in any way and who are not yet adherents of their superstition. If any person should administer such baptism, or should permit

⁷⁹ Cf CTh 16.6.6, quoted immediately above.

⁸⁰ Cf Ferrini op cit para 80 p 111; Gioffredi op cit 120-123; Mommsen op cit 77-78.

⁸¹ Cf p 148 below.

it to be administered to him, and should not report the fact, if he is freeborn, he shall be condemned to exile and a fine of ten pounds of gold, and to both offenders shall be denied the right to make a testament."

Further factors which could exclude criminal capacity were, amongst others, insanity⁸² and error of fact.⁸³ However, such factors would have played a part in charges of heresy in exceptional cases only.

4. PARTICIPATION

The foregoing analysis of the requirements for liability under the antisectarian legislation in the Theodosian Code relates to the simplest situation, viz where the relevant crime was committed by a single person acting on his own. However, it was also possible for a number of persons to co-operate in perpetrating a crime, with a greater or lesser degree of involvement. The question of the criminal liability of the individual participants then arises.

Roman law never developed a systematic, general theory of participation,⁸⁴ or came to draw a material distinction between various degrees of participation for the assessment of criminal liability.⁸⁵ Instead, it employed a comprehensive concept of liability, regarding all persons who had committed any act *dolo malo* in furtherance of a particular crime, and who had thereby contributed to the perpetration of that crime, as guilty without further qualification.⁸⁶

The equal liability of all those who contributed to the commission of a crime of heresy by any type of participation, is evidenced by the following constitution:

CTh 16.5.63 (Theodosius II & Valentinianus III, 425) Omnes haereses omnesque perfidias, omnia schismatica superstitionesque gentilium, omnes catholicae legi inimicos insectamur errores. Si quos vero [lacuna], haec quoque clementiae nostrae statuta poena comitetur et noverint sacrilegae superstitionis auctores participes conscios proscriptione plectendos, ut ab errore perfidiae, si ratione retrahi nequeunt, saltem terrore revocentur ...

"We prosecute all heresies and all perfidies, all schisms and superstitions of the pagans and all false doctrines inimical to the Catholic faith. If indeed any persons [lacuna] this statutory punishment also of Our Clemency shall attend them, and they shall know that, as authors of sacrilegious superstition and as participants and accomplices, they will be punished with

⁸² The repeated descriptions of adherence to heretical views as insane and demented (eg CTh 16.1.2.1 "... iubemus ... reliquos vero dementes vesanosque iudicantes haeretici dogmatis infamiam sustinere") are clearly just a rhetorical device. The emperors should not be regarded as actually perceiving heresy as a manifestation of mental derangement; had this been the case, there would never have been any criminal liability for heresy.

⁸³ See, in general, Ferrini op cit chapter 7.

⁸⁴ Id para 90 p 122-123.

⁸⁵ See Mommsen op cit 100.

⁸⁶ Id 100-101.

proscription, so that if they cannot be recalled by reason from their perfidious false doctrine, at least they may be restrained by terror."

Nevertheless, Roman law was conversant with certain types of criminal participation, in the simple sense of typical factual patterns, not of legally significant categories. Therefore, alongside legal sources in which mention was made of the commission of the prohibited crimes only - in which case such references were to be extensively interpreted as including all cases of contributory participation - there were other sources in which mention was made of the particular types of participation known to Roman law. These will now be discussed briefly, with specific reference to participation in crimes of heresy.

4.1. Co-Perpetration

This first type of participation concerned the case where more than one person was directly involved in the actual execution of the criminal act concerned, whether as a ringleader (*princeps sceleris*) or as an associate (*socius, particeps*).⁸⁷ This form of participation frequently occurred in the context of heresy. The reason for this is that some of the most prevalent crimes of heresy - participation in a religious service, participation in a tumultuous assembly, membership of a forbidden sect, and so forth - belonged to the category of mass crimes. The principle that co-perpetrators were all criminally liable was thus of great practical significance.⁸⁸ However, the co-perpetration of the remaining, essentially individual crimes of heresy was also always possible. In this regard, it should be pointed out that co-perpetration could take a passive as well as an active form. This is evidenced by those crimes of heresy which may be termed bilateral, such as rebaptism and the illicit ordination of clergy. These crimes involved both an active and a passive participant; and, as is shown by the following constitutions, both participants were regarded as perpetrators of the crime concerned:

CTh 16.5.65.1 (Theodosius II & Valentinianus III, 428) *Dein ut, si alios sibi adiungant clericos vel, ut ipsi aestimant, sacerdotes, decem librarum auri multa per singulos ab eo, qui fecerit et qui fieri passus sit ...*

"Next, if they should join to themselves other clerics or priests, as they consider them, a fine of ten pounds of gold for each person shall be paid into Our treasury, both by him who created such cleric and by him who allowed himself to be so created ..."

CTh 16.6.6 pr (Honorius & Theodosius II, 413) ... [V]olumus renovari, ut, si quis rebaptizasse, ex quo lex lata est, quempiam de mysteriis catholicae sectae fuerit detectus, una cum eo, quia piaculare crimen commisit, si tamen criminis per aetatem capax sit cui persuasum sit, statuti prioris supplicio percellatur.

⁸⁷ Ferrini op cit para 80 p 110. Cf also Gioffredi op cit 111; Mommsen op cit 98.

⁸⁸ For an example of this, see CTh 16.5.53, in terms of which Jovinian and his adherents, who had held congregations, were equally liable.

"... [I]t is Our will that the regulation shall be renewed that if after the time that the law was issued any person should be discovered to have rebaptized anyone who had been initiated into the mysteries of the Catholic sect, he shall suffer the penalty of the former statute, along with the person rebaptized, because he has committed a crime that must be expiated, provided, however, that the person so persuaded is capable of crime by reason of his age."⁸⁹

The latter constitution also shows that, in order to be liable, co-perpetrators had to individually meet all the requirements for liability for the relevant crime.

4.2. Instigation

The second type of participation concerned the situation in which one person (the auctor), without being directly involved in the actual execution of a criminal act, *dolo malo* instigated the commission of a crime by ordering the eventual perpetrator to commit it, or by decisively influencing the latter to do so.⁹⁰ Seen in the context of heresy, this type of participation would have been of special relevance to sectarian leaders who inspired their followers to commit acts prohibited by the authorities.⁹¹

4.3. Indirect Assistance

The third type of participation involved a person (a *consciens*),⁹² who promoted the perpetration of a crime by furnishing the perpetrator with some means or counsel⁹³ necessary to commit the crime, but who did not personally participate in the actual commission of that crime.⁹⁴

4.3.1. Forms of indirect assistance

The manifestations which such indirect assistance could assume in practice were limitless. The following is a catalogue of the forms prohibited in the antisectarian legislation:

⁸⁹ So, too, CTh 16.5.65.4, 16.6.7.

⁹⁰ Ferrini op cit para 83 p 116, read with Mommsen op cit 98-99.

⁹¹ Cf CTh 16.7.3 pr.

⁹² So Ferrini op cit para 80 p 110. Contra Mommsen op cit 98, who states that: a) the term "*consciens*" properly related to somebody who simply had knowledge of the fact that a crime was going to be, or was being perpetrated, and who was not personally involved in causing or perpetrating it, ie a non-participant, and b) this term was used in legal writings to denote indirect participants by way of exception only. As Ferrini op cit para 84 pp 116-117 states, it is incorrect to interpret the term *consciens* according to its basic sense, given the fact that the context in which it was used always indicated active co-operation.

⁹³ *Consilium*, which was not regarded as including instigation - see Ferrini op cit para 90 pp 122-123.

⁹⁴ The English terms to be found in modern textbooks for such a participant are "accomplice", "accessary" and "accessory before the fact"; however, I shall avoid using this terminology because of the confusion engendered by it (cf E M Burchell, J R L Milton & J M Burchell *South African Criminal Law and Procedure* vol 1 2 ed (1983) 411-412; Earl Jowitt & Clifford Walsh *Jowitt's Dictionary of English Law* vol 1 2 ed by John Burke (1977) s v "Accessory or Accessary", "Accomplice" for the ambiguity of these terms).

TABLE B
PROHIBITIONS ON ASSISTANCE TO HERETICS

SECT ASSISTED	CONSTITUTION	PROHIBITED FORM OF ASSISTANCE
General/All sects ^a	16.5.4 (376/378), 16.5.24 (394)	judge allowing heretics to assemble or hold a service
	16.5.12 (383)	office staff of judges or chief decurions of municipalities neglecting to prevent congregation
	16.5.21 (392)	property owner, or chief tenant without owner's knowledge, allowing ordination of heretical priests on landholding concerned
	16.10.13 (395)	failure to prevent or punish congregations, by judges, judge's office staff, municipal officials and procurators of imperial estates
	16.5.29 (395)	assisting heretics to obtain an office in the imperial service
	16.5.30.2 (396/402)	permitting heretics to congregate in one's house (in Constantinople)
	16.6.4.1 (405), 16.5.65.3 (428)	owner, or procurator acting without owner's knowledge, permitting conventicle on property
	16.5.46 (409)	judge failing to execute antisectarian provisions; judge's office staff failing to ensure implementation of antisectarian legislation; members of municipal senate failing to report transgressions in their municipalities
	16.5.54.2 (414)	harbouring bishops and priests trying to escape exile
	16.5.54.5 (414)	chief tenants of imperial estates or emphyteucaries permitting congregation on estates concerned
	16.5.54.6 (414)	owners who fail to evict tenants who allow congregation on their landholdings
	16.5.65.3 (428)	judges and municipal officials failing to prevent heretics from assembling or building churches
	16.5.65.5 (428)	judge imposing no punishment, or a lesser punishment than that prescribed
Apollinarians ^b	16.5.12 (383)	office staff of judges or chief decurions of municipalities neglecting to prevent congregation

Arians ^{bc}	16.5.8 (381)	providing a place where Arians can worship or build churches; housing their ministers
	16.5.12 (383)	office staff of judges or chief decurions of municipalities neglecting to prevent congregation
Donatists ^{bd}	16.6.4.4 (405), 16.5.46 (409)	judge failing to execute antisectarian provisions; judge's office staff failing to ensure implementation of antisectarian legislation; members of municipal senate failing to report transgressions in their municipalities
	16.5.52.1 (412)	chief tenants or procurators of landholdings who fail to hand Donatists over to authorities on demand
	16.5.52.4 (412)	masters who fail to flog their Donatist slaves or serfs
	16.5.54.2 (414)	harbouring bishops and priests trying to escape exile
	16.5.54.5 (414)	chief tenants of imperial estates or emphyteucaries permitting congregation on estates concerned
	16.5.54.6 (414)	owners who fail to evict tenants who allow congregation on their landholdings
Eunomians ^{bde}	16.5.8 (381)	providing a place where Eunomians can worship or build churches; housing their ministers
	16.5.12 (383)	office staff of judges or chief decurions of municipalities neglecting to prevent congregation
	16.5.34 (398)	- owner or overseer of landholding conniving at assembly on that property - permitting Eunomians to conduct a service in one's house (in Constantinople), or failing to eject and report them after discovering this
	16.5.36 (399)	owner of a property permitting Eunomians to hold a service on the property concerned; overseer of a landholding or steward of an urban property doing so without owner's knowledge
	16.5.50 (410)	officials who return confiscated property
	16.6.7 (413), 16.5.58.5 (415)	permitting conventicles in one's house or on one's landholding
Macedonians ^b	16.5.12 (383)	office staff of judges or chief decurions of municipalities neglecting to prevent congregation
Manichaeans ^b	16.5.35 (399)	harbouring Manichaeans fleeing from the authorities

Manichaeans ^b (contd)	16.5.40.7 (407)	owner permitting congregation on his estate; overseer, procurator or chief tenant doing so without owner's knowledge
	16.5.40.8 (407)	governor failing to prosecute Manichaeans, or neglecting to ensure execution of punishment
Montanists ^{bd}	16.5.34 (398)	- owner or overseer of landholding conniving at assembly on that property - permitting Montanists to conduct a service in one's house (in Constantinople), or failing to eject and report them after discovering this
	16.5.40.7 (407), 16.5.57.1 (415)	owner permitting congregation on his estate; overseer, procurator or chief tenant doing so without owner's knowledge
	16.5.40.8 (407)	governor failing to prosecute Montanists, or neglecting to ensure execution of punishment
Phrygians and Priscillianists ^{bf}		
Nestorians ^{bd}	16.5.66.2 (435)	furnishing a place for Nestorians to assemble and hold a council
Rebaptizing sects ^{bg}	16.6.2.1 (377)	furnishing a place to be used as a church
<p>^a See also specific sects. Constitutions which are framed in general terms and do not mention the affected sects by name have been included in the general category, for the reasons stated at p 15 above.</p> <p>^b See also "General/All sects".</p> <p>^c See also "Eunomians".</p> <p>^d See also "Rebaptizing sects".</p> <p>^e See also "Arians".</p> <p>^f See "Montanists". For the identification, see p 51 n 22 above.</p> <p>^g See also "Donatists", "Eunomians", "Montanists" and "Novatians".</p>		

As appears from the above conspectus, a common form of indirect assistance to sectarians, relating to the entire spectrum of prohibited sects,⁹⁵ entailed owners, stewards, tenants or overseers of buildings or of open land who knowingly allowed heretics to congregate there. This type of assistance was commonly encountered in Roman criminal law, in the general form of an owner or steward of premises allowing another (the perpetrator) to use the property for the purposes of committing the relevant crime there (*domum praeberere*).⁹⁶

A second common form of indirect assistance appearing in the above catalogue, is collusion on the part of public officials, by neglecting to prosecute or punish prohibited sects, permitting them to build churches, or enabling members of such sects to enter the imperial service. This form of indirect assistance is also often encountered in post-Classical legal sources; indeed, a startling number of post-Classical constitutions provided for the criminal liability of conniving officials as a matter of course.⁹⁷ The explanation for the frequent occurrence of this type of collusion should rather be sought in corruption, than in any sympathies on the part of the officials for the subjects (whether heretics, or any other group) assisted by them.⁹⁸

Examples of assistance by private individuals include the harbouring of heretical clerics, or of members of certain forbidden sects. In some cases, the harbouring of sectarians (as well as permitting them to assemble on one's property, discussed previously) would have occurred out of personal sympathy, but there are also indications that such actions were often inspired by a desire to recruit and retain farm labour.⁹⁹

A final form of indirect assistance appearing in the antiheretical legislation, is the failure to obstruct the commission of a transgression of the relevant prohibitions. To some extent, one encounters divergences between the rules stated here, and the general rules of Roman criminal law relating to obstruction. As a general rule, only positive assistance constituted criminal participation. That is to say, if a member of society became aware that a crime was going to be, or was being committed, no general duty rested on him to take steps to prevent its perpetration, or to inform the authorities of the matter, the breach of which duty would have entailed co-liability for that crime.¹⁰⁰ Therefore, someone who knew that a crime of

⁹⁵ Contra Ferrini *op cit* para 86 p 119, who notes CTh 16.5.34, 36 & 40 and, merely on the basis of these three constitutions, suggests that this rule applied to Eunomianism especially.

⁹⁶ See *ibid*.

⁹⁷ Cf *id* para 18 p 31.

⁹⁸ A H M Jones *The Later Roman Empire 284-602* vol 1 (1964) 399. Cf also Wolfgang Kunkel *An Introduction to Roman Legal and Constitutional History* 2 ed (tr JM Kelly) 1973 repr 1975) 141.

⁹⁹ Cf Jones *op cit* vol 2 1042 for the problem of lack of manpower in agriculture in the late Empire.

¹⁰⁰ See, generally, Ferrini *op cit* para 19 pp 31-33, para 21 pp 33-34. Although Mommsen states (*op cit* 91) that a duty to obstruct the perpetration of crime indeed existed in the case of crimes against the state (into which category certain crimes of heresy, such as seditious assembly, could simultaneously fall - cf p 56 above), the arguments advanced for this contention do not support it. The authority on which

heresy was going to be, or was being committed, and who failed to obstruct its perpetration (by personal action or by warning the appropriate authorities) would normally *not* have been regarded as having promoted the crime concerned, and as being criminally liable on that account. The foregoing, however, did not apply in certain cases relating to heresy. First, officials charged with enforcing or implementing criminal regulations were under a duty to obstruct the commission of crime. The violation of this duty by their failure to take appropriate action on becoming aware of the commission or proposed commission of a crime did therefore render them liable as participants.¹⁰¹ This exception applied generally to all crimes, and was also applicable to crimes of heresy. A second exception which did not apply generally,¹⁰² but which the above catalogue shows was applicable to crimes of heresy, was that if an owner of a slave was aware of the latter's adherence to a prohibited sect, or participation in a tumultuous assembly, and he failed to constrain the latter, he was himself declared criminally liable. A third exception, which was once again not generally applicable, but which was encountered in the context of heresy, was that guilds were declared liable for failing to restrain any guild members from participating in a tumultuous assembly of heretics. In the above three instances, therefore, participation in a crime of heresy by omission was possible.

4.3.2. Requirements for liability

Liability on the grounds of indirect assistance only ensued where the perpetrator did indeed commit the relevant crime.¹⁰³ The criminal *act per se* was of importance here, and not the perpetrator's criminal *liability*; thus, even where the perpetrator could not be held liable for some or other purely subjective reason relating to his inherent personal capacities (such as non-accountability), the person who had indirectly assisted him would nevertheless be held liable.¹⁰⁴ In other words, inherent personal capacities affecting the perpetrator's liability were not transposed onto the person who had offered indirect assistance. However, where the *general description* of a crime incorporated subjective elements (in the sense that the relevant crime could only be committed by a specific category of persons) there was a transposition of such subjective elements onto persons who had rendered indirect

Mommsen relies on CTh 9.14.3.6: "Id, quod de praedictis eorumque filiis cavimus, etiam de satellitibus consciis ac ministris filiis que eorum simili severitate censemus", and Tertullian *Apol* 2: "ad socios, ad conscios usque inquisitio extenditur". The support offered by these references is, however, entirely dependent on the interpretation given to the term "consciis"; as has been shown at p 65 n 92 above, "consciis" should not be understood in its most literal sense of someone who shares knowledge, but as an active, though indirect participant. If "consciis" is interpreted in the latter sense, the texts advanced by Mommsen will not offer support for his proposition. The better view therefore seems to be that there was no such duty (- so, too, Ferrini op cit para 84 p 117).

¹⁰¹ See, generally, Ferrini op cit para 18 pp 30-31.

¹⁰² Cf id para 21 pp 33-34.

¹⁰³ Id para 88 p 121.

¹⁰⁴ Id para 88 pp 121-122.

assistance; such persons would be held liable for the relevant crime, notwithstanding the fact that they did not fall into the prescribed category of persons.¹⁰⁵ Thus, for example, where an orthodox Christian had rendered indirect assistance to a member of a heretical sect committing a crime of heresy, the former could nevertheless be found guilty of the relevant crime of heresy. This is illustrated clearly by the following constitution:

CTh 16.5.52.4 (Honorius & Theodosius II, 412) *Servos etiam dominorum admonitio vel colonos verberum crebrior ictus a prava religione revocabit, ni malunt ipsi ad praedicta dispendia, etiam si sunt catholici, retineri.*

"Slaves also shall be recalled from the depraved religion by the admonition of their masters, and coloni by frequent flogging, unless the masters themselves, although they are Catholics, should prefer to be held liable to the aforesaid fines."

Finally, liability for indirect assistance only ensued where the assistance had been rendered *dolo malo*. Such *dolus* had to relate to not only the act of assistance itself, but also the perpetrator's commission of the criminal act.¹⁰⁶

4.4. Assistance after Completion of the Crime

Rendering assistance to a perpetrator after the commission of a crime did *not* amount to participation, since this did not constitute aiding the perpetration of the offence.¹⁰⁷

The principle, as stated above, relates to completed crimes. In the case of continuing crimes (such as the possession of heretical books, or being a heretical cleric), assistance given to the perpetrator after the inception of the offence still rendered the assistant liable for the crime in question on the grounds of participation.¹⁰⁸ However, once even a continuing crime was terminated, assistance no longer constituted participation; the person giving assistance was not liable on the charge facing the perpetrator, but could only be found guilty of another, independent crime, if this was applicable.¹⁰⁹ Thus, for example, officials who connivingly deferred or obstructed trials for heresy or execution of sentence,¹¹⁰ and colluding judges who imposed no or inadequate sentences on those convicted of crimes of heresy¹¹¹ were declared guilty of a punishable offence; however, they would not have been held liable for the particular crime of heresy committed by the perpetrator in question, but rather for a different offence.

¹⁰⁵ For a discussion of this problem of "comunicabilità delle circostanze" between participants, see *id* para 89 pp 121-122.

¹⁰⁶ *Id* para 87 p 121.

¹⁰⁷ See Mommsen *op cit* 101.

¹⁰⁸ Cf Ferrini *op cit* para 92 p 125.

¹⁰⁹ *Id* para 92 p 125.

¹¹⁰ Cf CTh 16.5.40.8.

¹¹¹ Cf *ibid*, CTh 16.5.65.5.

This concludes the analysis of the principles of liability in terms of the Theodosian Code's antisectarian provisions. In the following chapter, I shall discuss the procedure whereby liability for alleged transgression would be determined in a concrete case.

CHAPTER FOUR

CRIMINAL PROCEDURE

In the previous chapter, I analysed the provisions in the Theodosian Code relating to heresy from the perspective of the requirements for criminal liability; in this chapter, I shall set out the machinery whereby these provisions were implemented in practice. In this regard, I shall set out the courts competent to hear charges of heresy, and the procedure adopted by them for trials of alleged heretics.

1. COMPETENT COURTS

1.1. Introduction: Jurisdiction

Although heresy was essentially a religious matter, the *crime* of heresy was regarded as a secular matter. Therefore, although heresy would also have constituted an ecclesiastical offence, against which disciplinary measures could be taken by ecclesiastical tribunals, its prosecution as a crime vested in the secular authorities at all times.¹ The jurisdiction of the secular courts should be stressed, to avoid a contrary impression being created by a knowledge of medieval developments in heresy trials,² and by a superficial reading of constitutions such as the following:³

CTh 16.11.1 (Arcadius & Honorius, 399) *Quotiens de religione agitur, episcopos convenit agitare; ceteras vero causas, quae ad ordinarios cognitores vel ad usum publici iuris pertinent, legibus oportet audiri.*

"Whenever there is an action involving matters of religion, the bishops must conduct such action. But all other cases which belong to the judges ordinary and to the usage of the secular law must be heard in accordance with the laws."

This constitution should not be interpreted as drawing an absolute distinction between religious and secular actions; and as giving the ecclesiastical authorities sole jurisdiction over the former. Rather, it draws a distinction between, on the one hand, religious disputes relating to theological questions in abstracto and to matters of internal Church organization and discipline; and, on the other, religious disputes relating to the concrete application of a prior determination by a synod or similar ecclesiastical organ. It then affirms the principle that the ecclesiastical organs should pronounce on the orthodoxy or heterodoxy of a given belief, should decide whether or not a given movement represented a schism, and should

¹ Cf Th Mommsen *Römisches Strafrecht* (1899 repr 1955) 295.

² See, in this regard, Giorgio Barone-Adesi "Eresie «sociali» ed inquisizione teodosiana" in *Atti dell'Accademia Romanistica Costantiniana (VI Convegno Internazionale)* (1986) 146-147; Carl Ludwig von Bar et al *A History of Continental Criminal Law* (tr Thomas S Bell et al) (1916 repr 1968) 180.

³ Cf also CTh 16.2.23 and 16.2.41, which should also be interpreted as relating to internal church matters only (cf Iacobus Gothofredus *Codex Theodosianus cum Perpetuis Commentariis* vol 6(1) (ed Marvilius-Ritter) (1743 repr 1975) 58-62, 90-91) and should not be understood as providing for ecclesiastical intervention in criminal trials for heresy (contra Prof Edoardo Volterra "Appunti intorno all'intervento del vescovo nei processi contro gli eretici" (1934) 42 *Istituto di Diritto Romano Bullettino* 456-457).

make an abstract determination of heresy or schism. The secular authorities, on the other hand, would then give effect to such pronouncement or determination in concrete cases before them, would implement relevant legislation, and would assess individuals' criminal liability for heresy or schism. For the purposes of this dissertation, therefore, it is necessary to investigate the *secular* courts competent to try heresy.

In determining which secular organs were competent to hear charges of heresy, regard must be had to the criteria of (a) territorial jurisdiction and (b) personal jurisdiction.

(a) A criminal court was ordinarily vested with territorial jurisdiction by virtue of the commission of the crime in that court's district, as is clear from:

CTh 9.1.10 (Valentinianus I, Valens & Gratianus, 368/373) *Ultra provinciae terminos accusandi licentia non progrediatur. Oportet enim illic criminum iudicia agitari, ubi facinus dicatur admissum. Peregrina autem iudicia praesentibus legibus coherecemus.*

"The right of accusation shall not go beyond the boundaries of a province; for the trial of a crime must be conducted at the place where the crime is said to have been committed. Moreover, by the present statutes, We restrain such foreign trials."

Territorial jurisdiction may - the point is not clear - also have vested by the alleged criminal's being domiciled in the court's district; it could, however, not be vested by his arrest there.⁴

(b) The second, and overriding criterion for determining a given court's competence to hear a criminal charge was that of personal jurisdiction. In post-Classical times, persons of different ranks or classes were accorded different legal treatment to a significant extent; this phenomenon also emerged in the sphere of jurisdiction, in the form of jurisdictional benefits for some. A distinction therefore existed between the ordinary courts, which had jurisdiction over ordinary subjects, and the special courts, which alone were competent to try charges against persons of rank and members of certain privileged classes.

1.2. Ordinary Courts

During the period under consideration, jurisdiction was an incident of civil administrative authority. Therefore, the judicial system reflected the hierarchical administrative structure

⁴ On territorial jurisdiction, see Biondo Biondi *Il Diritto Romano Cristiano* vol 3 (1954) p 511; Karl Gustav Geib *Geschichte des römischen Kriminalprozesses* (1842 repr 1969) 487-496; Mommsen op cit 356-358.

of the time:⁵ The various courts were conducted by the civil administrative authorities and were organized in a staggered jurisdictional system, which allowed for appeals from one jurisdictional level to the next.⁶

1.2.1. Courts of first instance

In the case of charges of heresy to be tried in Rome or in Constantinople, the court of the urban prefect functioned as the ordinary court of first instance.⁷

In the provinces, the ordinary courts of first instance were those of the provincial governors.⁸ This applied to charges of heresy, too.⁹ However, it should be noted that provincial governors did not have the power to impose punishments which would have to be effected beyond the borders of their areas of jurisdiction, i e their provinces.¹⁰ They could moreover not impose the punishment of deportation - a punishment which was fairly frequently imposed for heresy¹¹ - but had to refer the imposition of the sentence to the imperial court, after they had found the alleged heretic guilty of a crime meriting this punishment.¹²

⁵ For a full account of the civil administration, see William G Sinnigen & Arthur E R Boak *A History of Rome to A.D. 565* 6 ed (© 1977) 436-438; Kaser op cit para 47 p 208-213; Gerhard Dulckeit, Fritz Schwarz & Wolfgang Waldstein *Römische Rechtsgeschichte* 6 ed (1975) para 36 p 235-242.

⁶ My account of the organization of the ordinary courts in this period is taken generally from Dulckeit, Schwarz & Waldstein op cit para 36 IV 3 p 241; Max Kaser *Römische Rechtsgeschichte* 2 ed (1967 repr 1986) para 47 III pp 211-212; Wolfgang Kunkel *An Introduction to Roman Legal and Constitutional History* 2 ed (tr J M Kelly) (1973 repr 1975) 143 (hereafter referred to as Kunkel I); Mommsen op cit 280-285; and, especially, Geib op cit 412-486.

⁷ Cf eg CTh 16.5.3, addressed to the prefect of Rome.

⁸ Although the municipal senates had some judicial functions, these were extremely limited (cf Geib op cit 480-481), so that the municipal courts are not relevant in the context of heresy. The reference to "iud[ex] in civitate, qua agitur", which occurs in CTh 16.2.23 may be explained on the basis that the Interpretatio derives from the Breviarum Alarici, and reflects later vulgar influences - cf Kunkel I 161.

⁹ See eg CTh 16.5.40.8 and 16.6.5 for explicit references to the judicial competence of the provincial governors in cases of heresy. Cf also Aug *Ep* 100, in which Augustine of Hippo exhorts Donatus, governor of Africa, to be merciful in sentencing heretics (Al Goldbacher (ed) *S. Aureli Augustini Hipponiensis Episcopi Epistulae in Corpus Scriptorum Ecclesiasticorum Latinorum* vols 34(1) (1895), 34(2) (1898), 44 (1904), and 57 (1911); and Aug *Contra Cresconium* 47. 51 (quoted at p 95 below), in which he refers to Crispinus' conviction as a heretic in the court of the proconsul, i e the governor of Africa.

¹⁰ Geib op cit 478-479. Only the governors of Syria and Dacia were given a somewhat wider jurisdiction, as a special privilege.

¹¹ Cf pp 120-128 below.

¹² Cf Mommsen op cit 975. - A further jurisdictional restriction should not be deduced from the reference in CTh 9.41.1 to "his qui in summa administrationis sunt positi potestate, vitae quoque noxiis ius adimendae sortiti sunt." This does not imply that only government officials of the first rank had the power to impose the death sentence, since the phrase quoted is no more than a circumlocution for "ius gladii"/"merum imperium" which, although limited to only some governors during the Classical era, was extended to all governors during the Severan era. Cf Gothofredus op cit vol 3 (ed Marvilius-Ritter) (1738 repr 1975) 351; A H M Jones *The Criminal Courts of the Roman Republic and Principate* (1972) 104 (hereafter cited as Jones I). In post-Classical times, all provincial governors could impose the death sentence, as well as all other penalties, with the exception of those mentioned in my text above; see Geib op cit 478.

Only the imperial court and, presumably, the court of the praefectus praetorio had an unrestricted capacity to impose a sentence of deportation. The praefectus urbi could impose this sentence, but normally had to consult the emperor concerning the place of exile¹³ (unless, as happened in the case of the followers of Jovinian,¹⁴ the emperor specifically authorised him to make this determination).

Furthermore, it was provided by Theodosius II in 425 AD that provincial governors would no longer be empowered to impose the penalty of confiscation - another punishment encountered in the context of heresy¹⁵ - but would be required to consult the imperial court in cases involving such punishment.¹⁶ Thereafter, trials for heresy involving confiscation had to be screened by the imperial court.

The provincial governors were empowered (as were all officials exercising judicial functions) to delegate their judicial authority in a given case to an appointee, termed a iudex pedaneus, to try the case in a subordinate capacity,¹⁷ and there is patristic evidence that this on occasion happened in trials for heresy.¹⁸ Logic dictates that the governor's delegates were subject to the same sentencing restrictions as the governors themselves. Moreover, they did not have the capacity to impose the death sentence or a sentence of condemnation to the mines,¹⁹ the two gravest punishments, which were imposed in certain cases of heresy.²⁰ The effect of this was that they could not exercise jurisdiction in the graver cases of heresy.

Apart from the above, it was also always possible for the emperor to commission a special court of the first instance;²¹ the trials conducted against the Donatists after the Council of Carthage by the special envoy, Marcellinus,²² offer clear evidence that this happened on occasion in the case of heresy.

¹³ Cf Mommsen op cit 975.

¹⁴ CTh 16.5.53.

¹⁵ Cf pp 120-131 below.

¹⁶ CTh 9.41.1.

¹⁷ Kunkel I 144.

¹⁸ A reference to trials of heretics by iudices pedanei occurs in Aug *Ep* 100.2: "[E]os ... rerum certarum manifestissimis documentis apud acta vel praestantiae tuae vel minorum iudicum convinci atque instrui patiaris".

¹⁹ Mommsen op cit 949 n 2.

²⁰ Cf *ibid*; pp 120-128 below.

²¹ Mommsen op cit 285. Cf also the reference in CTh 16.2.23 to the jurisdiction of extraordinary judges.

²² Cf CTh 16.5.55, where reference is made to the trials of certain Donatists by Marcellinus (on whom, see Gothofredus op cit vol 6(1) 198-199; Henry Paolucci (ed) *The Political Writings of St. Augustine* (© 1962) p 244 n 4). The trials by Marcellinus are also attested by i a Aug *Ep* 133.1, 139.2.

1.2.2. Courts of appeal

Appeal from the decision of a *iudex pedaneus* always first lay with the official who had appointed him, whereafter further appeals would follow the normal channels.

Appeal from the decisions of the provincial governors, excluding the governors of Africa, Asia and Achaia,²³ lay with the court of either the *vicarius* of the relevant diocese, or with that of the *praefectus praetorio* (or in highly exceptional circumstances only, directly to the imperial court, consisting of the emperor and his *consistorium*, which was made up of all the highest-ranking state officials attached to the imperial court, as well as councillors personally appointed by the emperor).²⁴ Further appeal from the courts of the *vicarii*²⁵ was possible, and lay with the imperial court; however, the decision of the *praefectus praetorio* was not subject to appeal, since he was seen to function as the emperor's full representative (*vice sacra*).

The decisions of the governors of Africa, Asia and Achaia could either be submitted for review to one or more members of the imperial *consistorium* (as happened when the Donatist bishop Crispinus appealed against the sentence imposed by the governor of Africa),²⁶ or could be submitted for retrial to the *quaestor palatii*, sitting together with the *praefectus praetorio* in whose prefecture the capital was situated, and who was therefore attached to the imperial court.

Contesting the decisions of the *praefecti urbi* was allowed in exceptional cases only, and then took the form of submitting a legal question to the imperial court.

Appeal from the decision of a special imperial delegate lay directly with the imperial court.

The courts of final instance were, therefore, normally those of the praetorian prefects, and the imperial *consistoria*.

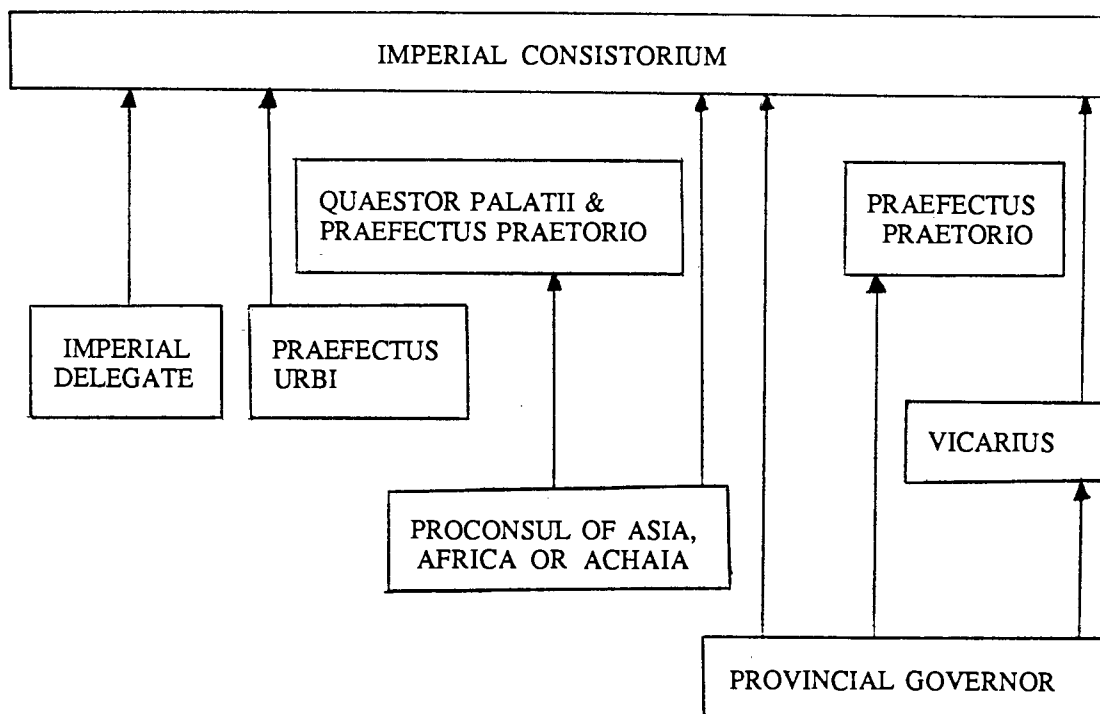
The entire court structure may be represented schematically as follows:

²³ The case of the governor of Achaia is not mentioned with those of the governors of Asia and Africa by the authorities on Roman criminal jurisdiction (eg Mommsen op cit 293), but I deduce its inclusion here from the account of the constitutional structure given in Sinnigen & Boak op cit 437, in terms of which the governor of Achaia, like those of Asia and Africa, was not subordinate to a *vicarius*.

²⁴ On the imperial *consistorium*, see Geib op cit 427-428; Mommsen op cit 284; Kaser op cit para 47 II p 210; Dulceit, Schwarz & Waldstein op cit para 36 III p 240.

²⁵ Including the Count of the Orient, who enjoyed the same status as a *vicarius* - see Mommsen op cit 282.

²⁶ See Aug *Ep* 88.7, read with Aug *Ep* 105.4.



1.3. Jurisdictional Privileges

As stated above, jurisdictional privileges were accorded to certain ranks or classes of persons. The classes which could come into consideration for such privileges will now be dealt with.²⁷

1.3.1. The senatorial order

According to a provision of Constantine the Great, senators could not lay claim to any benefit of forum, and fell under the ordinary courts' jurisdiction.²⁸ This provision was thereafter maintained in the Eastern Roman Empire, up to and including the time when the Theodosian Code was published.²⁹ Eastern senators therefore enjoyed no jurisdictional privileges. However, the Constantinian regulation was adapted in the Western Roman Empire. The position obtaining in the West during the period when heresy had become criminalized, was that the provincial governors could investigate charges brought against senators, but could not reach a verdict or pronounce sentence; this capacity vested in the two praetorian prefects or in the urban prefect only. In exercising this capacity, the latter could not consult ordinary assessors in cases involving senatorial accused, but had instead

²⁷ Jurisdictional privileges for imperial court servants began to develop from the reign of Theodosius II (cf Mommsen op cit 290 n 3; Geib op cit 501); but the extent of this during the period under consideration was so slight that it has not been included in the discussion which follows.

²⁸ CTh 9.1.1, discussed by Geib op cit 499; Mommsen op cit 287.

²⁹ Cf Mommsen op cit 287.

to be assisted by an ad hoc commission of five, chosen by lot from the members of the senate (the *quinquevirale iudicium*).³⁰ Senators in the Western Roman Empire - such as African senators supporting Donatism³¹ - therefore enjoyed a benefit of forum as regards their condemnation and sentencing.

1.3.2. Members of the military forces

In the post-Constantinian era, all crimes other than adultery committed by members of the armed forces in service (including officers and commanders) did not fall within the cognizance of the ordinary courts, but were tried by military courts only.³² Members of the military charged with crimes of heresy therefore enjoyed a benefit of forum.

1.3.3. High-ranking state officials

High-ranking officials of state (i.e. provincial governors and above) were not subject to the jurisdiction of the ordinary criminal courts, but were tried by special instances. In this regard, a distinction was drawn between provincial governors and other high-ranking state officials. Provincial governors were tried by their immediate superiors, viz the *vicarii* and the praetorian prefects; the imperial court could try their cases in the first instance, but did not usually do so. Other high-ranking state officials, viz all officials enjoying the rank of *illustres*, as well as the praetorian and urban prefects, could be tried by the imperial court only.³³

The above jurisdictional provisions applied not only when the officials concerned were themselves charged with heresy,³⁴ but also when they were charged with connivance with heretics by not suppressing congregation by sectarians, or by not ensuring the latter's adequate punishment.³⁵

1.3.4. Clergy

Despite a contrary tendency in the sphere of civil trials, the Catholic clergy enjoyed no benefit of forum in criminal cases, but remained subject to the secular courts' jurisdiction. This was even the case where bishops were charged: although it was provided by the sons

³⁰ Geib op cit 500; Mommsen op cit 287-288.

³¹ Cf CTh 16.5.52 pr, 16.5.54.4 for evidence of senators' adherence to Donatism.

³² CTh 2.1.2; Mommsen op cit 288-289; Geib op cit 505.

³³ Geib op cit 501.

³⁴ Cf e.g. CTh 16.5.52, 16.5.54 (summarized at pp 43, 121, 123 below) for evidence of such officials' adherence to Donatism.

³⁵ Cf p 69 above.

of Constantine in CTh 16.2.12 that bishops could be charged before a synod only, it was provided in 376 AD,³⁶ and reaffirmed in 399 AD³⁷ that *all* criminal disputes involving members of the clergy had to be tried by the secular authorities. Therefore, if a cleric's conduct constituted both an ecclesiastical and a secular offence - as would be the case if he founded a sect, or supported heretical doctrines - it would give rise to two separate processes, viz disciplinary proceedings by the ecclesiastical authorities and a criminal prosecution by the secular authorities.³⁸

2. CRIMINAL PROCEDURE

2.1. Types of Criminal Procedure

2.1.1. General introduction

The post-Classical system of criminal procedure represented a virtual fusion of the two Classical procedural systems, viz that of *accusatio* (where the prosecution was conducted by any competent member of the public before an impartial jury court in accusatorial proceedings)³⁹ and that of *cognitio* (where the trial was conducted by an official with some judicial functions in inquisitorial proceedings⁴⁰).⁴¹ The resultant system may be described as a broad procedural spectrum with a preponderance of the accusatorial element at the one extreme, and a preponderance of the inquisitorial element at the other.⁴² It is possible to discern four procedural types in this spectrum:

³⁶ CTh 16.2.23. Since CTh 16.2.23 is later than the conflicting CTh 16.2.12, it takes precedence over the latter - cf CTh 1.1.5, which provides that, in a case of conflict between two constitutions in the code, the later one is to be followed; and which explains that the Theodosian Code also contains abrogated laws for the benefit of legal scholars. Cf also Gothofredus op cit vol 6(1) 42-43, 60; Geib op cit 498. However, note that Mommsen (op cit 293 n 2 on 294) regards CTh 16.2.12 as valid, interpreting it as relating to jurisdiction over internal Church matters only.

³⁷ CTh 16.11.1.

³⁸ CTh 16.2.41, which provides that "[c]lericos non nisi aput episcopos accusari convenit" is not in conflict with the position as stated above, since this constitution relates to internal Church matters only, as is clear from a later reference in it to a cleric's expulsion from his office - see Gothofredus op cit vol 6(1) 90.

³⁹ In Classical times, the *accusatio* procedure was adopted before the *quaestiones perpetuae*, the standing jury courts, which tried criminal charges based on Roman criminal law and brought against Roman citizens. For a fuller discussion, see Geib op cit 169 et seq; Mommsen op cit 343-345.

⁴⁰ In Classical times, the *cognitio* procedure was adopted by the highest government officials, who took disciplinary steps against those whose actions threatened public order and security; in this way, they exercised a quasi-criminal jurisdiction in spheres where the *quaestiones perpetuae* did not operate. For a fuller discussion, see Kaser op cit para 8 II 1a p 41, para 29 IV pp 126-128; Mommsen op cit 346-347 (and cf 340-341); Fritz Schulz *Principles of Roman Law* (tr Marguerite Wolff) (1936) 173-175.

⁴¹ Cf p 24 above.

⁴² Cf the following description of post-Classical criminal procedure by Geib op cit 522-523: "[D]as gesammte Verfahren, gleichviel ob der äußere Schein einer Anklage beibehalten wurde oder nicht, [war] von einem inquisitorischen Charakter durchdrungen ... : der Unterscheid lag einzig und allein darin, daß dieser Charakter in manchen Fällen etwas mehr, in andern etwas weniger zum Vorscheine kam, unter keiner Voraussetzung aber gänzlich verschwand, und eben so wenig in irgend einer Beziehung vollkommen unvermischt sich darstellte." Cf also Biondi op cit vol 3 pp 501-502, 505.

(a) Proceedings by accusatio

Here, the outward appearance of an accusatorial process was still maintained. The proceedings required a formal accusation and a prosecution by any member of the public, who faced the punishment for calumnia (i.e. the same punishment which the accused would have suffered, if convicted)⁴³ if his prosecution was unsuccessful. However, the incorporation of certain inquisitorial features (for example, control by the judge rather than the accuser over the questioning of the witnesses, and questioning of the accused by the judge to clear up uncertainties) substantially derogated from the disinterestedness of the judge and the accusatorial nature of the proceedings.⁴⁴

(b) Proceedings by cognitio

Here, the prosecution was not conducted by an outside accuser, but was controlled by the official who functioned as judge. Proceedings by cognitio may be further distinguished into the three following categories, in order of the increasing predominance of the inquisitorial element:⁴⁵

(i) Trial following a report by one of the minor officials charged with security duties:⁴⁶

Here, the relevant official lodged an incriminating report, and was then required to appear in court and to put the case against the person charged. To some extent, his role corresponded to that of a formal accuser in accusatio proceedings.⁴⁷ Much like a formal accuser, an official who laid a charge was liable for calumnia if the trial did not result in the conviction of the person charged; however, unlike a formal accuser, he was only so liable if he had maliciously and knowingly brought a false charge.⁴⁸

(ii) Trial following a denunciation by a private informer:

Here, a private individual informally denounced another to the judge. The judge was under an obligation to act on such denunciation, and to officially institute and conduct criminal proceedings against the suspect. The denouncer did not play a formal role during the trial, and could not be prosecuted for calumnia if the charge proved to be unfounded.

⁴³ See Mommsen op cit 491-497; CTh 9.1.9, 9.1.11.

⁴⁴ Cf Geib op cit 532-534, 535.

⁴⁵ See, generally, id 525-531, 535.

⁴⁶ These officials were the municipal authorities and (in the East) the municipal irenarchs, the stationarii (soldiers posted in various localities by the governors to police the populace), the frumentarii (soldiers responsible for distributing provisions to the armies), the curiosi (officials in the imperial postage service) and the agentes in rebus (soldiers who were members of the imperial secret service). See Geib op cit 528-530; cf also Mommsen op cit 309, 313-315, 318-322.

⁴⁷ Cf p 106 below.

⁴⁸ Geib op cit 652.

(iii) Trial initiated by the judge and his agents:

Here, the official vested with judicial functions appointed his own agents to act as detectives. The judge himself was thus responsible for initiating the gathering of incriminating information. He could then *mero motu* proceed against those detected by his agents.

It was possible to proceed against an alleged offender by *accusatio* as well as by *cognitio* in the majority of instances. However, preference was given to *accusatio*, with *cognitio* usually operating in a supplementary capacity only.⁴⁹ Private denunciations, intended as a basis for a *cognitio* prosecution, were not generally permissible - indeed, making such denunciations usually constituted a capital crime.⁵⁰ However, as the severity of the crime increased, the range of available procedures widened to include the possibility of private denunciations.⁵¹

2.1.2. Types of criminal procedure applicable to heresy trials

In the case of heresy, the full range of the above-mentioned procedural spectrum came into play.

As far as *accusatorial proceedings*, at the one extreme, are concerned, one finds the following provision in the Theodosian Code:

CTh 16.5.40 (Arcadius, Honorius & Theodosius II, 407) *Quid de Donatistis sentiremus, nuper ostendimus. Praecipue tamen Manichaeos vel Frygas sive Priscillianistas meretissima severitate persequimur. Huic itaque hominum generi nihil ex moribus, nihil ex legibus sit commune cum ceteris. 1. Ac primum quidem volumus esse publicum crimen, quia quod in religionem divinam committitur, in omnium fertur iniuriam ...*

"We have recently published Our opinion in regard to the Donatists. Especially, however, do We prosecute with the most deserved severity the Manichaeans and the Phrygians and [Montanists].⁵² Therefore, this class of man shall have no customs and no laws in common with the rest of mankind. 1. In the first place, indeed, it is Our will that such heresy shall be considered a public crime, since whatever is committed against divine religion redounds to the detriment of all ..."

Here, it is expressly provided that heresy constitutes a public crime; that is to say, according to the post-Classical sense of the term, a crime which could be prosecuted by

⁴⁹ Mommsen op cit 351. Contra Biondi op cit vol 3 pp 503-505, who suggests that the authorities preferred trials to be by *cognitio*.

⁵⁰ See the constitutions collected in CTh 10.10 *De petitionibus et ultro datis et delatoribus*. Geib op cit 532 is of the opinion that only secret denunciations, made in order to obtain an informant's reward, were prohibited; however, in my opinion, this does not emerge from the relevant constitutions.

⁵¹ Gothofredus op cit vol 6(1) 138 states that it was usual to permit denunciations in the case of "atroc[es] & praerupt[i] crimin[es]", i e fearful and grave crimes.

⁵² Cf p 51 n 22 for this interpretation of the term "Priscillianistae" in the Theodosian Code.

any competent member of the public in *accusatio* proceedings.⁵³ Although this constitution mentions specific groups only, it is accepted that *all* forms of heresy could be prosecuted by *accusatio*.⁵⁴

Any competent plaintiff, who wished to do so, could thus institute *accusatio* proceedings against a heretic and thereby personally prosecute the latter. The letters of Augustine of Hippo provide some evidence that this did happen on occasion.⁵⁵ However, given the risk of calumny proceedings that faced an unsuccessful accuser,⁵⁶ personal prosecution by *accusatio* must have occurred by way of exception only, and must have been limited to those cases where the incidents giving rise to the prosecution were notorious.⁵⁷

It was further possible for the relevant *public officials exercising security functions*⁵⁸ to report cases of heresy to the judges; indeed, they were under a duty to do so, as appears from *inter alia* the following constitution:

CTh 16.5.46 (Honorius & Theodosius II, 409) ... Quod si quisquam iudicum peccato coniventiae executionem praesentis legis omiserit, noverit amissa dignitate graviolem motum se nostrae clementiae subiturum, officium quoque suum, quod saluti propriae contempta suggestione defuerit, punitus tribus primatibus condemnatione viginti librarum auri plectendum. Ordinis quoque viri si in propriis civitatibus vel territoriis commissum tale aliquid siluerint in gratiam noxiorum, deportationis poenam et propriarum amissionem facultatem se noverint subituros.

" ... But if any of the judges through the sin of connivance should fail to execute the present law, he shall realize that he will forfeit his official rank and that he will suffer a more severe action of Our Clemency. His office staff also, if it should jeopardize its own safety by contemptuously refusing to give official recommendations, shall be fined twenty pounds of gold, in addition to the punishment of its three primates. Moreover, if the members of a municipal senate out of favouritism to the criminals should keep silent about the commission of such an offence in their own municipalities or the territories thereof, they shall know that they will suffer the penalty of deportation and the forfeiture of their own property."

The duty resting on a governor's staff and on the municipal decurions to promote prosecutions for heresy is clearly set out here.

⁵³ Cf Geib *op cit* 404-405.

⁵⁴ Cf Mommsen *op cit* 609. Contra Gothofredus *op cit* vol 6(1) 178, who interprets this constitution in such a way that only adherence to the sects mentioned, represented a public crime, as only these sects were of a nature so heinous that the *ratio legis* ("quod in religionem divinam committitur, in omnium fertur iniuriam") could be applicable to them.

⁵⁵ See Aug *Ep* 88.7 "[D]einde cum uestrorum clericorum et Circumcellionum notissima omnibus non cessaret immanitas, dicta causa est cum Crispino ...", where "dicta causa" refers to the institution of *accusatio* proceedings (cf H Heumann & E Seckel *Handlexikon zu den Quellen des römischen Rechts* 10 ed (1958) s v "Dicere" c).

⁵⁶ Cf p 82 above.

⁵⁷ Cf the expression "notissima ... immanitas" in Aug *Ep* 88.7, n 55 on this page.

⁵⁸ See p 82 n 46 above.

Since, as has been indicated above, the relevant officials were not exposed to the risk of calumny proceedings if they acted in good faith,⁵⁹ the consideration militating against the frequency of accusatio proceedings is not operative here, and it may be deduced that criminal proceedings following on reports by such officials occurred more often in practice. The letters of Augustine of Hippo suggest that this was indeed the case.⁶⁰

As stated above, *denunciations by private informers* were usually discouraged, to the extent of being prohibited on pain of death.⁶¹ However, some charges, and notably the charge of heresy, were specifically excluded from this prohibition:

CTh 16.5.9.1 (Gratianus, Valentinianus II & Theodosius I, 382) Ceterum quos Encratitas prodigiali appellatione cognominant, cum Saccophoris sive Hydroparastatis ... summo supplicio et inexpiabili poena iubemus adfliigi ... Sublimitas itaque tua det inquisitores, aperiat forum, indices denuntiatoresque sine invidia delationis accipiat ...

"But those persons who are entitled Encratites, with a monstrous appellation, together with the Saccophori, and the Hydroparastatae ... We order to be afflicted with the supreme penalty and with inexorable punishment ... Your Sublimity, therefore, shall appoint investigators, shall open court, and shall receive informers and denouncers, without the odium attached to informants ... "

Although this constitution provides for the impunity of denunciators of certain sects only, it is clear that this indemnity applied generally in favour of the denunciators of all heretics; this may be deduced from constitutions concerning other forms of heresy, in which there are oblique references to informers. For example, CTh 16.5.34 provides for the punishment of householders in whose homes Eunomians or Montanists had congregated, and who had not ejected the heretics and reported them to the authorities.

Since persons who merely denounced alleged criminals were not exposed to the risk of calumnia penalties for false accusation,⁶² it is understandable that most private individuals suspecting others of heresy would rather have denounced the latter to the judges, than have prosecuted them personally by accusatio. Prosecution by denunciation was also preferred by the Catholic bishops, who, according to Augustine of Hippo, initiated the overwhelming majority of criminal proceedings against heretics,⁶³ since it did not accord

⁵⁹ See p 82 above.

⁶⁰ Cf Aug *Ep* 134.2 "Circumcelliones quosdam et clericos Donatistas cura eorum, qui disciplinae publicae inseruiunt, praemissa notoria ad iudicia legesque perduxit"; similarly, Aug *Ep* 133.1.

⁶¹ See p 83 above.

⁶² A clear inference may be drawn from Mommsen op cit 349 that denunciators and informers were not subject to the penalties for calumnia.

⁶³ Aug *Ep* 100.2 "... illud quoque prudentia tua cogitet quod causas ecclesiasticas insinuare uobis nemo praeter ecclesiasticos curat. proinde si occidendos in his homines putaveritis, deterrebitis nos, ne per operam nostram ad uestrum iudicium aliquid tale perveniat ..." Contra Aug *Ep* 88.9, where the clergy of Hippo Regius make the following statement in an open letter to the Donatist primate: "Nos interim si quando uestros tenemus, cum magna dilectione seruamus inlaesos, loquimur eis ... si autem ... unitati

with their office actively to conduct a criminal prosecution.⁶⁴ Finally, *accusatio* was precluded where complainants did not have the capacity to accuse; and since such complainants would, nevertheless, very often have been a fruitful source of information concerning others' heresy - the case of an accused heretic who named his accomplices, would be a good example - proceedings based on their denunciations would have been the practical solution. All the above considerations indicate that prosecution by denunciation must have occurred very frequently indeed.

Finally, there are constitutions which permitted the judges to appoint their own investigators (who would usually be recruited from the armies stationed in their provinces),⁶⁵ and to initiate trials *mero motu* on the basis of the latter's reports. Such proceedings were specifically prescribed where Catholic churches were violated and outrages were inflicted on Catholic priests,⁶⁶ for the prosecution of Eunomian writers and preachers,⁶⁷ and finally, for the prosecution of Manichaeans and those who concealed them.⁶⁸ The following constitution, however, is framed in general terms:

CTh 16.5.15 (Gratianus, Valentinianus II & Theodosius I, 388) *Omnes diversarum perfidarumque sectarum, quos in deum miserae vesania conspirationis exercet, nullum usquam sinantur habere conventum, non inire tractatus, non coetus agere secretos, non nefariae praevaricationis altaria manus impiae officiis impudenter adtollere et mysteriorum simulationem ad iniuriam verae religionis aptare. Quod ut congruum sortiatur effectum, in specula sublimitas tua fidissimos quosque constituat, qui et cohibere hos possint et deprehensos offerre iudiciis, severissimum secundum praeteritas sanctiones et deo supplicium daturus et legibus.*

"All members of diverse and perfidious sects, who are driven by the insanity of a miserable conspiracy against God, shall not be allowed to have an assembly anywhere, to participate in discussions, to hold secret meetings, to erect impudently the altars of a nefarious treachery by the offices of an impious hand, and to present the false appearance of mysteries, to the outrage of true religion. In order that this regulation may obtain its appropriate effectiveness, Your Sublimity shall appoint as watchmen certain very faithful persons who shall be able both to restrain the aforesaid persons and to arrest them and [take them to the judges]. The offenders, according to the previous sanctions, shall pay the severest penalty both to God and to the laws."

Christi consentire noluerint, sicut inlaesi retenti sunt, sic a nobis dimittuntur inlaesi. hoc, quantum possumus, monemus etiam laicos nostros ... sed ... aliqui adprehensos iudicibus offerunt nec nobis intercedentibus eis parcunt, dum ab eis pati mala immania pertimescunt." Here, the Catholic clergy are portrayed as seeking to convince the Donatists of their error, and, if this cannot be accomplished, as releasing them unharmed; while the handing over of the Donatists to the judges is portrayed as the work of some anxious laymen. Given the propagandistic character of the letter to Januarius, the account given therein is suspect, and cannot be preferred to the account in *Aug Ep* 100.2, which was addressed to the governor of Africa, who would have had an intimate knowledge of the actual state of affairs, and who would not have accepted an inaccurate version. - For further evidence of the denunciation of sectarian clergy to the authorities, see CTh 16.5.53 (Jovinian denounced by bishops); Manlio Sargenti "Contributi alla palingenesi delle costituzioni tardo-imperiali. II: Momenti della normativa religiosa da Teodosio I a Teodosio II" in *Atti dell' Accademia Romanistica Costantiniana (VI Convegno Internazionale)* (1986) 344.

⁶⁴ Cf CTh 11.39.8, in which this sentiment is expressed.

⁶⁵ Cf Mommsen op cit 313.

⁶⁶ CTh 16.2.31, cited by Geib op cit 526 n 83.

⁶⁷ CTh 16.5.32.

⁶⁸ CTh 16.5.35.

From this, it is clear that the employment of investigators, and initiation of trials *mero motu* by the judge was permitted in *all* cases of heresy.⁶⁹

2.2. Heresy Proceedings Post Mortem

Before discussing the course of criminal proceedings against heretics (whether by *accusatio* or by *cognitio*), it is necessary to take note of a distinctive feature of trials for heresy. Contrary to the general rule that criminal charges could only be brought against persons who were still alive, proceedings against heretics could also be instituted after their death. This was explicitly provided for in the following constitution:

CTh 16.5.40.5 (Arcadius, Honorius & Theodosius II, 407) *In mortem quoque inquisitio tendit. Nam si in criminibus maiestatis licet memoriam accusare defuncti, non inmerito et hic debet subire iudicium. Ergo et suprema illius scriptura inrita sit, sive testamento sive codicillo sive epistula sive quolibet genere reliquerit voluntas qui aut Manichaeus aut Fryga aut Priscillianista fuisse convincitur ...*

"Moreover, the inquisition shall extend beyond death. For, if in crimes of high treason it is permitted that the memory of the deceased may be charged with crime, not undeservedly must the deceased undergo judgment in this case also. Wherefore, if any person is convicted of having been a Manichaean or a [Montanist],⁷⁰ the document of his last will shall be void, whether he has left it in the form of a testament, a codicil, a letter, or any kind of will whatsoever."

Here it was directed that criminal proceedings could be instituted *post mortem*, and that the punishment applicable to those convicted of heresy in such proceedings would be retroactive *intestability*.

Although the wording of this constitution suggests that a novel rule was being introduced into the law regarding the prosecution of heresy, this was not the case. Manichaeans, specifically, had been subjected to *post-mortem* proceedings from a much earlier date. Valentinian I had already provided, in 372 AD, that Manichaeans were infamous;⁷¹ and a constitution issued in 383 AD, which sought to limit the effects of a Valentinian's measures⁷² (albeit only with regard to those Manichaeans who had apostasized from Christianity) shows that these measures had been implemented *post mortem*, sometimes even many years after the decedent's death.⁷³ Furthermore, Theodosius the Great confirmed the *intestability* of Manichaeans in 383, and moreover stipulated that the legislation he had issued to this effect would enjoy retroactive validity, affecting not only

⁶⁹ Cf Jean Gaudemet *L'Eglise dans l'Empire Romain (IV^e-V^e Siècles)* (1958) 614.

⁷⁰ See p 51 n 22 above.

⁷¹ CTh 16.5.3. (Cf also p 30 above.)

⁷² Apostate Manichaeans would also have been subjected to the *post-mortem* proceedings against all apostates envisaged in CTh 16.7.1.

⁷³ CTh 16.7.3.

those Manichaeans who were still alive at the date of its promulgation, but also those who were already deceased;⁷⁴ clearly, he here envisaged the institution of post-mortem proceedings against already deceased Manichaeans and, by implication, the continuing post-mortem cognizability of Manichaeism. These considerations show that Manichaeism, at least, was already tried post mortem during the latter half of the fourth century AD. Arguably, the post-mortem cognizability of Manichaeism would even have antedated this; for, as has been shown, Manichaeans were originally (under Diocletian) prosecuted on the grounds of i a their alleged collusion with the Persians against the Roman state,⁷⁵ and therefore for perduellio, or treason, for which post-mortem trials had always been allowed.⁷⁶

Post-mortem trials could be conducted according to either accusatio or cognitio proceedings. In practice, accusatio proceedings would usually have been instituted by close relatives of the deceased who were Catholics, and had been excluded from his will, since the punishment imposed in such a case, viz retroactive intestability, would have meant that any Catholic intestate heirs would inherit the estate. Initially, the capacity to accuse a deceased may have been limited to those relatives who had openly denounced the deceased for his heresy during his lifetime; however, this limitation seems to have been removed in 426 AD, so that all close relatives who were Catholics would have been able to bring a post-mortem accusatio.⁷⁷ Cognitio proceedings, again, would usually have been instituted by the imperial fisc, if the deceased had no Catholic relatives, in order to ensure the confiscation of the deceased's estate.⁷⁸

The course of criminal proceedings against heretics will now be discussed.

2.3. Initiation of Proceedings

2.3.1. Charge

If the trial was to be conducted in the form of cognitio proceedings, it was not initiated by the bringing of a formal charge; in such a case, any informal denunciation or report to the competent judge was sufficient for him to act on the charge, and indeed compelled him to do so.⁷⁹

⁷⁴ CTh 16.5.7.1.

⁷⁵ Cf p 30 above.

⁷⁶ See Mommsen op cit 66-67, 592.

⁷⁷ Cf CTh 16.7.3.1; 16.7.7.3 (relating to the analogous case of apostates).

⁷⁸ Cf CTh 16.5.7 pr. Cf further pp 112-113 below on time limits regarding post mortem trials.

⁷⁹ CTh 16.5.40.8.

However, if the trial was to be conducted in the form of *accusatio* proceedings, it was preceded by a preliminary procedural stage involving the formal bringing of an accusation.⁸⁰ This entailed the accuser's appearing in person before the judge, and informing the latter of the accused's crime (*delatio nominis*). This could be done either verbally, or by presenting a written charge sheet, in which the names of the accuser and the accused were set out, and the antiheretical law(s) allegedly transgressed were specified.

A cumulation of several charges in one accusation was permissible. This meant that an accuser could simultaneously bring a charge of not only heresy, but also any other crime which the relevant act of heresy may simultaneously have constituted, such as (where applicable) magic,⁸¹ sacrilege,⁸² high treason,⁸³ sedition,⁸⁴ public violence,⁸⁵ and so forth.⁸⁶

It was also possible to bring a charge against several accused simultaneously, if their crimes were related. This fact is of importance in the context of heresy, which often manifested itself as a mass crime.⁸⁷

After the charge had been brought, the accuser requested the judge to decree a trial.

Before accepting the accusation, the judge would first satisfy himself as to certain preliminary points, viz he would ascertain his jurisdiction, ensure that the accuser had capacity to prosecute⁸⁸ and would, in the event of a plurality of accusers, determine who

⁸⁰ The following account of the bringing of the charge, is based on Geib op cit 547-548, 553-554; Mommsen op cit 368-372, 378-379, 384-386, 388, 392-393.

⁸¹ Cf CTh 16.5.34.1 with regard to the Eunomians and Montanists, and Mommsen op cit 576 n 3 with regard to the Manichaeans.

⁸² Although sacrilege was, properly speaking, the crime of theft of sacred objects (Mommsen op cit 760-763), the post-Classical period witnessed an immense expansion of the crime's ambit: it came to include the violation of Catholic churches and the assault of Catholic priests (cf CTh 16.2.31); the disregarding of the Catholic Church and its clergy's privileges (cf CTh 16.2.40); and the violation of the principles of the Catholic religion (CTh 16.2.25). Cf Biondi op cit vol 1 para 90bis p 306; Enßlin op cit 16-17; Carlo Gioffredi *I Principi del Diritto Penale Romano* (1970) 37. Aggressive heretical groups which attacked Catholic churches or priests were therefore guilty of sacrilege on the first count mentioned above, as the Donatists were indeed declared to be in CTh 16.2.31; while all heterodox Christians, as well as the eclectic Manichaeans and Caelicolists, were guilty of it on the third count.

⁸³ See i a CTh 16.1.4, 16.8.19 in fin.

⁸⁴ See i a CTh 16.1.4, 16.4.1, 16.5.38.

⁸⁵ See i a CTh 16.2.35, 16.4.1.

⁸⁶ For example, arson - see CTh 16.2.37, issued with reference to John Chrysostom's followers; and sexual malpractices - see e g Aug *De Haeresibus* 46.8-9 (R Vander Plaetse & C Beukers (eds) in *Corpus Christianorum, Series Latina* vol 46 (1969), where mention is made of the alleged orgies and sexual obscenity of the Manichaeans.

⁸⁷ Cf also Aug *Ep* 134.2, quoted at p 85 n 60 above.

⁸⁸ Generally speaking, only free *sui iuris* male citizens above the age of puberty with a patrimony of more than 50 pieces of gold, who had not been declared *infamis*, had at most brought one accusation before, and were not themselves accused of any crime, had capacity to bring an *accusatio* - cf Mommsen op cit 368-372.

was to act as principal accuser. After the above points had been settled, the judge warned the prospective accuser of the punishments for calumny imposed on those who could not successfully prove their accusations, and then required the accusation to be lodged in writing,⁸⁹ according to the prescribed formalities.⁹⁰ The accuser also had to take an oath that he would not commit calumnia,⁹¹ and had to furnish security against an unjustified abandonment of the prosecution.

It should be noted that the person accused of heresy was not usually present at the above proceedings.⁹² However, he was entitled subsequently to be given access to the court records.⁹³

Only the entry of an *inscriptio* in the court register constituted a valid accusation for the purposes of proceeding to trial; and once this had been lodged, joinder of issue ensued.

Such joinder of issue had four consequences. First, the person accused of heresy's legal status was affected to some extent. As a result of being in *reatu*, he could no longer institute *accusatio* proceedings against others, serve as a soldier, obtain an official post, or, in capital charges (which would in principle entail confiscation of his estate),⁹⁴ manumit his slaves or donate any property.⁹⁵ Secondly, the applicable period of prescription of the charge (which came into effect one year from the date of joinder of issue) began to run.⁹⁶ The third consequence of joinder of issue was that the accuser became liable to the penalties for false or malicious accusation, unjustified abandonment of the case, and collusion.⁹⁷ Fourthly, steps could now be taken to institute and secure the trial of the alleged heretic.

⁸⁹ The requirement that the accusation be in writing was set in CTh 9.1.5, and confirmed in CTh 9.1.9 Intp and CTh 9.1.11.

⁹⁰ This was done by formally entering the accusation into the court roll (*inscriptio*). The *inscriptio* contained the following clauses: (i) the name of the accuser; (ii) the name of the accused; (iii) the law(s) allegedly transgressed; (iv) (usually) a brief description of the crime(s); (v) a guarantee by the accuser to prove the accused's guilt; and (vi) an undertaking by the accuser to conduct the trial to its very end - cf Geib op cit 554; Mommsen op cit 385. The *accusatio* was then signed by the accuser, or by someone else on his behalf - Geib op cit 553. If there were co-accusers, they appended their signatures at the bottom of the *inscriptio* in a *subscriptio* - Mommsen op cit 385-386; Heumann-Seckel op cit s v "Subscriptio"; contra Geib op cit 553, who identifies the *subscriptio* with the signature of the principal accuser.

⁹¹ It is not clear whether all, or only some accusers were required to take this oath - see Mommsen op cit 386.

⁹² Geib op cit 551.

⁹³ CTh 9.1.6.

⁹⁴ Cf pp 135, 136, 137, 139. But see also p 138 n 39 below.

⁹⁵ Geib op cit 558; Mommsen op cit 392 n 1. According to Mommsen op cit 392, crimes involving patrimonial penalties also became passively transmissible at this stage; however, D 48.2.20 requires condemnation for their passive transmissibility, so that Mommsen's view seems incorrect to me.

⁹⁶ CTh 9.19.2.2; Mommsen op cit 488.

⁹⁷ Cf Mommsen op cit 490-503 concerning the relevant punishments.

2.3.2. Determining the date of trial

In cognitio proceedings, determining the date of trial was in the discretion of the judge. This was also the case in accusatio proceedings, although it was customary for the judge to determine the date in consultation with the accuser.⁹⁸

The general principle was that all criminal trials, whether by accusatio or by cognitio, should be conducted and brought to an end as quickly as possible. This was not only in the alleged heretic's, but also in the state's interests: on the one hand, it was necessary to check undue hardship suffered by innocent accused, and, on the other hand, it was essential to prevent cases of collusion between an accused and a dilatory sham accuser, who had forestalled a genuine accusation by a real accuser, or of continual postponements made by a judge who was biased in favour of the accused. In order to combat prolonged proceedings, the following rules in respect of time limits were established:

- (i) all trials by accusatio had to be brought to an end within one year after joinder of issue;⁹⁹ if this did not occur, the accusation lapsed and the accuser became subject to infamy and to confiscation of a quarter of his estate;¹⁰⁰
- (ii) if the alleged heretic was detained in prison pending his trial, the hearing had to take place within one month;¹⁰¹ if he was not imprisoned, the judge had to set the trial date for as early as possible;¹⁰² and
- (iii) trials by accusatio involving patrimonial penalties could be postponed once only, while those involving capital punishment could be postponed thrice only at the accused heretic's, and twice only at the accuser's request.¹⁰³

Where the accused had to come to trial from an outlying region, the judge had to allow for a period of at least thirty days to elapse between the issue of summons and the trial date.¹⁰⁴

⁹⁸ Id 395-396.

⁹⁹ CTh 9.19.2.2, 9.36.2.

¹⁰⁰ CTh 9.36.1.

¹⁰¹ Cf CTh 9.1.7.

¹⁰² CTh 16.5.40.8. Cf also CTh 9.1.18, 9.3.1.

¹⁰³ Cf Mommsen op cit 397 n 7.

¹⁰⁴ Cf CTh 9.2.3. Cf also Aug *Ep* 113-115, which show (in the context of a different crime) that this provision was not always respected in practice.

2.3.3. Summons

Once the trial date had been determined, it was the duty of the presiding judge to summons the person charged with a crime of heresy and, in accusatio proceedings, the accuser to the trial.¹⁰⁵ Summons could take place either by personal notice, or by edictal citation.¹⁰⁶

The presiding judge also arraigned all witnesses who would be required to testify in the case.

2.4. Interim Measures

Once the trial had been set down for hearing and the persons involved had been summonsed, certain interim measures aimed at securing their presence at the trial would be taken.

First, as regards the *person charged with a crime of heresy*: In principle, the alleged heretic could simply be enjoined to attend the trial. In this event, he would be prohibited only from leaving the province in which the trial was to be held,¹⁰⁷ and would for the rest be left free on his own recognizance; the only measure aimed at securing his presence at the trial, would be the threat of confiscation of his estate if he failed to attend.¹⁰⁸

On the other hand, an alleged heretic could also be detained in order to secure his presence at the trial. There were three such forms of detention.¹⁰⁹ The first of these was *custodia libera*, which entailed the alleged heretic's being placed in the custody of a high-ranking official (usually under as lenient circumstances as possible). The second was *custodia militaris*; here, the suspect was given into the charge of one or more, but usually two soldiers of long service, who were held personally responsible for securing him. This form of detention could be fairly lenient or restrictive, depending on the custodians. The last form was *custodia publica*, or detention in a state prison; this was considered the harshest of the three forms. In determining which of these forms of detention was appropriate in a given case, the judge would be expected to have regard to the magnitude of the charge, and to the personal circumstances of the alleged heretic. Further considerations were the alleged heretic's sex and status. Apparently, senators could not be subjected to any form of

¹⁰⁵ Cf Mommsen op cit 390.

¹⁰⁶ Id 332-333.

¹⁰⁷ CTh 9.1.6.

¹⁰⁸ CTh 9.1.2. The possibility of being released on bail by a surety, discussed in Mommsen op cit 329-331, is not relevant in the context of heresy, as this was only applicable in the case of minor offences - see Geib op cit 568-569.

¹⁰⁹ The following account is based on Geib op cit 561-567; Mommsen op cit 305, 331-332.

detention, and had to remain at liberty while the trial was pending. Although women were ordinarily not subjected to *custodia publica*, they could be imprisoned on charges of very grave crimes, such as some crimes of heresy (for example, possessing Eunomian or Montanist writings)¹¹⁰ might be. Slaves who had to be detained, were imprisoned as a matter of course. In practice, *custodia publica* was the form of detention which was employed in the vast majority of cases.

For this reason, the post-Classical provisions concerning the treatment of prisoners awaiting trial are of importance. It was decreed in several constitutions that such prisoners (as opposed to those already convicted) had to be treated well (according to the perceptions of the age) - they were, *inter alia*, not to be manacled, but only lightly chained, were to be allowed into the open air during daytime, and were not to suffer starvation; furthermore, the conditions under which they were imprisoned, and the reasons for their continued detention were to be regularly investigated.¹¹¹ It is, however, doubtful whether these provisions were implemented effectively, judging from the repeated references to prison malpractices in the Theodosian Code.¹¹²

Secondly, the *accuser* in *accusatio* proceedings was subjected to exactly the same form of custody as the accused heretic, and was therefore also usually imprisoned before the trial.¹¹³ The reason for this post-Classical development is that an accuser, if found guilty of *calumnia*, would incur exactly the same punishment that the accused would have suffered, had the latter been convicted; it was thus equally necessary to secure the accuser's person.¹¹⁴ (Of course, such imprisonment could only be effected if the accuser's rank allowed of this.)

Finally, the *witnesses* arraigned by the judge could also be secured by detention. This detention also usually took the form of *custodia publica*, in the case of witnesses who were to be examined under torture, i.e. those from the lowest strata of society, or those who were likely not to give truthful evidence of their own accord.¹¹⁵

¹¹⁰ Cf CTh 16.5.34.1, which provided that the possession of these writings carried a capital punishment (on which, see pp 133-139 below).

¹¹¹ See the constitutions collected in CTh 9.3 *De custodia reorum*; cf also Biondi *op cit* vol 3 pp 512-514.

¹¹² See CTh 9.3 *De custodia reorum* *passim*; see also Geib *op cit* 567.

¹¹³ Cf CTh 9.1.19 *pr.* Cf also Mommsen *op cit* 497.

¹¹⁴ Mommsen *op cit* 332.

¹¹⁵ The imprisonment of witnesses is attested by CTh 9.37.4, which regulates the withdrawal of accusations and *in a* provides for cases where witnesses had already been imprisoned, or imprisoned and tortured. The *custodia* of witnesses is further attested by Aug *Ep* 153.25, where the following remark is addressed to an official: "Redde, quod accepisti, quando iubente iudice cuicumque causae necessarium hominem tenuisti, ne resisteret, uinxisti, ne fugeret, inclusisti, postremo aut permanente lite exhibuisti aut finita dimisisti".

2.5. Trial

2.5.1. Attendance; position in event of absence

On the day and time determined by the judge, the trial to establish the innocence or guilt of the alleged heretic would be opened by calling the parties.¹¹⁶

In the majority of cases, the *alleged heretic* would have been detained (as discussed above); consequently, his presence at the trial would be assured, and would not occasion any difficulties. Where, however, he had been left at liberty, or had in some way regained his freedom, it was possible that he might be absent when the parties were called to the trial. In this event,¹¹⁷ the judge was required to inform the district officials from the area in which the alleged heretic resided, of the latter's absence, and to issue an edict demanding that he report to the court. If these measures had no effect, the judge entered the absentee's name on the list of wanted fugitives (*requirendum adnotare, requisitio*) and ordered the temporary seizure of his property. If the alleged heretic came forward within one year, his property was returned to him and his trial was resumed. If he did not come forward, the consequences of his continued absence depended on whether the charge against him carried the punishment of deprivation of life, liberty or civil rights, or whether it involved less severe penalties (both of these alternatives being possible in the case of heresy, depending on the circumstances).¹¹⁸ In the latter instance, the judge was entitled to try the person charged with heresy in his absence. However, capital charges could not be tried in absentia; in the former instance, therefore, the confiscation of the alleged heretic's estate became final and irrevocable.¹¹⁹ In addition, since he was debarred from raising the defence of prescription,¹²⁰ the alleged heretic could be apprehended and tried at any future date, and could still be punished for the relevant crime of heresy, notwithstanding the fact that his estate had already been confiscated.

If the trial was clothed in the form of *accusatio* proceedings, the presence of the *accuser* (who was to act as prosecutor) was also required in principle. Since the accuser would usually have been detained (as discussed above) his presence would have been secured in most cases. If, however, he had not been in detention, and failed to appear on the day of the

¹¹⁶ Cf Geib op cit 593; Mommsen op cit 425.

¹¹⁷ The following account is based on Geib op cit 598-9; Mommsen 326, 335-6.

¹¹⁸ See pp 120-131 below.

¹¹⁹ Cf CTh 9.1.2.

¹²⁰ A fugitive heretic was so debarred because no fugitive accused regarding whom a *requisitio* had been posted, could raise prescription - D 48.17.4.2, quoted by Mommsen op cit 326 n 2. The Manichaeans and the ascetic sects identified with them, were debarred on the further ground that their crimes never prescribed - see pp 111-112 below.

trial, the judge suspended the proceedings and issued an edict ordering the accuser to report to him. If the accuser still failed to appear, the judge either struck the case off the roll, or, if there was a very strong *prima facie* case against the person accused of heresy, proceeded to try the case inquisitorially.¹²¹ If the accuser's absence was culpable, he was held liable under the *SC Turpillianum*.¹²²

Similarly, where a *cognitio* trial stemmed from an official denunciation, the official concerned had to be present.¹²³

Any *witnesses* who had been summonsed to appear by the judge were also under a duty to attend, and could incur the penalties for contumacy if they failed to do so.¹²⁴

2.5.2. Plea

If the relevant persons were present, the trial could commence. It would appear that the proceedings commenced by requiring the alleged heretic to plead, by asking him whether he admitted belonging to the prohibited sect in question, and, where applicable, participating in the relevant illegal activity. This assumption is deduced by Mommsen from the analogy of the proceedings against the Christians in earlier times,¹²⁵ to which I would add the evidence of the following account by Augustine of Hippo:¹²⁶

Aug. *Contra Cresconium* 47.51. Exhibitus igitur Crispinus et, quod se esse proconsuli quaerenti negaverat, facillime convictus haereticus [est] ...

"Therefore, Crispinus was presented in court, and having denied being a heretic when interrogated by the governor, was most easily convicted as such ..." ¹²⁷

From this, it is clear that a person charged with heresy was first questioned as to his plea. The following possibilities existed in this regard:

¹²¹ Cf Geib op cit 594; Jones I 118. Although Jones' account relates to the period of the Principate, the source on which he relies is C 9.2.4, which contains a constitution issued by Gordian in 241 AD. Since this constitution was incorporated in the *Codex Iustinianus* (which, according to the provisions of *c Haec* 2, had to contain living law only), it had clearly remained valid throughout the post-Classical period, and was thus still in force at the time of the Theodosian Code's compilation.

¹²² Cf Mommsen op cit 499 for the provisions of this *senatusconsultum*.

¹²³ Cf Geib op cit 652; see also p 106 below.

¹²⁴ CTh 2.18.2.

¹²⁵ Mommsen op cit 609-610.

¹²⁶ M Petschenig (ed) *Sancti Aureli Augustini Scripta contra Donatistas in Corpus Scriptorum Ecclesiasticorum Latinorum* vol 52 (1909).

¹²⁷ My translation.

(a) *Pleas justifying a summary verdict of guilty*

It was possible for the accused (if he had not already done so) to *confess* having committed the crime of heresy with which he was charged (whether of his own accord, or as a result of a confession having been extracted under torture).

There is some controversy regarding the effect of an admission of guilt. According to one school of thought, a confession resulted in automatic conviction until the Classical period only, but, in the post-Classical era only had this consequence where the confession was credible in itself and was moreover corroborated by external evidence; in the event of an uncorroborated confession, it was still necessary to try the person charged according to normal procedure.¹²⁸ However, according to a second school of thought, a confession usually - and in crimes of conscience, always - sufficed for an automatic verdict of guilty and a summary passing of sentence (subject only to the provision that execution of the sentence could, if the accused so wished, be delayed for a certain period, so that he could reconsider, and possibly withdraw his confession).¹²⁹

In my opinion, the view that an admission of guilt resulted in an automatic conviction and pre-empted the need for a trial, is the better - at least, as far as the crime of heresy is concerned - for it accords with the following texts in the Theodosian Code:

CTh 16.5.39 (Arcadius, Honorius & Theodosius II, 405) *Donatistae superstitionis haereticos quocumque loci vel fatentes vel convictos legis tenore servato poenam debitam absque dilatione persolvere decernimus.*

"We decree that heretics of the Donatist superstition, in any place whatever, shall pay to the full the due penalty without delay, if they should either confess their crime or should be convicted with due observance of the provisions of the law."

CTh 16.5.43 (Honorius & Theodosius II, 408/407) ... *Poena vero lege proposita veluti convictos tenere debet eos, qui Donatistas se confessi fuerint vel catholicorum communionem refugerint scaevae religionis obtentu, quamvis Christianos esse se simulent.*

"... The punishment established by law must surely also consider as convicted those persons who confess that they are Donatists or shun the communion of the Catholics under the pretext of a perverse religion, although they pretend that they are Christians."

¹²⁸ Geib op cit 552, 612-613; cf also Wolfgang Kunkel "Prinzipien des römischen Strafverfahrens" in Wolfgang Kunkel *Kleine Schriften* (1974) 19 (hereafter referred to as Kunkel II), who states that the rule *confessus pro iudicato est* only applied up to the Severan era, and thus implies that it was not recognized during the post-Classical period.

¹²⁹ Mommsen op cit 437-438, 961; cf also Biondi op cit vol 3 p 508, 509.

As far as I can ascertain, this latter view is also in accord with post-Classical practice.¹³⁰ I would therefore maintain that, if an alleged heretic confessed, a trial to establish his guilt would be superfluous; the trial itself would be bypassed, a verdict of guilty would be pronounced, and the judge would (if the person charged did not wish to avail himself of the *spatium deliberandi*) proceed to impose the punishment prescribed by law.

Certain forms of conduct were regarded as *constructive confessions*. Thus, for example, if an alleged heretic who faced the death penalty¹³¹ or deportation¹³² committed suicide, or if an alleged heretic who faced any capital punishment¹³³ killed his accuser, this conduct was regarded as an implied admission of guilt.¹³⁴

Similarly, a trial was considered superfluous if someone who was accused of a crime punishable with death or deportation (the latter of which was a fairly usual penalty for certain crimes of heresy, such as acting as a cleric, or participating in a ceremony of rebaptism)¹³⁵ had been *apprehended in the act*.¹³⁶ The municipal officials in whose district the crime had been committed, were required to establish whether someone who had reportedly been apprehended in the act, had indeed been so apprehended, and if he had, to send him to the judge for summary sentencing.¹³⁷ The following constitution offers evidence for the application of the rule *manifestus pro iudicato est* to charges of heresy:

CTh 16.5.9.1 (Gratianus, Valentinianus II & Theodosius I, 379) *Ceterum quos Encratitas prodigiali appellatione cognominant, cum Saccophoris sive Hydroparastatis refutatos iudicio, proditos crimine, vel in mediocri vestigio facinoris huius inventos summo supplicio et inexpiabili poena iubemus adfligi ...*

"But those persons who are entitled Encratites, with a monstrous appellation, together with the Saccophori, and the Hydroparastatae, when they have been convicted in court, betrayed by crime, or discovered in a slight trace of this wickedness, We order to be afflicted with the supreme penalty and with inexpiable punishment."

¹³⁰ Cf *Aug Ep* 134.2, in which Augustine addresses the governor of Africa with regard to the punishment of certain Circumcellions and Donatists, and in which he expresses the fear "*ne uel ipsi [= qui confessi sunt] uel illi, quorum homicidium patefactum est, per tuae potestatis sententiam multentur*". From this, it is clear that those who had confessed to the charges against them were, for the purposes of punishment, regarded as equal to those whose crimes had been proven by evidence.

¹³¹ Cf pp 133-135 below.

¹³² Cf pp 138-139 below.

¹³³ Cf pp 133-139 below.

¹³⁴ Cf Mommsen *op cit* 438-439.

¹³⁵ See pp 120-128.

¹³⁶ Cf Mommsen *op cit* 438. Cf also Gaudemet *op cit* 614: "*Si la culpabilité n'est pas notoire, elle sera établie par tout moyen de preuve ...*". Kunkel (II 17-19, 22) implies that the rule *manifestus pro iudicato est* became obsolete during the Classical period; however, as can be seen from CTh 16.5.9.1 and CTh 16.5.43, quoted on p 96 above, this rule was still applicable in the era of Theodosius II.

¹³⁷ CTh 9.3.2, read with CTh 9.2.5.

A person charged with heresy who neither refuted nor admitted the charge, but *refused to defend himself* (i e an indefensus) was treated in the same way as a confessus,¹³⁸ and would have been summarily sentenced.

(b) Pleas necessitating a summary release

It was possible for a person charged with heresy to secure his immediate release by denying having ever held heterodox beliefs, and by coupling this denial to an explicit acceptance of Catholic doctrine. An accused could moreover secure summary acquittal if he could produce a certificate issued by a Catholic bishop to the effect that the former had at some earlier stage belonged to a heretical sect, but had since repented and returned to the Catholic Church;¹³⁹ or, if he had not yet repented before the trial date, confessed his guilt, but coupled this admission to a recantation of his earlier beliefs.

The rule that a heretic who had already repented, or who recanted at the trial, had to be released forthwith, was merely a specific application of the general rule that recantation immediately resulted in the discontinuance of the prosecution for heresy, no matter at which procedural stage the recantation occurred; the constitutions which are authority for the above proposition, may be found in the discussion of the general rule.¹⁴⁰

(c) Pleas necessitating a hearing to determine guilt

The final possibility was that the person charged with heresy could *deny* being guilty as charged. Mommsen in effect negates this possibility, by maintaining the following:¹⁴¹

Im Verfahren scheint nach dem Muster der früheren Christenprozesse im wesentlichen dem Angeschuldigten die Frage vorgelegt worden zu sein, ob er sich zu der gesetzlich verbotenen Christensecte ... bekenne, wobei, da der Rücktritt auch hier die Klage aufhob, *die Verneinung zur Freisprechung führte*.¹⁴²

I cannot, however, agree with Mommsen's interpretation of a bare denial of guilt as an implicit rejection of the heretical beliefs concerned, and as a tacit acceptance of the tenets of the Catholic faith; for the logical consequence of his view, viz that there would be no hearing in the event of a plea of not guilty, is simply not in accordance with the practice of this period. Trials of people pleading not guilty, did in fact occur. This is shown by not only

¹³⁸ Cf Kunkel II 19.

¹³⁹ See Volterra op cit 460.

¹⁴⁰ See pp 113-114 below.

¹⁴¹ Op cit 609-610.

¹⁴² My emphasis.

references in the Theodosian Code,¹⁴³ but also the following excerpt from the writings of Augustine of Hippo, in which he deals with the proceedings against the Donatist bishop Crispinus:¹⁴⁴

Aug Contra Cresconium 47.51. Exhibitus igitur Crispinus et, quod se esse proconsuli quaerenti negaverat, facillime convictus haereticus¹⁴⁵ decem tamen libras auri, quam multam in omnes haereticos imperator maior Theodosius constituerat, intercedente Possidio non est compulsus exsoluere.

"Therefore, Crispinus was presented in court, and *having most easily been convicted as a heretic - which he denied being, when the governor interrogated him* - was, as a result of the intercession of Possidius, nevertheless not compelled to pay the ten pounds of gold which the emperor Theodosius the Elder had established as punishment against all heretics."¹⁴⁶

On these grounds, I am of the opinion that it was possible for an alleged heretic to enter a plea of not guilty, without this being interpreted as an affirmation of Catholicity; and that a full hearing had to be held in this event.

2.5.3. The hearing

The manner in which the hearing for determining the innocence or guilt of someone who had pleaded not guilty to heresy was conducted, was determined by whether the trial took the form of *accusatio* or of *cognitio* proceedings, and, if the latter, by whom the charge had been laid.

(a) *Accusatio* proceedings

If the criminal trial took the form of *accusatio* proceedings, the hearing (which was, in principle, although not always in practice, a public hearing)¹⁴⁷ commenced with an address to the court by both the accuser and the alleged heretic, or by advocates acting on their behalf. In his opening address, each summarized his case, and indicated what evidence he intended to lead, and what this would prove.¹⁴⁸

After the litigants had concluded their opening addresses, they began to lead evidence.¹⁴⁹ Apparently, this was led in the following order: the testimony of free witnesses was first

¹⁴³ See, e.g., CTh 16.5.9.1.

¹⁴⁴ See p 95 n 126 above.

¹⁴⁵ My emphasis.

¹⁴⁶ My translation.

¹⁴⁷ Cf Geib op cit 509; Mommsen op cit 359.

¹⁴⁸ Geib op cit 601; Mommsen op cit 426.

¹⁴⁹ Mommsen op cit 429, 430.

put to the court, followed by depositions made by slaves; after this, any written documents which had not yet been handed up as evidence, were then submitted to the judge.¹⁵⁰

Witnesses could be called by both the accuser and the alleged heretic, up to a maximum number determined by the judge. The names of witnesses who would be required to testify were submitted beforehand to the judge, who then summonsed them to appear. The litigants were only allowed to call persons as witnesses who were competent to testify.¹⁵¹ Persons who had no capacity to act whatsoever (due to some physical or mental disability), convicted criminals, persons accused of crimes, and persons who had suffered *infamia*¹⁵² were absolutely incompetent to testify, and could therefore never be called as witnesses. Furthermore, the accused's ascendants, descendants, immediate family, freedmen, patron or patron's son were relatively incompetent, and were therefore precluded from testifying against the particular accused. In addition, the litigants could only insist on testimony in the case of compellable witnesses; they could not compel close relatives of the other party, and those closely linked to him through ties of patronage, young people, the aged, the infirm, soldiers, persons absent on official business, and bishops¹⁵³ to attend the trial and to give testimony.¹⁵⁴ At the hearing, the witnesses for the prosecution were called first, and thereafter, the witnesses for the defence.¹⁵⁵

All witnesses were required to take the oath before proceeding to testify.¹⁵⁶ They had to deliver their testimony by responding to questions put to them; they were not allowed to offer any information of their own accord.¹⁵⁷ Little is still known about the exact procedure of interrogation, but it would appear that the examination and cross-examination of witnesses was conducted by the litigants or by their advocates, subject to the judge's overriding control over these proceedings; the latter could intervene at any time and put further questions to the witness concerned.¹⁵⁸

In certain circumstances, witnesses would be subjected to examination under torture. This would occur where testimony under torture was required by law, or was considered necessary for a proper trial. In terms of a constitution issued by Constantine the Great, the

¹⁵⁰ For the order of proceedings, cf id 430, 432 n 2, 432-433.

¹⁵¹ This account of capacity to testify is based on Geib op cit 625-626; Mommsen op cit 402-403.

¹⁵² See p 146 below on the penalty of *infamia*.

¹⁵³ Bishops were exempted from being compelled to testify by CTh 11.39.8. - The last part of this constitution, in which it is stated that bishops should not be allowed to give testimony, should not be taken to mean that bishops were not competent witnesses, but rather that they should submit their evidence by way of written depositions, and not in person.

¹⁵⁴ Cf Geib op cit 629; Mommsen op cit 409, 410.

¹⁵⁵ Mommsen op cit 431.

¹⁵⁶ CTh 11.39.3 pr; Geib op cit 622-623.

¹⁵⁷ Mommsen op cit 430-431.

¹⁵⁸ Geib op cit 632; Mommsen op cit 422 n 2, 430, 431.

testimony of a "harenarius testis vel similis persona", that is, a witness drawn from the "dregs of society", or a person of like condition (the precise ambit of this description is not clear, and its interpretation probably fluctuated in practice, according to the judge's discretion),¹⁵⁹ could only be accepted if it had been given under torture.¹⁶⁰ Witnesses drawn from the lowest strata of society were thus subjected to torture in all cases, including in heresy trials. The torture of other witnesses could be ordered if they refused to co-operate, or gave unreliable and contradictory evidence.¹⁶¹ Even in such cases, though, the upper classes (honestiores) were exempt from being interrogated under torture; these were the members of the senatorial or equestrian nobility, all government officials of the first and second rank, leading members of municipal senates, soldiers, veterans, clerics (from the rank of priest upwards), and (to a more limited extent, inasmuch as they were not exempt from scourging) ordinary members of municipal senates, and their descendants.¹⁶² However, even honestiores were not exempt from torture in cases relating to charges of maiestas and magic,¹⁶³ of which persons charged with heresy were sometimes simultaneously tried;¹⁶⁴ so that torture of members of one of the exempt classes could occur in some trials involving a charge of heresy. It was *never* permissible to order the torture of pregnant women, children, blind people, the insane, or deaf mutes;¹⁶⁵ moreover, no torture was allowed during Lent.¹⁶⁶

Orders for the torture of a given witness were issued by the judge, who also specified the method and degree of torture to be applied, and where it would be performed.¹⁶⁷ The judge and his assessors, the accuser, the alleged heretic and the litigants' advocates were present during the torturing. Although the litigants or their advocates could put questions to the witness at this stage, the interrogation was essentially controlled by the judge. The only limitation on the way in which the witness could be examined was, apparently, that leading questions could not be put to a witness while he was being tortured.¹⁶⁸

¹⁵⁹ Cf Mommsen op cit 408 n 1.

¹⁶⁰ Charisius in D 22.5.21.2, cited by Mommsen ibid.

¹⁶¹ Geib op cit 623; Mommsen op cit 407.

¹⁶² Mommsen op cit 417, read with 406-407 and Geib op cit 618. - For a discussion of the social categories listed here, see A H M Jones *The Later Roman Empire 284-602* vol 2 (1964) (hereafter cited as Jones II) 523 et seq (senators and honorati), 607 et seq (the army) and 737 et seq (members of municipal senates).

¹⁶³ Geib op cit 617; cf also Mommsen op cit 408. The other categories of crimes with regard to which the normal exemptions did not apply, e g forgery, are not really relevant in the context of heresy.

¹⁶⁴ Cf pp 55-56, 89 above.

¹⁶⁵ Mommsen op cit 417, read with Geib op cit 620.

¹⁶⁶ CTh 9.36.4. (See, however, CTh 9.36.7, which declared that the torture of certain Isaurian brigands during Lent was permissible, on the grounds that divine pardon for this would be assured, as it would secure the safety of many people.)

¹⁶⁷ Geib op cit 640-641. The methods of torture included tormenting the victim with the "iron claws" and burning him (cf CTh 9.12.1) as well as physically mutilating him (cf Aug *Ep* 133.2 and 134.2). Interrogation under mere scourging was regarded as sufficiently lenient to deserve special mention (cf Aug *ibid*, and Mommsen op cit 416 n 2).

¹⁶⁸ Geib op cit 641.

Written records were kept of all evidence given by the witnesses (whether freely or under torture) for later reconsideration by the court.¹⁶⁹

In the stage that followed next, the *depositions of slaves* who had been interrogated were submitted to the court. As a rule, the evidence of slaves could only be considered in cases involving charges against their owners, and then only in defence of the latter, and not against them.¹⁷⁰ However, it would appear that the judge could, in his discretion, also allow the testimony of slaves belonging to a third parties to be submitted by either the prosecution or the defence; this, though, was subject to the owners' consenting to the interrogation of their slaves, or to the person who wished to tender the slaves' evidence giving security for any depreciation in their value resulting from their interrogation, which always took place under torture.¹⁷¹ The reason why the evidence of slaves could only be tendered if it had been obtained under, or confirmed by torture, was that slaves did not give testimony under oath. Mere depositions made by them could thus not qualify as evidence, but had to be confirmed by the additional element of torture.¹⁷² In the case of slaves, also, pregnant women, children, blind people, the insane and deaf mutes were exempt from being tortured;¹⁷³ slaves in these conditions could therefore not give depositions.

In the final stage of the hearing, the accuser and alleged heretic submitted any remaining *documentary evidence*,¹⁷⁴ for example, extra-judicially attested depositions made by non-compellable witnesses¹⁷⁵ (such as bishops).¹⁷⁶

This concluded the tendering of evidence by the litigants.

A further part of the hearing which still remains to be discussed, is the *interrogation of the person accused of heresy himself*.

¹⁶⁹ Id 632, 641.

¹⁷⁰ Id 638; Mommsen op cit 414, 415. This rule did not apply to cases where the slaves' owners were charged with *maiestas*, with which alleged heretics were simultaneously charged on occasion (see p 56 above). The other exceptions to the rule that slaves' evidence could not be used to incriminate their owners, are not relevant in the context of heresy.

¹⁷¹ Geib op cit 639-640; Mommsen op cit 414.

¹⁷² Geib op cit 635; cf also id 642. - Contra Mommsen op cit 416 n 1, who denies that torture was a formal requirement for acceptability of a slave's evidence, and asserts (without citing any supporting authority) that torture would have been employed only if a slave's evidence was disputed. Proof that torture was indeed a formal requirement for the admissibility of a slave's evidence, is furnished by the consideration that it was a formal requirement for the admissibility of evidence given by base witnesses (see p 101 above); and since (as Mommsen himself states, at 407-408) base persons were subjected to torture in post-Classical times as a result of their position being assimilated to *that of slaves*, it follows that torture was a fortiori required before any evidence given by slaves could have been acceptable.

¹⁷³ Geib op cit 640.

¹⁷⁴ Id 643-645; Mommsen op cit 432.

¹⁷⁵ Cf Geib op cit 633-634; Mommsen op cit 411 regarding such depositions.

¹⁷⁶ Cf p 100 n 153 above.

As a result of the absorption of inquisitorial elements into the post-Classical accusatio procedure,¹⁷⁷ it was now accepted that an accused could be interrogated directly by the judge in an attempt to elicit incriminating answers from him.¹⁷⁸ Such interrogation could be conducted either while the accused was under no compulsion or while under torture,¹⁷⁹ and could take place before, as well as during the trial (although it was considered preferable for the accused not to be tortured before the commencement of the trial).¹⁸⁰

Once again, the decision whether or not to subject the accused to interrogation under torture vested in the trial judge, as did the determination of the method¹⁸¹ and duration of such torture.¹⁸² In principle, the judge could only order the accused's torture if the latter's guilt could not be proved by any other means, and if a *prima facie* case against him had been established.¹⁸³ Here, too, slaves and members of the very lowest strata of society were interrogated under torture as a matter of course.¹⁸⁴ The same rules concerning exemption from torture already set out with regard to the interrogation of witnesses¹⁸⁵ also applied to the torture of the accused.¹⁸⁶

Volterra is of the opinion that the actual interrogation of persons charged with heresy was normally referred to the bishops, and was *not* conducted by the judges.¹⁸⁷ He bases this thesis on, first, the consideration that lay judges would not have had the specialized knowledge to distinguish between orthodox and heterodox beliefs, and would, of necessity, have had to rely on the ecclesiastical authorities' guidance; secondly, the fact that bishops could give penitent heretics and schismatics certificates of conversion, whereby they were afterwards protected from any ecclesiastical or - importantly - secular actions against them, an indication of the bishops' pre-eminence over the secular authorities in assessing an alleged heretic's guilt; and thirdly, certain legal and patristic texts which he interprets as authority for the proposition that the judicial examination of alleged heretics was the province of the bishops.

¹⁷⁷ Cf pp 81-82 above.

¹⁷⁸ Mommsen op cit 410, 430.

¹⁷⁹ Geib op cit 615; Mommsen op cit 410.

¹⁸⁰ Mommsen op cit 417.

¹⁸¹ Cf p 101 n 167 above.

¹⁸² Geib op cit 621. Cf Aug *Ep* 133.2 and 134.2, where it was clearly the trial judge's decision not to subject the Donatists concerned to harsh forms of torture.

¹⁸³ Geib op cit 616; Mommsen op cit 417.

¹⁸⁴ Geib op cit 618, read with Mommsen op cit 406.

¹⁸⁵ See pp 100-101 above.

¹⁸⁶ Geib op cit 618; Mommsen op cit 406-407.

¹⁸⁷ Op cit 453-468. Followed by Giorgio Barone-Adesi "Eresie «sociali» ed inquisizione teodosiana" in *Atti dell' Accademia Romanistica Costantiniana* (1986) 146 n 71 at 146-147.

However, I disagree with this view that the interrogation of those charged with heresy, was normally conducted by the bishops. As far as the first consideration mentioned by Volterra is concerned, it must be pointed out that a lay judge was normally not required to assess the orthodoxy of a given belief *de novo*; most heresies were specifically outlawed by the emperors (following the decisions of synods),¹⁸⁸ so that all that was required of a judge was the determination of membership of the relevant sect - which (given the high degree of religious awareness of the age)¹⁸⁹ he would usually have been quite competent to do. Secondly, the certificates of conversion mentioned by Volterra, which protected the convert concerned against *past* heresy, do not offer any evidence of a bishop's pre-eminence over a secular judge in a trial for a continuing, present transgression; such certificates were effective, not because they had been issued by a bishop, but because of the legal principle that recantation - in *any* manifestation, and at *any* stage - released a person charged with heresy from further criminal proceedings.¹⁹⁰ I would argue that such certificates were issued by the bishops simply because *viva voce* testimony by bishops was discouraged in criminal trials, in favour of the submission of written depositions from them.¹⁹¹ Finally, the texts cited by Volterra do not adequately support his thesis. The legal texts cited from the Theodosian Code, viz CTh 16.2.23 and CTh 16.11.1, relate to the exclusive jurisdiction of bishops over internal Church matters, and do not provide for their intervention in *secular* trials for crimes of religion.¹⁹² As far as the patristic texts are concerned, he cites an excerpt from Augustine of Hippo's *De Haeresibus*, and the *Acta cum Felice Manichaeo*. In the former text, *De Haeresibus* 46.9, Augustine discusses the Manichaeans and their malpractices. In this regard, he refers to the case of a girl and a woman suspected of Manichaeism, who were taken to the church at the command of the tribune, Ursus, where they were interrogated by the bishop, and confessed their crimes.¹⁹³ Volterra interprets this text as follows:

Questo passo di S. Agostino ha per noi una grande importanza, in quanto ci mostra l'intervento della Chiesa nel processo penale e la funzione da questa esercitata. Dal procedimento descritto da S. Agostino possiamo infatti arguire che al Vescovo spettava pronunciare se la persona indiziata era colpevole o no di eresia: il magistrato inviava l'imputato alla Chiesa, ove veniva sottoposto ad interrogatorio e ad esami: sulla base della pronunzia del Vescovo, il magistrato applicava o meno la sanzione prevista dalle leggi imperiali.¹⁹⁴

188 Cf p 35 above.

189 Cf Jones II 964.

190 Cf pp 113-114 below.

191 Cf pp 100 n 153, 102 above.

192 Cf pp 74-75 above.

193 Cf the text and summary thereof in Volterra op cit 461.

194 Op cit 461-462.

I cannot agree with Volterra's interpretation of Augustine's passage, or the use he makes of it. Quite apart from the fact that the trial of the Manichaeans concerned was conducted simultaneously by both the secular and the ecclesiastical authorities, and not by the ecclesiastical authorities only, as other sources show,¹⁹⁵ it must be pointed out that the proceedings mentioned by Augustine occurred - as can be deduced from his reference to the tribune Ursus¹⁹⁶ - during the reign of the son of Constantine the Great. Therefore, Augustine's description relates to the period when Christianity had only just been recognized - *before* the relationship between Church and State in matters with a religious element had become clearly established, *before* heresy had been declared a secular crime, and *before* Gratian provided that religious offences constituting secular crimes fell within the jurisdiction of the secular authorities, and that there was to be a complete separation between secular and ecclesiastical trials.¹⁹⁷ In the light of the subsequent development just outlined, it is clear that Augustine's description of Manichaean trials in the age of Constantius would not necessarily be authority for the procedure followed in trials for heresy in the period after Gratian. The second patristic text cited by Volterra, the *Acta cum Felice Manichaeo*, also does not support his argument. He suggests that these *Acta*, in which a religious debate between Augustine of Hippo and a certain Manichaean, Felix, is reported verbatim, may be the record of a judicial examination conducted during a criminal trial, and on this basis cites it as authority for his proposition.¹⁹⁸ However, the *Acta* cannot be taken to refer to a criminal trial: Felix was referred to Augustine for interrogation by the curator of Hippo,¹⁹⁹ i.e. by a municipal official,²⁰⁰ who did not have jurisdiction to try serious charges (as Manichaeism was),²⁰¹ but who could, at most, hold a preliminary investigation before reporting the case to a competent judge.²⁰² Furthermore, the debate reported in the *Acta* was aimed at establishing whether Manichaeism contained any evil teachings; an exercise which would have been superfluous in a criminal trial, since the legislature

¹⁹⁵ Cf P Cacciarus *Exercitationes in S. Leonis Magni Opera: De Manichaeorum Haeresi et Historia Libri Duo* in J-P Migne (ed) *Patrologiae Cursus Completus, Series Latina* vol 55 (1886) col 918: "[A]pud Carthaginem nonnullis eorum detectis, publica et ecclesiastica auctoritate in eos animadversum est ... Ut hi ergo ad Ecclesiae tribunal perducerentur, ipse tribunus Rufus nostrorum iurium vindex imperaverat ... Ad horum autem confessionem audiendam non tantum notarii, qui ibi tamquam iudices assidebant, ut juxta humanas et ecclesiasticas leges totius inquisitionis forma et ordo servarentur. Episcoporum autem nomina ... prorsus ignoramus. Sed ex tota illa provincia fuisse collectos episcopos probabilis est."

¹⁹⁶ Ibid: "Constat enim ex Prosperi Chronico, *Ursum, Regiae Constantii imperatoris domus praefectum*, qui tribunitia pariter praefulgebat dignitate et in Africa civilibus rebus praeerat ... aliquos eorum Manichaeorum interceptisse ..." (my emphasis).

¹⁹⁷ CTh 16.2.23, confirmed by subsequent rescript - see Gothofredus op cit vol 6(1) 61-62.

¹⁹⁸ Op cit 462.

¹⁹⁹ Cf Cacciarus op cit col 914-915.

²⁰⁰ Heumann-Seckel op cit s v "Curator".

²⁰¹ Cf p 76 n 8 above.

²⁰² Cf p 106 below.

had already declared Manichaeism a crime,²⁰³ leaving the individual trial judges no discretion as to its acceptability or otherwise.

For the above reasons, I cannot agree with Volterra's contention that the legal and patristic sources offer evidence of the great importance assumed by bishops in the secular authorities' antiheretical programme, and that these illustrate their function in the criminal proceedings against heretics.²⁰⁴ I would argue that, while the secular judges might on occasion have consulted the ecclesiastical authorities for doctrinal guidance in a given case, there is no evidence that the alleged heretics were, as a rule, taken to the bishops for a resolution of the question whether or not they subscribed to heretical beliefs. I would therefore maintain that the interrogation of those charged with heresy would generally have been conducted by the secular authorities, according to the normal rules of procedure. Where the bishops did intervene in person during the hearings of alleged heretics, this would have been aimed at persuading the latter to renounce their beliefs,²⁰⁵ and not at judicially interrogating them; their intervention would therefore not have amounted to a formal procedural function.

After the various stages of the hearing had been concluded, the judge and assessors withdrew to consider their verdict. There were no closing addresses by the parties.

(b) Cognition proceedings

Where the person charged with heresy had been *denounced by an official whose general duties involved reporting crimes* (for example, a municipal official),²⁰⁶ the procedure for the hearing was substantially modelled on that followed in accusatorial trials. The relevant crime of heresy would have been investigated in a preliminary hearing conducted by the official concerned, who would then have dispatched the alleged heretic to the judge, together with a report on the matter (*notoria*).²⁰⁷ At the hearing proper, the official concerned was required to appear before the court, and to address it on the contents of his *notoria*, much as an accuser addressed the court at the beginning of an accusatorial hearing.²⁰⁸ As far as can be ascertained, the remainder of the hearing also largely

²⁰³ The relevant legislation would have been either Diocletian's constitution prohibiting Manichaeism - Cacciarus op cit col 914 - or that issued subsequently by the Christian emperors, and contained in the Theodosian Code.

²⁰⁴ Volterra op cit 468.

²⁰⁵ Cf Augustine's request to Donatus, governor of Africa: "[Donatistas], cum hoc abs te petitur, rerum certarum manifestissimis documentis apud acta vel praesentiae tuae vel minorum iudicum convinci atque instrui patiaris ..." (Aug *Ep* 100.2 in fin).

²⁰⁶ See p 82 n 46 above.

²⁰⁷ Cf Aug *Ep* 134.2, quoted at p 85 n 60 above.

²⁰⁸ Geib op cit 651.

corresponded to the equivalent stages of an *accusatio* trial, although it may be accepted that the inquisitorial element was far more marked here than in the latter.²⁰⁹

However, where the charge had been brought as a result of information provided by *private denunciators*, or of reports submitted by *informers specifically appointed by the judge*, the form of the procedure for the hearing was not regulated in any way. The hearing would essentially have consisted of a purely inquisitorial interrogation of the alleged heretic and of an examination of the available evidence, but the manner in which this was done was purely a matter for the judge's discretion. The only limitation was that the judge remained bound by the rules concerning the obtaining and submission of evidence,²¹⁰ as already discussed in the previous section.²¹¹

2.5.4. The reaching of a verdict

After the conclusion of the hearing, the judge, in consultation with the assessors appointed by him,²¹² considered the evidence in order to determine whether the alleged heretic's guilt had been adequately proven, with regard to all of the constituent elements of the specific crime of heresy with which he had been charged.²¹³ The weight to be accorded to evidence was largely a matter of discretion; however, a rudimentary theory of evidence which had now developed did offer certain guidelines to the judge:²¹⁴

(i) *Confessions* made by the alleged heretic during the hearing were dealt with in precisely the same way as admissions of guilt made during the plea stage, and would, therefore, as a rule, constitute conclusive proof of guilt.²¹⁵

(ii) The *testimony of witnesses* and the *depositions of slaves* were to be accepted as evidence only if they were factual,²¹⁶ and related to what the witness or slave concerned had personally experienced. Accordingly, hearsay evidence was not to carry any weight, while evidence as to a person's character, albeit permissible, was to be accorded very limited significance.²¹⁷ A definite rule of evidence was that the

²⁰⁹ Id 653. Cf also Mommsen op cit 421. Cf, further, Aug *Ep* 133.1-2 and 134.2: here, Augustine refers to the trial judge's inquisition of certain Donatists and Circumcellions, who had been brought to trial by officials.

²¹⁰ Geib op cit 650, 651 n 443.

²¹¹ Cf pp 100-102, 103 above.

²¹² Mommsen op cit 442-443.

²¹³ See chapter 3 regarding the elements of liability.

²¹⁴ Geib op cit 610-611; Mommsen op cit 436.

²¹⁵ Mommsen op cit 437-438. See also p 96-97 above. Aug *Ep* 133.1, 134.2, and 139.2, illustrate the conclusive value of confessions made during a trial: Augustine clearly regards punishment of the Donatists and Circumcellions who have confessed their transgressions as a foregone conclusion.

²¹⁶ Geib op cit 624; Mommsen op cit 440.

²¹⁷ Mommsen op cit 441.

testimony of only one person could not be admitted as proof.²¹⁸ If there were conflicting statements before the court, their veracity was to be assessed by having regard to the credibility of the witnesses concerned.²¹⁹ Evidence given coram iudice was generally to be preferred to extra-judicial depositions, since, in the former instance, the judge would have had an opportunity to study the witness' or slave's conduct, and it would have been possible to cross-examine him; however, one may presume that depositions by bishops would have enjoyed greater of weight.²²⁰ Finally, where congruent evidence had been given by a number of witnesses, this could be accorded great weight.²²¹

(iii) It would appear that *circumstantial evidence* could also be relied on, whether as subsidiary to other forms of evidence, or as sole evidence where there were no eyewitnesses who could testify to the alleged heretic's having committed the conduct with which he was being charged.²²² However, circumstantial evidence alone would only have been sufficient to found a verdict of guilty if it not merely created a suspicion regarding the alleged heretic's guilt, but rather proved his guilt unequivocally and irrefutably.²²³

Having weighed the evidence before the court, the judge reached his verdict. If the court was not satisfied that the alleged heretic was guilty (either because it was convinced of his innocence, or because it was merely not convinced of his guilt) the judge absolved him, freeing him from all restraints.²²⁴ If applicable, the judge also instituted calumny proceedings against the unsuccessful accuser (or malicious official),²²⁵ aimed at subjecting the latter to the same punishment that the alleged heretic would have suffered, had he been found guilty.²²⁶ If, on the other hand, the court was convinced of the alleged heretic's guilt, the judge would reach a verdict of guilty as charged,²²⁷ and would proceed to the next stage.

²¹⁸ CTh 11.39.3.1; Geib op cit 624. Contra Mommsen op cit 440 n 4, who argues (against the clear and unambiguous wording of CTh 11.39.3.1) that the inadmissibility of a single witness' evidence was merely a guideline, and not a binding rule of evidence.

²¹⁹ In determining a witness' credibility, the trial judge was to have regard to the manner in which the witness had given evidence, his status, and (if applicable) his hostility towards or friendship with the person for or against whom he was called - see CTh 11.39.3 pr; Geib op cit 624, 627-628; Mommsen op cit 440 n 1.

²²⁰ Geib op cit 624; Mommsen op cit 411, 440.

²²¹ Cf Mommsen op cit 440.

²²² Although there is no authority in the primary sources for regarding circumstantial evidence as admissible, both Geib op cit 646-649 and Mommsen op cit 442 argue that it was indeed allowed.

²²³ Geib op cit 648.

²²⁴ Mommsen op cit 436-437, 450.

²²⁵ See p 82 above.

²²⁶ Mommsen op cit 494, 496.

²²⁷ For the position where an accusation as framed in the *inscriptio* had not been proved, but it had become clear during the hearing that the accused was, nevertheless, guilty on another count, see Geib op cit 653-654.

2.5.5. Determination of punishment

If an alleged heretic was convicted after a proper trial, or if circumstances justifying a summary conviction²²⁸ were present, the judge proceeded to determine the punishment to be imposed, as provided for in the imperial constitutions prohibiting heresy.²²⁹

2.5.6. Sentence

After the judge had reached a verdict of guilty and had determined the appropriate punishment, he proceeded (if it was not necessary to refer the case to the imperial court at this stage, as was the case with charges attracting a punishment of *deportatio* or, from 425 AD, confiscation of the estate)²³⁰ to formally condemn the person charged with heresy.²³¹

The trial procedure ended with the passing of sentence.

2.6. Cessation of Trial or of Execution of Sentence

The course of the criminal proceedings set out in the foregoing sections of this chapter could at any stage be barred, interrupted or arrested in a number of ways.

2.6.1. If the *prosecution fell away* *pendente lite*, the proceedings were discontinued.

Therefore, *accusatio* proceedings would be discontinued if the accuser died, or for some reason lost his capacity to prosecute (for example, if he became insane).²³² Similarly, *cognitio* proceedings were halted by the death or removal from office of the trial judge.²³³

The following constitution is not in conflict with the foregoing:

CTh 16.5.55 (Honorius & Theodosius II, 414) *Notione et sollicitudine Marcellini spectabilis memoriae viri contra Donatistas gesta sunt ea, quae translata in publica monumenta habere volumus perpetuam firmitatem. Neque enim morte cognitoris perire debet publica fides.*

²²⁸ See pp 96-98 above.

²²⁹ See pp 119-132 below.

²³⁰ See pp 76-77 above.

²³¹ The formal requirements for a valid condemnation were, first, that the sentence had to be put in writing (in Latin, or perhaps in Greek too) and had to state the crime, the punishment, and whether or not the verdict had been reached in consultation with a council of advisers or assessors; secondly, that this written statement had to be read out aloud to the condemned heretic; and thirdly, that the sentence had to be entered into the official court records. - Mommsen *op cit* 447-449, 518. Cf also Aug *Ep* 134.4 with regard to entry into the court records.

²³² Prof Contardo Ferrini *Diritto Penale Romano: Esposizione Storica e Dottrinale* (1976) para 137 p 167; Mommsen *op cit* 453.

²³³ Mommsen *ibid*.

"It is Our will that the proceedings as held against the Donatists through the judicial investigation and supervision of Marcellinus, a man of Respectable memory, and as transferred to the public records, shall have permanent validity. For the trustworthiness of the State must not perish on account of the death of the trial judge."

The reason why this constitution was issued, is that certain Donatists had argued that, since Marcellinus had died in *dishonourable* circumstances,²³⁴ his official deeds, including the trials conducted by him, were invalid; here, the emperors vindicated Marcellinus' memory, and furthermore made it clear that the Donatists' argument was false. The important point is that this constitution relates to *completed* trials, and does not concern the case where a judge died during a *cognitio*.

2.6.2. The *death of a person charged with heresy* who was being prosecuted according to *accusatio* proceedings did not terminate the trial; ²³⁵ patrimonial penalties and intestability could therefore still be imposed.²³⁶

2.6.3. A prosecution that had not yet been completed could be discontinued by the *prosecutor's withdrawal of the charge*.²³⁷

Prosecutions of heresy by *cognitio* would therefore be discontinued if the judge abandoned the charge. It is not clear exactly to what extent the judge had a discretion to withdraw the charge. However, the many constitutions penalizing conniving judges' neglect to prosecute or to appropriately punish cases of heresy reported to them²³⁸ suggest, by analogy, that the ordinary judges of first instance must have had virtually no discretion to discontinue a trial.

Restrictions were also placed on the discontinuance of accusatorial proceedings by the accuser's withdrawal of his accusation. If the accused had been imprisoned pending his trial, as was usual in this period,²³⁹ the accuser could withdraw his accusation unilaterally within the first thirty days only; thereafter, he could only do so with the consent of the accused²⁴⁰ (who might prefer the trial to continue, so as to expose the accuser to calumny proceedings). However, if any free witnesses had already been subjected to examination

²³⁴ Marcellinus (a special imperial envoy, sent to Africa by Honorius to try the Donatists - cf p 77, 77 n 22 above) had been falsely condemned to death at the instigation of certain Donatists during the revolt of Heraclian - see Gothofredus op cit vol 6(1) 198-199. For the trials conducted by Marcellinus, cf Aug *Ep* 133, 134, and 139.

²³⁵ Cf Mommsen op cit 67.

²³⁶ Cf also Ferrini op cit para 132 p 163, para 126 p 159 for the possibility of refusal of burial rights in the case of very grave crimes.

²³⁷ Id para 137 p 167; Mommsen op cit 453-454.

²³⁸ Eg CTh 16.5.40.8, 16.5.46, 16.5.65.5.

²³⁹ Cf pp 92-93 above.

²⁴⁰ CTh 9.39.4; cf also CTh 9.37.2.

under torture,²⁴¹ or if the judge suspected that the withdrawal of the charge was collusive,²⁴² it was not possible to abandon the charge, and the prosecution had to be continued.

2.6.4. If the *accusation had become prescribed* because the trial had not been concluded within one year after the accusation had been formally brought, the proceedings were dismissed and the accuser became liable to the penalties for calumnia.²⁴³

2.6.5. However, a further impediment to the institution, or ground for the discontinuance of the trial, viz the *prescription of the indictability of the crime* by virtue of its prosecution not having been concluded within twenty years of its commission,²⁴⁴ was not applicable to (at least) the Manichaeans and, by their identification with the former,²⁴⁵ the Encratites, Saccophori and Hydroparastatae.²⁴⁶ This is shown clearly by the following constitutions:

CTh 16.5.7.1 (Gratianus, Valentinianus II & Theodosius I, 381) ...[E]os, qui etiam post legem primitus datam nequaquam ab illicitis et profanis coitionibus refrenari divina saltem monitione potuerunt, tamquam in ipsius depictae legis iniuriam veluti sacrilegii reos tenemus, severitatem praesentium statutorem non tam ad constituendae, sed ad ulciscendae legis sanximus exemplum, ita ut nec defensio temporis prosit.

"... We hold as guilty of sacrilege those persons also who, since the issuance of the original law, have not been able to be restrained at least by divine imperial admonitions from unlawful and profane assemblies, in violation of the aforesaid law as written. We sanction the severity of the present statute not so much as an example of a law that should be established but as one that should be avenged, so that the defence of time also shall not be of advantage to them."

CTh 16.5.9.1 (Gratianus, Valentinianus II & Theodosius I, 382) ... Sublimitas itaque tua det inquisitores, aperiat forum, indices denuntiatoresque sine invidia delationis accipiat. Nemo praescriptione communi exordium accusationis huius infringat ...

"... Your Sublimity, therefore, shall appoint investigators, shall open court, and shall receive informers and denouncers, without the odium attached to informants. No person shall destroy the establishment of this accusation by means of the usual defense of prescription ..."

Mommsen is of the opinion that crimes which were exempted from normal prescription did, nevertheless, prescribe after a period of thirty years had elapsed from the date of

241 CTh 9.39.4.

242 CTh 9.37.1.

243 Mommsen op cit 488; cf p 91 above; and cf also p 90 n 90.

244 C 9.22.12 (Diocletianus et al, 293); cf Mommsen op cit 489.

245 Cf pp 30-31 above.

246 The fact that apostasy was also imprescriptible (cf CTh 16.7.7 pr) may indicate that crimes against religion generally, did not prescribe; however, apostasy and Manichaeism were usually treated more severely than the other crimes of religion, so that the foregoing generalization might be incorrect.

commission of the crime.²⁴⁷ The authority cited in support of this statement is a constitution issued by Theodosius II, of which I quote the essential sections only:

CTh 4.14.1 pr (Theodosius II, 424) Sicut in re speciali est, ita ad universitatem ac personales actiones ultra triginta annorum spatium minime protendantur. Sed si qua res vel ius aliquod postuletur vel persona qualicumque actione vel persecutione pulsetur, nihilo minus erit agendi triginta annorum praescriptio metuenda: eodem etiam in eius valente persona, qui pignus vel hypotheca non a suo debitore, sed ab alio possidente nititur vindicare. Nam petitio finium regundorum in eo scilicet, quo nunc est, iure durabit ... 3. Hae autem actiones annis triginta continuis extinguantur, quae antiquitus fixis temporibus limitantur.

"Just as actions in rem for specific pieces of property, so actions for an aggregate of things and personal actions shall not be extended beyond the space of thirty years. But if any property or right should be claimed or any person should be sued in any action or prosecution of whatsoever nature, the plaintiff must nevertheless beware of the prescription of thirty years. The same rule is valid also in the case of a person who seeks to vindicate a pledge or hypothecated property, not from his debtor but from another person who is in possession ... 3. Moreover, the period of thirty continuous years shall extinguish only those actions that appear to be perpetual, not those that were anciently limited by fixed periods of time."

I cannot agree with the inference that Mommsen seeks to draw from this constitution. As I understand it, it clearly relates to one of the vulgar-law forms of prescription operative in the law of things;²⁴⁸ and concerns civil claims only. Technically, the term "actio" refers to a (possibly reipersecutory) claim in personam based on civil and praetorian law,²⁴⁹ whilst the term "persecutio" refers to a reipersecutory action in personam based on imperial law.²⁵⁰ The phrase "persona qualicumque actione vel persecutione pulsetur" in the principium should accordingly be interpreted as referring to all forms of reipersecutory actions in personam, but should not be interpreted as including criminal prosecutions. The term "actiones perpetuae" mentioned in the third paragraph of the constitution can, it is true, include criminal actions;²⁵¹ but the context in which it is employed here is clearly that of civil obligations, and it must therefore be interpreted as relating to civil claims only.

The only time limit on the indictability of crimes of heresy would have related to trials instituted post mortem in order to have an alleged heretic's will declared invalid.²⁵² It was a general principle that cases concerning the disputing of wills had to be instituted within

²⁴⁷ Op cit 489. In discussing crimes exempted from normal prescription, Mommsen mentions parricide and apostasy only, and does not refer to heresy in this regard. However, as is clear from the constitutions quoted in the discussion above, the same principle applied with regard to at least Manichaeism and sects equated with it.

²⁴⁸ Cf the description of post-Classical prescription in Max Kaser *Das römische Privatrecht* vol 2 (1975) para 243 II 1 pp 286-287.

²⁴⁹ Cf Heumann-Seckel op cit s v "Actio" 5.

²⁵⁰ Cf Heumann-Seckel op cit s v "Persecutio" 1 c bb.

²⁵¹ Cf Mommsen op cit 489 n 4.

²⁵² Cf pp 87-88 above.

five years after the deceased's death; and this rule was also applicable where the contestation of the will resulted from the deceased's crime against religion.²⁵³

2.6.6. Contrary to the general principle of criminal law that subsequent penitence did not absolve a criminal, *recantation* by a heretic interrupted and nullified the criminal proceedings against him. It made no difference at which procedural stage such recantation occurred: it could occur pending the trial, pending execution of the sentence or during execution of the sentence, and resulted forthwith in the release of the person recanting. This was specifically decreed in the following constitution:²⁵⁴

CTh 16.5.41 (Arcadius, Honorius & Theodosius II, 407) Licet crimina soleat poena purgare, nos tamen pravos hominum voluntatas admonitione paenitentiae volumus emendare. Quicumque igitur haereticorum, sive Donatistae sint sive Manichaei vel cuiuscumque alterius pravae opinionis ac sectae profanis ritibus adgregati, catholicam fidem et ritum, quem per omnes homines cupimus observari, simplici confessione susceperint, licet adeo inveteratum malum longa ac diuturna meditatione nutriverint, ut etiam legibus ante latis videantur obnoxii, tamen hos, statim ut fuerint deum simplici religione confessi, ab omni noxa absolvendos esse censemus, ut ad omnem reatum, seu ante contractus est seu postea quod nolumus contrahitur, etiamsi maxime reos poena videatur urgere, sufficiat ad abolitionem errorem proprio damnasse iudicio et dei omnipotentis nomen, inter ipsa quoque pericula requisitum, fuisse complexum, quia nusquam debet in miseriis invocatum religionis deesse subsidium. Ut igitur priores quas statuimus leges in excidium sacrilegarum mentium omni executionis argueri iubemus effectu, ita hos, qui simplicis fidem religionis licet sera confessione maluerint, censemus datis legibus non teneri. Quae ideo sanximus, quo universi cognoscant nec profanis hominum studiis deesse vindictam et ad rectum redundare cultum legum quoque adesse suffragium.

"Although it is customary for crimes to be expiated by punishment, it is Our will, nevertheless, to correct the depraved desires of men by an admonition to repentance. Therefore, if any heretics, whether they are Donatists or Manichaeans or of any other depraved belief and sect who have congregated for profane rites, should embrace, by a simple confession, the Catholic faith and rites, which We wish to be observed by all men, even though such heretics have nourished a deep-rooted evil by long and continued meditation, to such an extent that they also seem subject to the laws formerly issued, nevertheless, as soon as they have confessed God by a simple expression of belief, We decree that they shall be absolved from all guilt. Thus for every criminal offence, whether it was committed before or should be committed afterward, a thing which We regret, although punishment seems to be especially urgent for the guilty, it shall suffice for annulment that they should condemn their false doctrine by their own judgment and should embrace the name of Almighty God, which they may call upon even in the midst of their perils; for when the succor of religion has been invoked, it must nowhere be absent in afflictions. Therefore, just as We order that the previous laws which We have issued for the destruction of sacrilegious minds shall be forcefully pressed to the full extent of their execution, in like manner We decree that those persons who have preferred the faith of pure religion, even by late confession, shall not be bound by the laws which have been issued. We sanction the foregoing regulations in order that all persons may know that the infliction of punishment on

²⁵³ Cf CTh 2.19.5 (inofficious wills) and CTh 16.7.3.1 (wills made by those who apostasized to paganism, Judaism or Manichaeism).

²⁵⁴ Cf also CTh 16.5.40.5 (providing that heretics' children could inherit from them, if the latter repented) and CTh 16.5.52 pr (providing that the Donatists were to be punished if they did not return to the Catholic Church). - CTh 16.5.62, in which Valentinian III decreed that the schismatics in Rome had twenty days within which to return to communion with the Pope, after which they would be expelled from the city, appears to have been intended to give the sectarians concerned a period of grace, rather than to deprive sectarians of the ability to convert after the twenty-day period and to be able to return to Rome at that stage.

the profane desires of men shall not be lacking, and that it redounds to the true worship that the support of the laws should also be present."

Although this constitution was only issued in 407 AD, there is evidence that the rule enunciated in it was already applied in practice before this time; this emerges from the following constitution, issued in 391 AD:²⁵⁵

CTh 16.7.4.1 (Valentinianus II, Theodosius II & Arcadius, 391) Sed nec umquam [apostati] in statum pristinum revertentur ... Lapsis etenim et errantibus subvenitur, perditis vero, hoc est sanctum baptismum profanantibus, nullo remedio paenitentiae, quae solet aliis criminibus prodesse succurritur.

"But never shall apostates return to their former status ... Help is extended to those who have slipped and those who go astray, but those who are lost, that is, those who profane holy baptism, shall not be aided by any expiation through penitence, which customarily avails in other [sc religious] crimes."

Here, the position as regards apostates is contrasted with that as regards the lapsi et errantes, that is, the sectarians; and it is stated that liability for apostasy, *unlike liability for heresy*, cannot be expunged by repentance.

2.6.7. In principle, it was possible to *appeal* to a higher instance²⁵⁶ against any irreversible decision (such as an order for interrogation under torture) or final decision (such as the verdict, or sentence) of a trial judge.²⁵⁷

In the era of the Theodosian Code, however, this right of appeal was subject to certain limitations, which must, in practice, have had a relatively significant impact on heresy trials. First, leave to appeal could be refused by the trial judge if he was convinced, by virtue of an admission of guilt or other cogent evidence, that there was no merit in the appeal, and that the attempt to appeal was nothing but a dilatory manoeuvre.²⁵⁸ Secondly, leave to appeal could also be refused those whose actions had endangered public safety,²⁵⁹ as might have occurred in the case of a large-scale eruption of religious fanaticism.²⁶⁰ Lastly, it was not yet possible for condemned slaves to appeal against their sentences.²⁶¹

²⁵⁵ Cf also Volterra op cit 460; Cacciarus op cit col 922-923 for evidence that it was already an established practice by the time of Augustine of Hippo for Catholic bishops to give certificates of conversion to converts from Manichaeism, to safeguard the latter against any future liability before the secular courts; this shows that the secular authorities of this period recognized the principle that recantation expunged guilt. - The principle that recantation secured immediate release, was probably modelled on a similar provision which had applied to the prosecution of Christians during the pagan era, whereby apostasy absolved those charged with being Christians from any further liability (cf further p 164 n 41 below in this regard).

²⁵⁶ As set out at p 78 above.

²⁵⁷ The following account of the appeal procedure is based on Geib op cit 685-690; Mommsen op cit 468473.

²⁵⁸ Cf the constitutions collected in CTh 11.36.

²⁵⁹ Biondi op cit vol 3 p 517.

²⁶⁰ See pp 56-57.

²⁶¹ Cf Biondi op cit vol 3 p 518, who states that Justinian first allowed slaves to appeal.

An appeal could be brought by the person charged with, or convicted of heresy; or, in the event of the charge involving the death penalty (as a few crimes of heresy did),²⁶² by the condemned person's relatives; or indeed, by any member of the public (including even a member of the orthodox clergy, as seems to have happened sometimes),²⁶³ even without the convict's assent. If the trial for heresy had been conducted according to *accusatio* proceedings, the accuser could also appeal against decisions that were prejudicial to him.²⁶⁴

The procedure for an appeal entailed two stages, viz bringing the appeal and retrial. An appeal was brought by the aggrieved person's notifying the court *a quo* of his objection to its decision, and his requesting it to refer the final decision of the issue concerned to a higher instance; if the trial court did not refer the matter, the appellant lodged a complaint with the higher judge, which complaint then constituted the appeal. An appeal had to be lodged within two or, in certain circumstances, three days after the decision concerned had been given.

Pending the appeal, the person convicted of heresy (as well as his accuser, if applicable) was detained in the usual way,²⁶⁵ being normally imprisoned.²⁶⁶

On the day set for the appeal, the person charged with heresy (as well as the accuser, if applicable) appeared in person before the court of higher instance, which then tried the case *de novo*, presumably according to substantially the same procedure as that adopted in the court *a quo*.

However, a particular procedure was adopted by the emperor's court for the decision of a case referred to it. Here, the proceedings were not conducted orally at all, but were based entirely on documents submitted for its consideration. The judge *a quo* was required to draw up a full report of the proceedings before him, and to transmit this to the person charged with heresy and to the accuser, if applicable, so that they could add any further statements and arguments to it. The judge's report, together with these supplements, and all the court records, were then submitted to the imperial chancery, where all the papers

²⁶² Cf pp 120-128 below.

²⁶³ Cf *Aug Ep* 134.4 in fin, where Augustine writes as follows to Apringius, the governor of Africa: "[S]olent homines, quando cum inimicis eorum conuictis lenius agitur, a mitiore sententia prouocare; sed inimicos nostros ita diligimus, ut, nisi de tua Christiana oboedientia praesumamus, a tua seuera sententia prouocemus". Here, Augustine issues a veiled threat that he will appeal on behalf of the Donatists and Circumcellions concerned if they are subjected to the death penalty, against which he pleads.

²⁶⁴ Cf *ibid*.

²⁶⁵ Cf pp 93-93 above.

²⁶⁶ Cf p 93 above.

were studied and a further report was drawn up for the information of the imperial consistory. After the members of the imperial court had considered all the documents before them and had deliberated on the matter, the emperor announced his verdict and sentence, which was then read out and published by the quaestor sacri palatii.²⁶⁷

2.6.8. Accused or convicted criminals could, furthermore, be spared further prosecution or punishment by their release in terms of *general pardons* (*abolitiones publicae*), which were issued at certain especially joyous occasions,²⁶⁸ and notably at Easter.²⁶⁹ However, certain classes of crimes were specifically excluded from the benefits of these general pardons. One of the crimes thus excluded, was sacrilege, which, in post-Classical times, encompassed the crimes of heresy.²⁷⁰ Therefore, those charged with, or convicted of heresy were in effect unable to benefit from general pardons.²⁷¹

2.6.9. A condemned criminal's punishment could normally be mitigated or completely annulled by means of a *special pardon*, issued by the emperor in terms of his prerogative of mercy. However, restrictions were gradually placed on petitioning the emperors for mercy in cases concerning heresy. First, heretics were forbidden to personally supplicate the imperial court, in terms of the following constitution:

CTh 16.5.14 (Gratianus, Valentinianus I & Theodosius I, 388) ... His etiam illud adnectimus, ut supra memoratis omnibus adeundi atque interpellandi serenitatem nostram aditus denegetur.

"... Moreover, We subjoin to the following provisions that to all the aforesaid persons [sc Appollinarians and all other heretics] the opportunity to approach and address Our Serenity shall be denied."

From the date on which this constitution was issued, it was, therefore, at most possible for a third party to make representations for mercy to the emperor on the condemned heretic's behalf; and there is evidence that this did occur in practice.²⁷² However, this possibility was also abolished later in terms of the following constitutions:

CTh 16.5.63 (Theodosius II & Valentinianus III, 425) ... [U]niverso supplicationum aditu in perpetuum denegato criminibus debita severitate

"... They shall be punished with the severity due to their crimes, and all recourse to supplication to the Emperor shall be forever denied them."

²⁶⁷ Geib op cit 691-692.

²⁶⁸ Ferrini op cit para 137 p 167.

²⁶⁹ See the constitutions collected in CTh 9.38.

²⁷⁰ See, for example, CTh 9.38.7, 9.38.8. See also p 89 n 82 above.

²⁷¹ So, too, Mommsen op cit 605, read with 600 n 4.

²⁷² Cf Aug *Ep* 88.7 (intervention for the Donatist bishop Crispinus by certain Catholic bishops).

CTh 16.5.65.3 (Theodosius II & Valentinianus III, 428) ... Illis etiam in sua omnibus manentibus firmitate, quae de militia et donandi iure ac testamenti factione vel neganda penitus vel in certas vix concessa personas poenisque variis de diversis sunt haereticis promulgatae, ita ut nec speciale quidem beneficium adversus leges valeat impetratum.

"... Furthermore, all those laws which were promulgated concerning the imperial service and concerning the right to make gifts or with reference to testamentary capacity, a capacity which must either be denied altogether or one that was barely conceded to certain persons, and those laws concerning various penalties against the different heretics, shall remain in full force, and not even a special grant of imperial favor impetrated contrary to the laws shall avail."

In view of the above, it is clear that heretics were ultimately precluded from being pardoned and from having the punishments imposed on them mitigated.²⁷³

It should be noted that the prerogative of mercy could be exercised by the emperor only; officials who attempted to do so, were guilty of maiestas, a crime against the state.²⁷⁴ Therefore, the judges had no capacity to issue pardons or mitigations of sentence with regard to those condemned of heresy, either, even when petitioned to do so; they could thus not have acceded to the intercessions by Catholic bishops recorded in the patristic literature.²⁷⁵

If the proceedings were not arrested in terms of one of the above grounds, the trial would be followed by the imposition of the sentence pronounced upon the convicted heretic. The applicable penalties and their execution will be discussed in the next chapter.

²⁷³ Contra Gaudemet op cit 613-614, who states that the instances where condemned heretics approached the emperor for relief, represented cases of supplications for special pardons, rather than appeals.

²⁷⁴ Mommsen op cit 484 read with 558.

²⁷⁵ For practical examples of the Catholic clergy's intercession with the African judges, in an attempt to secure a mitigation of sentence, cf Aug *Contra Cresconium* 47.51 (intervention for the Donatist bishop Crispinus by the Catholic bishop Possidius) and Aug *Ep* 100, 133, 134 and 139 (intervention for certain Donatists and Circumcellions by Augustine). See also Lucio de Giovanni "Ortodossia, eresia, funzione dei chierici - Aspetti della legislazione religiosa tra Teodosio I e Teodosio II" in *Atti dell' Accademia Romanistica Costantiniana (VI Convegno Internazionale)* (1986) 65 for an account of Gregory of Nazianzus' intercession following an Arian attack on the church of Tiana.

CHAPTER FIVE

PUNISHMENTS

1. CATALOGUE OF PRESCRIBED PUNISHMENTS

A fundamental feature characterizing post-Classical criminal law, was the principle of fixed punishment. During the preceding Classical era, punishment had largely been a matter in the discretion of the trial judge; now, the emperor accorded to each crime - a few exceptions aside - a specific punishment, from which the judges were not allowed to deviate in any way. Once the judge had determined that a given suspect's conduct conformed to the description of the crime concerned, he was obliged to impose the punishment prescribed, regardless of any mitigating or aggravating factors.¹

The foregoing also applied to the crimes of heresy. The constitutions collected in the *Codex Theodosianus* contain elaborate schemes of punishments for the various prohibited acts of heresy; and it is clearly stated that the judges are absolutely bound by these penal provisions:

CTh 16.5.65.5 (Theodosius II & Valentinianus III, 428) *Quae omnia ita custodire decernimus, ut nulli iudicum liceat delatum ad se crimen minori aut nulli coercitioni mandare, nisi ipse id pati velit, quod aliis dissimulando concesserit.*

"We decree that all the foregoing provisions shall be so enforced that no judge may order a minor punishment or no punishment at all for such a crime when it is reported to him, unless he himself is willing to suffer the penalty which through connivance he has remitted for others."

The penalties applicable to the various crimes of heresy, may be catalogued as follows:

¹ See, generally, Ernst Levy "Gesetz und Richter im kaiserlichen Strafrecht. Erster Teil: die Strafzumessung" (1938) 45 *Istituto di Diritto Romano Bullettino* 152-162. Augustine's statement "Soleo enim audire in potestate esse iudicis mollire sententiam et mitius uindicare quam leges" (*Aug Ep* 139.2.13-14 in Al Goldbacher (ed) *S. Aureli Augustini Hipponiensis Episcopi Epistulae in Corpus Scriptorum Ecclesiasticorum Latinorum* vol 44 (1904)) does not refute the above, as a study of the context in which it was written, will show: cf Levy op cit 158-159. (Cf also p 117 above.)

TABLE C
PRESCRIBED PUNISHMENTS

CONDUCT	CONSTITUTION	SECT/S AFFECTED	PENAL PROVISION
ADHERENCE TO HERESY	^a 16.5.7 pr (381)	Manichaeans	deprived of right to bequeath or take property, whether under a will or by donation, on pain of confiscation of property concerned (<i>see "intestability" below</i>)
	16.5.7.1 (381)	Manichaeans	retroactive confiscation of property previously bequeathed or inherited (<i>see "intestability" below</i>)
	16.5.7.3 (381)	Manichaeans; Manichaic ^b Saccophori, Encratites, Apotactites & Hydroparastatae	declared infamous and execrable (<i>see "infamia" below</i>)
	16.5.9 pr (382)	Manichaeans	declared intestable; incapable of donating inter vivos; incapable of leaving property on their death to appointed heirs - all property to go to intestate successors (<i>see "intestability" below</i>)
	16.5.9.1 (382)	Manichaic Encratites, Saccophori, Hydroparastatae	supreme penalty and inexpiable punishment; remain subject to existing proprietary restrictions (<i>see "death penalty"; "intestability" below</i>)
	16.5.9.2 (382)	Those who celebrate Easter on a different day (Quartodecimans & Audani - equated with Manichaeans ^c)	supreme penalty and inexpiable punishment, and subject to proprietary restrictions applicable to Manichaeans (<i>see "death penalty"; "intestability" below</i>)
	^d 16.5.17 (389)	Eunomians	intestable - cannot bequeath or inherit under a will, legacy, fideicommissum or any other accessory instrument, and property left to them confiscated (<i>see "intestability" below</i>)
	16.5.18 (389)	Manichaeans	expulsion from Rome, under threat of a [capital] ^e punishment; intestable - their property will befall the state [as caducous property], ^f and nothing may be left to them or through them (<i>see "relegatio (simplex)"; "intestability" below</i>)
	16.5.25.1 (395)	Eunomians	excluded from imperial service; once again declared incapable of inheriting under, or of making a will ^g (<i>see "infamia"; "intestability" below</i>)

ADHERENCE TO HERESY (contd)	16.5.29 (395)	General	staff of imperial service: deprived of office and expelled from Constantinople (<i>see "infamia"; "relegatio (simplex)" below</i>)
	16.5.35 (399)	Manichaeans	an appropriate, very severe punishment (<i>by way of exception, judge given some discretion - see "factors affecting sentencing" below</i>)
	16.5.40.2-5 (407)	Manichaeans, Priscillianists & Phrygians [=Montanists]	deprived of property in favour of those intestate successors who are not heretics; incapable of accepting any donation or inheritance; cannot donate, buy, sell or contract in any way; wills invalid (<i>see "intestability" below</i>)
	16.5.42 (408)	General	excluded from service in the imperial palace (<i>see "infamia" below</i>)
	16.8.19 (409)	Caelicolists	subject to existing penalties applicable to heretics (<i>see "intestability"; "infamia" below</i>)
	16.5.48 (410)	General	excluded from entire imperial service, subject to the provision that this does not operate to exempt them from service on municipal senates or provincial governors' office staff ^h (<i>see "infamia" below</i>)
	16.5.49 (410)	Eunomians	cannot donate inter se; cannot inherit or bequeath under a will; prohibited gifts and caducous estates confiscated (<i>see "intestability" below</i>)
	16.5.52 pr (412)	Donatists	monetary fines, according to status: ⁱ Illustres 50 lb gold, Spectabiles 40 lb gold, members of the senatorial order 30 lb gold, Clarissimi 20 lb gold, those ranking in the civil priesthood 30 lb gold, chief decurions 20 lb gold, other decurions 5 lb gold, tradesmen 5 lb gold, plebeians 5 lb gold, Circumcellions 10 lb silver each (<i>see "fines" below</i>)
	16.5.52.3 (412)	Donatists	if persevere in schism, after imposition of fines provided for in 16.5.52 pr (above), entire estate will be confiscated (<i>see "confiscation of estate" below</i>)
	16.5.52.4 (412)	Donatists	coloni ⁱ to be frequently flogged by their masters, and slaves to be punished in their owners' discretion, until they repent (<i>see "corporal punishment" below</i>)
	16.5.54 pr (414)	Donatists	intestable, incapable of entering into any contract, and branded with perpetual infamy; separated from gatherings of honest men and public assemblies (<i>see "intestability"; "infamia" below</i>)
	16.5.54.7 (414)	Donatists	staff of governors: fine of 30 lb silver for first five convictions, thereafter castigation and exile (<i>see "fines"; "corporal punishment"; "relegatio" below</i>)

ADHERENCE TO HERESY (contd)	16.5.54.8 (414)	Donatists	slaves and coloni ⁱ to be most severely punished [= flogged] ^j by their owners/masters; coloni who persist in heresy despite flogging fined a third of their peculium (see "corporal punishment"; "confiscation of estate (portion)" below)
	16.5.58.4 (415)	Eunomians	confirmation of their inability to bequeath or to donate inter se, whether directly or indirectly, and of the provision that only their legitimate intestate heirs may succeed them (see "intestability" below)
	16.5.58.7 (415)	Eunomians	excluded from imperial service and provincial administration (see "intestability" below)
	16.5.60 (423)	General	confirmation of existing penalties
	16.5.61 (423)	Eunomians	exclusion from imperial service and provincial administration, except for service on the governors' office staff ^h (to clarify 16.5.58.7 above) (see "infamia" below)
	16.10.24 pr (423)	Manichaeans, Pepyzites [Montanists] and those who celebrate Easter on a different day [Novatians, Sabbatians & Protapaschites]	proscription of their estates and exile (see "confiscation of estate"; "relegatio"/"deportatio" ^l below)
	16.5.62 (425)	General	banished from the very sight of Rome (see "relegatio (simplex)" below)
		Eulalians ^k	banished to a solitary place of their own choice beyond a hundred miles from Rome, unless they return to communion with the Pope (see "relegatio (qualificata)" below)
	16.5.63 (425)	General	proscription (see "confiscation of estate" below)
	16.5.64 (425)	General	banished from the very sight of all cities (see "relegatio (simplex)" below)
16.5.65.3 (428)	General	excluded from all offices in the imperial service, except for posts on the provincial governors' office staff and as soldiers on active duty; deprived of the right to make reciprocal gifts and to make a will; confirmation of existing laws providing for exclusion from imperial service and lack of capacity to donate and testamentary capacity (see "infamia"; "intestability" below)	

CONGREGATION FOR RELIGIOUS PURPOSES	16.5.3 (372)	Manichaeans	segregated from the company of men as infamous and ignominious (<i>see "infamia" below</i>)
	16.5.9.2 (382)	Those who celebrate Easter on a different day [Quartodecimans & Audiani ^m - equated with Manichaeans] ^a	supreme penalty and inexorable punishment, and deprived of testamentary capacity (<i>see "death penalty"; "intestability" below</i>)
	16.7.3 pr (383)	Manichaeans	penalty prescribed by Valentinian I (<i>see 16.5.3 above</i>)
	^o 16.5.15 (388)	General	full force of existing penalties confirmed
	16.5.38 (405)	Manichaeans, Donatists	existing fine confirmed ^p
	16.6.4.3 (405)	Donatists, and other sects which rebaptize	presence at a rebaptism: deprived of testamentary capacity, capacity to accept a donation and capacity to contract (<i>see "intestability" below</i>)
	16.5.53 (412/398)	Jovinians [equated with Manichaeans] ^q	deported for life to separate, solitary islands (<i>see "deportatio" below</i>)
	16.5.54.3-4 (414)	Donatists	monetary fines, according to status: ⁱ Illustres and Spectabiles 200 lb silver for the first four convictions and the punishment (relating to confiscation of estate and being stripped of rank) thereafter to be determined by the imperial court, members of the senatorial order and those ranking in the civil priesthood 100 lb silver, chief decurions 50 lb silver, other decurions 10 lb silver (<i>see "fines" below</i>)
HOLDING OR ACQUIRING COMMUNAL PROPERTY (e.g. CHURCHES)	16.5.3 (372)	Manichaeans	place where doctrine is taught, confiscated (<i>see "confiscation of estate - specific asset" below</i>) ^r
	16.5.4 (376/378), 16.5.30 (396/402), 16.5.45 (408)	General	place of worship confiscated (<i>see "confiscation of estate - specific asset" below</i>) ^r
	16.5.8 (381)	Eunomians & Arians	place of worship confiscated (<i>see "confiscation of estate - specific asset" below</i>) ^r
	16.5.12 (383)	Eunomians, Arians, Macedonians & Apollinarians	establishing new places of worship: that property confiscated (<i>see "confiscation of estate - specific asset" below</i>) ^r
	16.5.43 (408/407)	Donatists, Montanists, Manichaeans & Caecicolists	places of worship confiscated, then to be given to Catholics (<i>see "confiscation of estate - specific asset" below</i>) ^r

HOLDING OR ACQUIRING COMMUNAL PROPERTY (contd)	16.5.54.1 (414)	Donatists & all other heretics	places of worship confiscated, then to be given to Catholics (<i>see "confiscation of estate - specific asset" below</i>) ^r
	16.5.57.2 (415)	Montanists	places of worship confiscated, then to be given to Catholics (<i>see "confiscation of estate - specific asset" below</i>) ^r
	16.5.59 (423)	Manichaeans, Montanists, Arians, Eunomians, Macedonians, Novatians & Sabbatians	punishment (<i>by way of exception, judge given a discretion - see "factors affecting sentencing" below</i>)
CELEBRATION OF EASTER ON A DIFFERENT DAY	16.5.9.2 (382)	General [Quartodecimans & Audiani ^m - equated with Manichaeans] ⁿ	supreme penalty and inextinguishable punishment, and deprived of testamentary capacity (<i>see "death penalty"; "intestability" below</i>)
	16.6.6.1 (413)	Protopaschites, [Sabbatians] ^s & Novatians	those responsible for calling the assembly: deportation and proscription (<i>see "deportatio"; "confiscation of estate" below</i>)
	16.10.24 pr (423)	General	proscription of estate and exile (<i>see "confiscation of estate"; "deportatio"/"relegatio"^l below</i>)
POSSESSION OF SECTARIAN WRITINGS	16.5.34.1 (398)	Eunomians & Montanists	books burned, and possessor to suffer capital punishment, on analogy with crime of magic (<i>see "capital punishments" below - judge has a discretion as to which of these to impose; see "factors affecting sentencing" below</i>)
	16.5.66.1-2 (435)	Nestorians	books burned, and possessor's estate confiscated (<i>see "confiscation of estate" below</i>)
REBAPTISM: - ACTIVE	16.6.4 pr (405)	Donatists & others	entire estate confiscated (<i>see "confiscation of estate" below</i>)
	16.6.4.3 (405)	Donatists & others	deprived of capacity to make a will, to acquire a donation and to contract (<i>see "intestability" below</i>)
	16.6.5 (405)	Donatists & Montanists	entire estate confiscated (<i>see "confiscation of estate" below</i>)
	16.6.6 pr (413)	General	existing penalty confirmed (<i>reference uncertain</i>) ^l
	16.5.58 pr (415)	Eunomians	cleric's house in which rebaptism occurs, confiscated (<i>see "confiscation of estate - specific asset" below</i>)

REBAPTISM: - ACTIVE (contd)	16.5.58.1 (415)	General	cleric's house in which rebaptism occurs, confiscated (see "confiscation of estate - specific asset" below)
	16.5.58.6 (415)	Eunomians	deportation (see "deportatio" below)
	16.5.65.4 (428)	General	if freeborn: fine of 10 lb gold and exile; and loss of capacity to make a will or to donate (see "fines"; "relegatio"/"deportatio" ^l and "intestability" below)
	- PASSIVE		
	16.6.6 pr (413)	General	existing penalty confirmed (reference uncertain) ^l
	16.5.58.2 (415)	Eunomians	exile by relegation [...which is like deportation - 16.5.58.3] (see "deportatio" below)
	16.5.65.4 (428)	General	if freeborn: fine of 10 lb gold and exile; and loss of capacity to make a will or to donate (see "fines"; "relegatio"/"deportatio" ^l and "intestability" below)
DISPUTING ABOUT FAITH, ASSERTING HETERODOXY	16.4.2 (388)	General	due penalty and proper punishment (by way of exception, punishment is left to judge's discretion - see "factors affecting sentencing" below)
	16.4.3 (392)	General	for perseverance after a first conviction: deportation (see "deportatio" below)
	16.5.45 (408)	General	proscription & sent into exile (see "confiscation of estate"; "relegatio"/"deportatio" ^l above)
ACTING AS A CLERIC	16.5.3 (372)	Manichaeans	teachers: ^u houses confiscated ^v (see "confiscation of estate - specific asset" below)
	16.7.3 pr (383)	Manichaeans	penalty provided for adherence, as well as heavier penalties determined by judge (see "infamia" below; for discretionary punishment, see "factors affecting sentencing" below)
	16.5.12 (383)	Eunomians, Arians, Macedonians, Apollinarians and all others	major clergy (=bishops, priests & deacons): ^u banished to their regions of origin, under prohibition of entering any cities or going to any other regions (see "relegatio (qualificata)" below)
	16.5.13 (384)	Eunomians, Arians, Macedonians & Apollinarians	major clergy: ^u banishment from Constantinople to live in other places, separate from the society of good people (see "relegatio (simplex)" below)
	16.5.21 (392)	General	all members of the clergy: ^u fined 10 lb gold (see "fines" below)
	16.5.30.1 (396/402)	General	all members of the clergy: expelled from Constantinople (see "relegatio (simplex)" below)

ACTING AS A CLERIC (contd)	16.5.31 (396)	Eunomians	authors and teachers: ^u exiled from all municipalities (<i>see "relegatio (simplex)" below</i>)
	16.5.32 (396)	Eunomians	authors and teachers: ^u exiled from all municipalities and segregated from human con- course (<i>see "relegatio (simplex)" below</i>)
	16.5.34 pr (398)	Eunomians & Montanists	all members of the clergy: exiled from all cities and municipalities, under pain of the supreme penalty ^w and confiscation of entire estate for re-entry; and penalty for holding or participating in an assembly while living in the countryside, deportation for life (<i>see "relegatio"; "death penalty"; "confiscation of estate"; deportatio" below</i>)
	16.5.52.5 (412)	Donatists	major clergy: ^u banished from Africa and each sent, under guard, to a separate place of exile (<i>see "relegatio (qualificata)" / "deportatio"^l below</i>)
	16.5.53 (412/398)	Jovinians [equated with Manichaeans] ^q	Jovinians: scourged with a lead-tipped whip and transported to the island of Boa; major clergy: ^u each deported for life to a solitary island chosen by the judge (<i>see "corporal punishment"; "deportatio" below</i>)
	16.6.7 (413)	Eunomians	major clergy ^u presiding over assemblies: proscription and forfeiture of estate (<i>see "confiscation of estate" below</i>)
	16.5.54.1 (414)	Donatists	major clergy: ^u entire estate confiscated, and exiled to separate islands and provinces (<i>see "confiscation of estate"; "relegatio (qualificata)" / "deportatio"^l below</i>)
	16.5.57 pr (415)	Montanists	a member of the major clergy ^u holding an assembly: deportation (<i>see "deportatio" below</i>)
	16.5.58.3 (415)	Eunomians	a member of the major clergy ^u holding an assembly: deportation (<i>see "deportatio" below</i>)
BEING A BISHOP	16.5.14 (388)	Apollinarians and all others	exile to secluded places, excluding all association with other people (<i>see "relegatio (qualificata)" / "deportatio"^l below</i>)
	16.5.36.2 (399)	Eunomians	for participation in an assembly: deportation and confiscation of entire estate (<i>see "deportatio"; "confiscation of estate" below</i>)
	16.6.7 (413)	Eunomians	proscription and forfeiture of entire estate (<i>see "confiscation of estate" below</i>)
	16.5.54.1 (414)	Donatists	confiscation of all property and solitary exile in a separate island or province (<i>see "confiscation of estate"; "relegatio (qualificata)" / "deportatio"^l below</i>)

BEING A BISHOP (contd)	16.5.57 pr (415)	Montanists	for conducting an assembly: deportation (<i>see "deportatio" below</i>)
ORDINATION AS A PRIEST	16.5.21 (392)	General	fine of 10 lb gold payable both by person ordaining another and by person being ordained (<i>see "fines" below</i>)
	16.5.57 pr (415)	Montanists	both person ordaining another and person being ordained, deported (<i>see "deportatio" below</i>)
	16.5.58.3 (415)	Eunomians	penalty of deportation imposed on both person ordaining another and person being ordained (<i>see "deportatio" below</i>)
	16.5.65.1 (428)	General	fine of 10 lb gold payable both by person ordaining another and by person being ordained - entire corpus of clergy or common offertories liable if transgressors cannot pay the fine (<i>see "fines" below</i>)
AGITATION BY DEPOSED BISHOPS	16.2.35 (400/405)	General	bishop banished beyond a hundred miles from the city where he had been the bishop, for life (<i>see "relegatio (simplex)" below</i>)
TUMULTUOUS ASSEMBLY	16.5.6.3 (381)	General	banished from cities (<i>see "relegatio (simplex)" below</i>)
	16.4.1 (386) [= 16.1.4]	General	to pay the penalty of high treason with their life and blood (<i>see "death penalty" below</i>)
	16.4.3 (392)	General	deportation (<i>see "deportatio" below</i>)
	16.4.4 (404)	General	members of imperial office staffs: deprived of office and punished with proscription of estate (<i>see "infamia"; "confiscation of estate" below</i>)
	16.4.5 pr (404)	General	participation by slave: slave to suffer a [corporal] ^x punishment (<i>see "corporal punishment" below</i>)
	16.4.5.1 (404)	General	guilds: ⁱ fined 50 lb gold for each guild-member participating (<i>by way of exception, judge has some discretion - see "factors affecting sentencing" below</i>)
	16.5.51 (410)	[Donatists] ^y	proscription and death penalty (<i>see "confiscation of estate"; "death penalty" below</i>)

TUMULTUOUS ASSEMBLY (contd)	16.5.56 (415/410)	[Donatists] ^y	proscription and death penalty (<i>see "confiscation of estate"; "death penalty" below</i>)
ATTACK ON CATHOLIC CHURCHES OR CLERGY	16.5.44 (398, 408)	General	just punishment (<i>framed in general terms, but capital punishment meant² - see "capital punishments", "factors affecting sentencing" below</i>)
	16.2.31 (398, 409)	General	capital punishment (<i>judge has a discretion to impose any capital punishment - see "capital punishments", "factors affecting sentencing" below</i>)
INDIRECT ASSISTANCE: - PERMITTING ASSEMBLY ON PROPERTY	16.5.8 (381)	Eunomians, Arians & all followers of Aetius	if owner permits presence of clergy or worship in his house: that house is confiscated (<i>see "confiscation of estate - specific asset" below</i>)
	16.5.21 (392)	General	- if landowner permits assembly by heretics on his property: that property confiscated (<i>see "confiscation of estate - specific asset" below</i>) - if tenant allows heretics to assemble on landowner's property without latter's knowledge: fined 10 lb [gold?] ^{aa} if freeborn, but beaten and deported [to the mines] ^{bb} if born of servile origin ^t (<i>see "fines"; "corporal punishment"; "condemnation to the mines" below</i>)
	16.10.13 (395)	General	- if procurator of imperial estate allows congregation on it: subject to existing penalties (<i>see 16.5.21 above</i>)
	16.5.34 pr (398)	Eunomians & Montanists	- if landowner permits heretics to assemble on his property: that property confiscated (<i>see "confiscation of estate - specific asset" below</i>) - if overseer ^t permits heretics to assemble on a landowner's property: supreme penalty (<i>see "death penalty" below</i>) - if owner of a house in a city permits an exiled cleric to perform the rites in his house, or becomes aware of services being held there and fails to eject the heretics and report the matter: that house confiscated (<i>see "confiscation of estate - specific asset" below</i>)
	16.5.36.1 (399)	Eunomians	- if owner permits worship on his land or in his house: that property confiscated (<i>see "confiscation of estate - specific asset" below</i>) - if overseer of a landed estate or steward of an urban house ^t allows worship there: he will suffer the supreme penalty (<i>see "death penalty" below</i>)

- PERMITTING ASSEMBLY ON PROPERTY (contd)	16.6.4.1 (405)	Donatists & other rebaptizing sects	- if owner permits assembly on his property: that property confiscated, and owner to suffer infamia (see "confiscation of estate - specific asset"; "infamia" below) - if tenant or overseer ⁱ permits assembly without owner's knowledge: tenant or overseer flogged with lead-tipped whip and sent into life-long exile (see "corporal punishment"; "relegatio"/"deportatio" ^l below)
	16.5.40.7 (407)	Manichaeans, Priscillianists & Phrygians [= Montanists]	- if owner is aware of congregation on his property and doesn't prevent it: that property confiscated (see "confiscation of estate - specific asset" below) - if overseer or steward ⁱ permits congregation without owner's knowledge: flogged with lead-tipped whip and condemned to work in the mines for life (see "corporal punishment"; "condemnation to the mines - ad opus metalli" below) - if tenant ⁱ permits congregation without owner's knowledge: deported [if fairly rich; if not, condemnation to the mines or death penalty] ^{cc} (see "deportatio"; "condemnation to the mines"; "death penalty") below
	16.6.7 (413)	Eunomians	if owner in whose house or field heretics congregate, is aware of this: punished with proscription and forfeiture of estate (see "confiscation of estate" below)
	16.5.54.5 (414)	General	tenants of imperial estates and emphyteucaries of state land, ⁱ who permit assembly on the property concerned: fined amount of [annual] rental payable (see "fines" below)
	16.5.57.1 (415)	Montanists	- if owner allows heretics to congregate on his property: that property confiscated (see "confiscation of estate - specific asset" below) - if, without owner's knowledge, overseer ⁱ allows heretics to congregate on the property: overseer severely punished and sent into exile [or condemned to the mines, if very poor] ^{dd} (see "relegatio"/"deportatio" ^l ; ["condemnation to the mines"] below)
	16.5.58.5 (415)	Eunomians	if owner permits congregation on his property: that property confiscated (see "confiscation of estate - specific asset" below)
	16.5.65.3 (428)	General	- if overseer permits assembly on property without landowner's knowledge: fined 10 lb gold or exiled if freeborn, but flogged and condemned to the mines, if born of servile origin ⁱ (see "fines" or "relegatio"/"condemnatio"; "corporal punishment"; "condemnation to the mines - ad metallum" below)
- HARBOUR- ING FUGITIVE HERETICS	16.5.35 (399)	Manichaeans	those who hide in their homes Manichaeans facing prosecution: most severely punished (by way of exception, judge given some discretion, provided punishment is very severe)

- HARBOURING FUGITIVE HERETICS (contd)	16.5.52.1 (412)	Donatists	tenants or overseers of landholdings, including overseers of imperial estates ⁱ who fail to deliver up Donatists resident there, when required to do so by officials: subject to punishment [viz a monetary fine, the amount of which depends on their rank] ^{ee} (see "fines" below)
	16.5.54.2 (414)	General	person who harbours clergy fleeing from a threatened punishment of exile to a separate island or province, as provided for in 16.5.54.1: estate confiscated, and similar punishment of exile imposed (see "relegatio"/"deportatio" above)
- PERSON WHO FAILS TO RESTRAIN THOSE IN HIS CONTROL	16.4.5 pr (404)	General	if slave participates in a tumultuous assembly: owner fined 3 lb gold for each such slave (see "fines" below)
	16.5.52.4 (412)	Donatists	if master fails to adequately punish a slave or a colonus ⁱ adhering to the sect: fined according to his status - Illustres 50 lb gold, Spectabiles 40 lb gold, masters of senatorial rank 30 lb gold, Clarissimi 20 lb gold, masters of the rank of civil priest 30 lb gold, chief decurions 20 lb gold, decurions 5 lb gold, tradesmen 5 lb gold, plebeians 5 lb gold (see "fines" below)
	16.5.54.6 (414)	General	landowner who fails to prevent a tenant ⁱ who had allowed heretics to congregate on the property, from doing so again or alternatively fails to terminate the lease: fined amount of rental received [annually] from tenant (see "fines" below)
- OFFICIALS WHO CONNIVE/ FAIL TO IMPLEMENT DECREES FULLY	16.5.12 (383)	General	office staff of provincial governors and chief decurions who are negligent in preventing heretics from assembling: punished (by way of exception, judge given a discretion - see "factors affecting punishment" below)
	16.10.13 (395)	General	- governors who fail to punish heretics attempting to congregate: subject to existing fines applicable to conniving governors, as well as those applicable to clergy (10 lb gold); see "fines" below - office staff who disregard laws against heretical congregations: capital punishment (see "capital punishment" below)
	16.5.29 (395)	General	if connive at heretic's membership in imperial service: deprived of office and expelled from Constantinople (see "infamia"; "relegatio (simplex)" below)
	16.5.30.2 (396/ 402)	General	office staff of urban prefect who permit the congregation of heretics: fined 100 lb gold (see "fines" below)
	16.5.40.8 (407)	Manichaeans, Priscillianists & Phrygians [=Montanists]	- if governor defers trial of suspect, or neglects to implement punishment after suspect's conviction: fined 20 lb gold (see "fines" below) - if municipal defenders, ⁱ chief decurions ⁱ and/or governor's office staff fail fully to assist governor against heretics: fined 10 lb gold (see "fines" below)

<p>- OFFICIALS WHO CONNIVE/ FAIL TO IMPLEMENT DECREES FULLY (contd)</p>	16.5.46 (409)	General	<p>- if governor fails to execute anti-heretical decrees: stripped of rank, and subject to a severe punishment by the imperial court (<i>administrative action, and punishment in discretion of imperial court</i>)</p> <p>- if governor's office staff fail to promote latter's acting against heretics: the three chief officials punished, and the office staff fined 20 lb gold (<i>discretionary punishment; and see "fines" below</i>)</p> <p>- if members of a municipal senate¹ fail to denounce heretics within their area of jurisdiction: their estates confiscated, and they deported (<i>see "confiscation of estate"; "deportatio" below</i>)</p>
	16.5.50 (410)	Eunomians	<p>officials who remit confiscated property to a heretic: punishment (<i>by way of exception, judge granted a discretion - see "factors affecting punishment" below</i>)</p>
	16.5.65.3 (428)	General	<p>governors and municipal officials¹ who fail to combat worship by heretics: fined 20 lb gold each (<i>see "fines" below</i>)</p>
	16.5.65.5 (428)	General	<p>judge who imposes a lesser sentence than the one prescribed, or who fails to impose any punishment at all: will himself suffer the penalty remitted</p>
- ANY FORM	16.5.63 (425)	General	<p>proscription (<i>see "confiscation of estate" below</i>)</p>

^a CTh 16.5.1 (326), which provides that heretics and schismatics were not only to be excluded from the privileges granted the Christians but were moreover to be subject to the various compulsory public duties, has not been included here, since the latter part of the constitution relates to administrative sanctions, not to criminal penalties - see Th Mommsen *Römisches Strafrecht* (1899 repr 1955) 603 n 1.

^b Cf p 31 above.

^c Cf p 31, 31 n 55 above.

^d repealed by CTh 16.5.23 (394)

^e Cf Iacobus Gothofredus *Codex Theodosianus cum Perpetuis Commentariis* vol 6(1) (ed Marvilius-Ritter) (1743 repr 1975) 150.

^f Cf id 150.

^g deprivation of testamentary capacity revoked by CTh 16.5.27 (395) & 16.5.36 (399)

^h Cf Wolfgang Kunkel *An Introduction to Roman Legal and Constitutional History* (tr J M Kelly) 2 ed (1973 repr 1975) 136, 138 on the reasons for non-exemption from these offices.

ⁱ See Gerhard Dulckeit, Fritz Schwarz & Wolfgang Waldstein *Römische Rechtsgeschichte* 6 ed (1975) para 38 pp 246-249; Francesco de Martino *Storia della Costituzione Romana* vol 5 (1967) 53-90 on the social order during the post-Classical era.

^j Cf Gothofredus op cit 193.

^k Cf Gothofredus op cit 204.

^l The original text has "exilium", a term which lacked a specific, technical meaning, and could denote any form of banishment - cf Mommsen op cit 966-967.

^m Cf Gothofredus 138-139.

ⁿ Cf p 31, 31 n 55 above.

^o CTh 16.5.11, which provides that all persons could expel heretics from their towns, has not been included here, since it provided for self-help measures, not for a criminal penalty.

^p Gothofredus op cit 175 suggests that this fine amounted to 10 lb gold.

^q Cf p 20 n 9 above.

^r See pp 58-59 above for the argument that confiscation of church property represented a confiscation of the individual members' shares therein.

^s Cf Gothofredus op cit 222.

^t Cf Clyde Pharr (tr) *The Theodosian Code and Novels and the Sirmondian Constitutions* (1952 repr 1969) 465 n 17; Gothofredus op cit 222.

^u The translation of the names of the various kinds of clergy mentioned in the Theodosian Code, is based on the description of the degrees of clergy during the fourth and fifth century given in Jean Gaudemet *L'Eglise dans l'Empire Romain (IV^e - V^e Siècles)* (1958) 100 et seq.

^v Cf Gothofredus op cit p 126 on the interpretation of this constitution.

^w Gothofredus op cit 168 interprets this as denoting deportation, on the grounds that this punishment is prescribed in CTh 16.5.36; however, since the latter constitution concerns bishops, and concerns their participation in any assembly wheresoever held, it is not congruent with the above constitution, and cannot be used to interpret it.

^x Cf Gothofredus op cit 114.

^y Although the constitution is framed in general terms, it in fact refers to the Donatists - cf Gothofredus op cit 190.

^z Cf id 184.

^{aa} Cf Pharr op cit 454 n 48.

^{bb} Cf Gothofredus op cit 154.

^{cc} Cf id 179.

^{dd} Cf id 179.

^{ee} as emerges from studying this provision in the context of the entire constitution

2. DISCUSSION OF STIPULATED PUNISHMENTS

Post-Classical criminal law knew two broad categories of punishments.² First, there was that of the capital punishments. This, the graver category, comprised those punishments which affected the condemned criminal's caput, or legal status, either by reducing him to the status of a slave (and, as an incidence of this, depriving him of his Roman citizenship and of his civil rights), or by leaving him his freedom but depriving him of his Roman citizenship (and, as an incidence of this, depriving him of all his civil rights, including his property and family rights).³ These punishments were termed the capital punishments. Secondly, there was the category of the non-capital punishments, sometimes termed the poenae existimationis. This was, in principle, the less severe category.

2.1. Capital Punishments

2.1.1. Death penalty

The death penalty, generally termed *summum supplicium* or *ultimum supplicium*,⁴ was the most severe of all the punishments known to Roman criminal law.⁵

There were four general forms of execution which the sentencing judge could impose, and which were thus available in the few cases where the death penalty was prescribed for a crime of heresy.⁶ The most lenient form of execution was decapitation by the sword (*decollatio/capitis amputatio*). The remaining three forms of execution were the aggravated forms. The first of these was garotting (*ad furcam/patibulum damnatio*); despite this being a relatively quick and painless form of execution when compared with the two other methods of execution in this category, it was regarded as an aggravated form of the death penalty, inasmuch as it had been introduced by Constantine the Great to replace (for religious reasons) death by crucifixion, a slow and agonizing form of execution.⁷ The second of the aggravated forms of execution was death at the stake (*vivi crematio*). This entailed the heretic's being stripped naked and tied or nailed to a wooden stake, which was then planted upright amidst a pile of faggots; the latter was then set on fire. The torment was sometimes

² Cf Th Mommsen *Römisches Strafrecht* (1899 repr 1955) 907-909.

³ Cf Max Kaser *Das römische Privatrecht* vol 2 2 ed (1975) para 206 I 3, 206 II p 113 on *capitis deminutio*.

⁴ Mommsen op cit 908 n 1.

⁵ The following account of the death penalty is based on Prof Contardo Ferrini *Diritto Penale Romano - Esposizione Storica e Dottrinale* (1976) para 111 p 147-para 115 p 150; Mommsen op cit 911 et seq, especially 921, 923-929.

⁶ The factors taken into account by the sentencing judge in determining the appropriate form of execution, will be dealt with at pp 146-148 below.

⁷ Contra Biondo Biondi *Il Diritto Romano Cristiano* vol 3 (1954) para 510 p 456.

prolonged by placing the faggots some distance away from the stake, instead of planting the stake amidst them. The foregoing two forms of execution were the regular forms of the aggravated death penalty. In addition, it was possible to convert the punishment of heretics who had been condemned to one of these two forms of execution, to the third of the aggravated death penalties, viz execution at the public games. The latter punishment was not a regular form of execution, since it depended on the fortuitous circumstance of games being held at a given time; the organizers of the games would requisition the judges for criminals as and when victims were required. If their request was granted, the organizers could dispose of the condemned criminals at their discretion, as long as they were put to death in some way or another. For example, they could be used as extras to be killed during a theatrical performance, or be executed to fill in intervals in the programme; the most common form of execution entailed their being cast (usually completely unarmed and defenceless) to wild beasts, such as lions and bears, to be mauled and torn apart. Any condemned criminals who were only mutilated, and not killed, were either exposed again to other animals, or were put to the sword in the arena.

The death penalty became executable immediately upon the passing of the sentence if no appeal was lodged; there was no general mandatory waiting period which had to elapse before the execution could be carried out. The only restriction on this was imposed by CTh 9.40.13, in terms of which at least thirty days had to pass before a death sentence pronounced by the imperial court, acting in the first instance, could be executed; however, this limitation was not absolute, since the emperor could - and, in practice, often did - override this restriction.⁸ A maximum period within which the execution had to be carried into effect, existed as regards the provincial governors, who were required to have all death sentences executed within a year of their having been pronounced.⁹ A similar provision did not bind the more superior judicial officers, who could therefore delay the execution indefinitely, thus to all intents and purposes "converting" the death penalty to life imprisonment.¹⁰

As a rule, condemned criminals (both men and women) were executed in public. The execution often took place at the locality where the crime had been committed, in order to act as a deterrent to others in the area.

⁸ Mommsen op cit 912. If one accepts Mommsen's argument *ibid* n 3 that CTh 9.40.13 was issued by Gratian in 382 AD, and not by Theodosius the Great in repentance after the Thessalonian massacre of 390 AD, one may take the Thessalonian incident as one example of the emperors' not respecting the restriction under discussion.

⁹ Cf Mommsen op cit 913.

¹⁰ Cf pp 140-141 below.

Certain subsidiary penalties were automatically applicable to all persons who had been condemned to death. First, the passing of the death sentence had the immediate effect that the condemned criminal lost his freedom, and was reduced to the status of a slave of the state.¹¹ A constitution¹² issued by Constantine the Great in 333 AD did, it is true, only state loss of citizenship as a consequence of the pronouncement of the death penalty, instead of the more severe consequence of public enslavement; but it is not clear whether this constitution was of general application during the era concerned and thus altered the subsidiary consequences of the death penalty, or whether it was of special or temporary application only. However, this issue is not really of practical significance, as the most important incident of public enslavement, viz confiscation of the convict's estate, was now specifically regulated by legislation. Although confiscation was, in most instances, expressly prescribed alongside the death penalty,¹³ the estate was normally conceded to the condemned criminal's family. An exception to the foregoing existed only as regards those convicted of *maiestas* (as heretics who had been condemned of instigating sedition, could be); their entire estate was always confiscated.¹⁴ The second subsidiary penalty applicable to men (but not women) condemned to one of the aggravated death penalties, was flagellation before their execution;¹⁵ in addition, condemned slaves were often tortured while awaiting execution.¹⁶ Thirdly, it was possible for the authorities to withhold the convict's corpse from burial after the execution; but, in post-Classical practice, this only occurred in cases where execution had followed a condemnation of *perduellio* (high treason),¹⁷ so that this subsidiary punishment would not have applied to heretics.

2.1.2. Enslavement as a public slave

The most severe form of capital punishment after the death penalty, involved being sentenced to forced labour as a slave in certain public industries having a very high mortality rate. There were two forms of this, viz condemnation to the mines and condemnation to public gladiatorial shows.

¹¹ Mommsen op cit 947.

¹² CTh 9.32.1.

¹³ Cf i a CTh 9.42 *De bonis proscriptorum seu damnatorum* passim, 16.5.56.

¹⁴ See CTh 9.42.2 (356) (repealed by CTh 9.42.4 (358)), 9.42.6 (364), 9.42.23 (421). CTh 9.42.2 had also provided that the estates of those condemned of magic would not be granted to the condemned person's family; but this provision was not re-enacted.

¹⁵ Ferrini op cit para 115 p 150; Mommsen op cit 938.

¹⁶ Mommsen op cit 987 - 989.

¹⁷ Ibid.

(a) *Condemnation to the mines*

Condemnation to the mines¹⁸ was regarded as the most severe form of punishment after the death penalty.¹⁹ In practice, it often amounted to a deferred death sentence, since the conditions under which heretics condemned to the mines lived were such that most persons succumbed.

In a sense, condemnation to the mines was perceived as a mitigation of the death sentence; but because of this, those upon whom this sentence was imposed were regarded as deserving of extremely harsh treatment. For this reason, they were branded as public slaves,²⁰ were further distinguished by having half their heads shaven, and were apparently (despite the protests of the Christian clergy)²¹ physically mutilated before being delivered to the mines.²² Once there, they were treated with the utmost severity. Those whose sentence had been delivered in the formula "condemnatio ad metallum" ("condemnation to a mine") were fettered with heavier chains and were treated even more harshly than those who had been condemned "ad opus metalli" ("to mine labour").

In principle, condemnation to the mines was imposed for life. Possibly, the Diocletianic measure that those too ill or too weak to be productive were to be put to the sword, may by now have been replaced with a provision whereby such convicts could be returned to their families, to be maintained by the latter. However, even if this were the case, it would not have altered the essentially perpetual character of the sentence, since such returned convicts would have continued in the condition of state slaves.

The subsidiary punishments automatically accompanying the penalty of condemnation to the mines were enslavement,²³ and, as an incidence of this, loss of citizenship and of all civil-law rights and capacities; confiscation of one's estate,²⁴ subject to the possibility, as mentioned above, of its being granted as a concession to one's descendants;²⁵ probably mutilation;²⁶ flagellation for men; and confinement for the duration of the sentence.²⁷

¹⁸ The following account, is based on Ferrini op cit para 119 p 153; Mommsen op cit 949-951.

¹⁹ Cf D 48.19.28 pr: "Proxima morti poena metalli coercitio".

²⁰ According to the provisions of CTh 9.40.2.

²¹ Cf Augustine's plea with the civil authorities on behalf of certain Circumcellions and Donatists found guilty of having murdered one Catholic priest and of having assaulted and mutilated another: "[N]on quo scelestis hominibus licentiam facinorum prohibeamus auferri, sed hoc magis sufficere uolumus, ut uiui et nulla corporis parte truncati uel ab inquietudine insana ad sanitas otium legum cohercitione dirigantur uel a malignis operibus alicui utili operi deputentur" (Aug *Ep* 133.1).

²² Cf Mommsen op cit 982.

²³ Id 947, 950.

²⁴ Id 948.

²⁵ See p 135 above.

²⁶ See text at p 136 n 22 above.

²⁷ Mommsen op cit 963.

The penalty for attempting to escape from the mines, was the aggravation of the punishment to *damnatio ad metallum*, in the case of those condemned *ad opus metalli*; and death, in the case of those condemned *ad metallum*.

(b) Condemnation to gladiatorial combat

The Classical punishment of condemnation to gladiatorial combat (*ad ludum*) was only abolished in 399 AD.²⁸ Before this, some restrictions had been placed on the imposition of this punishment, the most notable being Valentinian I's decree that no Christians could be sentenced *ad ludum*.²⁹ However, since the privileges accorded the Christians benefited only those persons regarded as Christians by the emperors,³⁰ it follows that Valentinian I's provision would not have protected those belonging to heretical or schismatic sects. Therefore, until 399 AD those who had been found guilty of a charge of heresy for which a capital punishment could be imposed, could be condemned to gladiatorial combat.

Condemnation to gladiatorial combat was regarded as corresponding in severity to condemnation *ad opus metalli*.

Heretics sentenced *ad ludum* were delivered up to either those in charge of a public circus, or a school training gladiators for future public shows. Here, they were required to subject themselves to all disciplinary measures and to master the gladiatorial art. Later, when actual combats were staged, they were required to fight to the death.

Although this form of punishment was in principle imposed for life, the practice was that convicts who had fought successfully for three years could be released from the duty to engage in further combat, while those who fought successfully for five years could regain their freedom.

The subsidiary punishments which automatically accompanied a sentence *ad ludum* were enslavement,³¹ and incidentally loss of citizenship and of all civil-law rights and capacities; confiscation of one's estate,³² subject to the provisions of the concession of the estate to direct descendants mentioned above;³³ and captivity.³⁴

²⁸ The following account is based on Ferrini op cit para 121 pp 154-155; Mommsen op cit 953-955.

²⁹ CTh 9.40.8. Cf Biondi op cit vol 3 para 510 p 455.

³⁰ Cf pp 25-26 above.

³¹ Mommsen op cit 947.

³² Id 948.

³³ See p 135 above.

³⁴ Mommsen op cit 963.

The punishment for refusing to perform gladiatorial training or combat, or for attempting to escape was the aggravation of the convict's sentence to a condemnation ad metallum.³⁵

2.1.3. Forced labour in the public works for life

Condemnation to forced labour in one of the public works (*opus publicum*) for life,³⁶ was regarded as a less severe form of capital punishment than the foregoing category, for two reasons. First, this sentence did not entail enslavement as a public slave, but only loss of Roman citizenship, a less serious form of *capitis deminutio*. Secondly, heretics on whom this sentence was imposed were not put to work in a high-mortality industry, as in the previous category of capital punishments, but were employed in merely ignoble, debasing work, such as sewerage disposal, roadbuilding and (during the post-Classical era) labour in the public bakeries,³⁷ in the imperial weaving establishments,³⁸ or in one of the other compulsory guild industries.

The subsidiary punishments which automatically accompanied a sentence for life ad *opus publicum*, were loss of citizenship,³⁹ and incidentally of all civil-law rights and capacities; and captivity. In addition, the sentencing judge usually ordered the flagellation of the condemned criminal.

The penalty for attempting to escape, was the aggravation of the sentence to that of condemnation to the mines.⁴⁰

2.1.4. *Deportatio*

Deportatio was regarded as the least severe form of capital punishment. It consisted of the condemned heretic's retaining (until 428 AD)⁴¹ his free status but being deprived of his Roman citizenship,⁴² and being banished for life to a specific locality (usually, a small island or a desert oasis), which was normally determined by the emperor (or, in applicable cases,

³⁵ Cf id 949 n 1.

³⁶ The following account is based on Ferrini op cit para 120 p 154; Mommsen op cit 952-953.

³⁷ CTh 9.40.3, 5, 6; cf also CTh 9.40.7.9.

³⁸ Cf CTh 10.20.9.

³⁹ Mommsen op cit 958-959. Apparently, confiscation of the estate did not ensue - cf id 1009.

⁴⁰ Id 949 n 1.

⁴¹ Cf Kaser op cit vol 2 p 123 n 29.

⁴² Cf Mommsen op cit 974 - 975.

the praefectus praetorio)^{43,44} (The provisions of CTh 16.5.53, in terms of which the praefectus urbi was authorised to determine the place of exile of the adherents of Jovinian, represent an exception.) The deported heretic was never again allowed to leave his place of exile for whatever reason, unless the emperor, as an act of grace, permitted the sentence to be interrupted for a specified period (*commeatus*).⁴⁵

The subsidiary punishments to which a deported heretic was automatically subject as soon as the sentence of *deportatio* had been confirmed,⁴⁶ were loss of Roman citizenship,⁴⁷ and incidentally of all civil-law rights and capacities; and, in principle, the confiscation of his estate,⁴⁸ although this was in practice mitigated by, first, the fact that it was once again the norm to concede all or part of the estate to his family,⁴⁹ and, secondly, by the custom of granting the deportee a subsistence allowance.⁵⁰

The penalty for breach of the sentence of *deportatio* was death.⁵¹

2.2. Non-Capital Punishments

2.2.1. Relegatio

The penalty of *relegatio* related to banishment without loss of citizenship, i e without any capital implications.⁵²

There were two forms of *relegatio*, viz *relegatio simplex* and *relegatio qualificata*. The former entailed banishment *from* a specific locality, i e exclusion from a certain place (in the case of heresy, usually from urban areas); while the latter, the more severe form, entailed banishment *to* a specific locality (whether a given region, an island, or an oasis).⁵³ A

⁴³ Cf pp 76, 77 above.

⁴⁴ See H Heumann & E Seckel *Handlexikon zu den Quellen des römischen Rechts* 10 ed (1958) s v "Deportare", "Relegare" 1; cf Mommsen op cit 975-976.

⁴⁵ Cf Ferrini op cit para 124 p 157; Mommsen op cit 976.

⁴⁶ Cf D 32.1.3, D 48.19.2.1. Contra Mommsen op cit 976.

⁴⁷ See reference cited at p 138 n 42 above.

⁴⁸ Ferrini op cit para 124 p 157; Mommsen op cit 967, 969. Cf also Heumann-Seckel s v "Relegare" 1.

⁴⁹ Cf Mommsen op cit 1010 read with 1006. See also CTh 9.42.8 (380), which provided that the deported person and his family could retain half the estate; CTh 9.42 passim. Procopius (3.7.22-25 in H B Dewing (tr) *History of the Wars* vol 2 (1916)) states that the heretic Basiliscus, who had been exiled to Cappadocia (together with his wife and children), was deprived of all food and was starved to death. Although this occurred in approximately 475 AD, under the emperor Zeno (and therefore at a slightly later date than the period now under consideration), it does illustrate that there could be some divergence between the theory outlined above, and actual practice; however, such practical divergences would have constituted malpractices, and do not affect the *general* validity of the above description.

⁵⁰ Mommsen op cit 975, 1010.

⁵¹ Ferrini op cit para 124 p 156-157, 157; Mommsen op cit 936, 967, 977.

⁵² Mommsen op cit 977.

⁵³ Ferrini op cit para 124 p 156; Heumann-Seckel s v "Relegare" 1.

sectarian subject to a sentence of *relegatio* was not allowed to either enter the prohibited area, or to leave the assigned locality, as the case may have been, without a special pass from the emperor.⁵⁴ Both *relegatio simplex* and *relegatio qualificata* could be imposed for life, or for a certain period of time only; if the period of exile was not specified in the sentence, the sentence was regarded as being applicable for life.⁵⁵

The subsidiary punishment of the confiscation of a mathematical share of the exile's estate automatically attached to a sentence of *relegatio* for life (regardless of whether this took the form of *relegatio simplex* or *relegatio qualificata*).⁵⁶ In addition, the sentencing judge could, at his discretion, order the castigation of those sentenced to any form of *relegatio*.⁵⁷

A breach of the conditions of exile was punished by the aggravation of the sentence by one degree: *relegatio* for a fixed term was aggravated to *relegatio* for life, while *relegatio simplex* was aggravated to *relegatio qualificata*, and *relegatio qualificata* to *deportatio*.⁵⁸

2.2.2. Forced labour in the public works for a fixed term

This sentence entailed being put to work in one of the debasing public industries such as sewerage disposal, mentioned above,⁵⁹ for a fixed period of years.⁶⁰

A subsidiary punishment automatically accompanying this penalty, was captivity for the duration of the sentence.⁶¹

The penalty for attempting to evade this punishment was aggravation of this sentence to the capital sentence of condemnation to the public works for life.⁶²

2.2.3. Incarceration

Strictly speaking, Roman criminal law never recognized incarceration as a form of punishment;⁶³ according to Roman perceptions, the sole function of a prison was temporarily to secure persons awaiting trial, or persons awaiting the execution of one of the

⁵⁴ Ferrini op cit para 124 p 157.

⁵⁵ Cf Mommsen op cit 976.

⁵⁶ Id 977, 1010.

⁵⁷ Id 969, 984.

⁵⁸ Ferrini op cit para 124 p 157; Mommsen op cit 977.

⁵⁹ See p 138 above.

⁶⁰ See, generally, Ferrini op cit para 120 p 154; Mommsen op cit 953.

⁶¹ Cf Mommsen op cit 963.

⁶² Id 949 n 1.

⁶³ Ferrini op cit para 123 p 155; Mommsen op cit 963.

more severe sentences.⁶⁴ Nevertheless, since the jurisdictional officers were not legally required to ensure that sentences which they had imposed, were executed within a prescribed maximum period (the only exception being that provincial governors were required to ensure that a death sentence was executed within a year of its having been pronounced),⁶⁵ it was possible for them never to hand over a convicted criminal for execution of the sentence. In practice, the jurisdictional officers could therefore substitute incarceration of a heretic for another sentence,⁶⁶ for the period for which the latter had been imposed⁶⁷ (or, in the case of a commutation of the death sentence, for life).

It should be noted that Constantine the Great's celebrated prison reforms⁶⁸ related only to the conditions under which prisoners awaiting trial were detained; they did not affect prisoners who had already been convicted.⁶⁹ The conditions under which convicts were imprisoned, continued to be appalling: they were kept in fetters, were confined in narrow, windowless cells, and were never permitted into the open air,⁷⁰ and were furthermore physically maltreated by the prison guards.⁷¹

The subsidiary personal and patrimonial punishments applicable to the original sentence for which incarceration had been substituted, remained applicable to imprisoned heretics.

In contradistinction to the foregoing, the incarceration of slaves was a standard punishment where they had been convicted of a crime for which the appropriate penalty was being sentenced to the public works, since the latter would not have constituted any punishment for those already in a state of servitude. Instead, at the discretion of the sentencing judge, such slaves were usually flagellated, and then delivered to their owners for compulsory imprisonment in the latter's private slave prisons. The period for which a slave found guilty

⁶⁴ Cf D 48.19.8.9.

⁶⁵ Cf Mommsen op cit 913; p 134 above.

⁶⁶ Cf Mommsen op cit 961-962. The statement of Ferrini op cit para 123 p 156 that incarceration was sometimes substituted for the death sentence, is too narrow; it was also substituted for other severe punishments, as is clear from CTh 9.40.22 & 23, which relate to the incarceration of persons condemned to relegatio for a fixed term.

⁶⁷ Cf CTh 9.40.22, 23.

⁶⁸ Cf p 93 above.

⁶⁹ I deduce this from the use of the terms "accusatio" and "reus" in CTh 9.3.1, 9.3.4, 9.3.6 and 9.3.7; from the wording of CTh 9.3.1 pr "Nec vero sedis intimae tenebras pati debet [reus] inclusus ... ne poenis carceris perimatur, quod innocentibus miserum, noxiis non satis severum esse cognoscitur"; and from the description in CTh 9.40.22 of the conditions under which certain persons condemned to relegatio were incarcerated, which are clearly not in accord with Constantine's prison provisions. Contra Biondi op cit vol 3 para 505 p 439, who fails to note that Constantine's reforms did not extend to the imprisonment of convicted criminals; et contra Mommsen op cit 304, who accepts that, while the reforming constitutions only refer to prisoners awaiting trial, the reforms would also have benefited convicted prisoners, since the two categories of prisoners seem not to have been kept separate - the contents of CTh 9.40.22 show that the latter assumption is incorrect.

⁷⁰ Cf CTh 9.40.22.

⁷¹ CTh 9.3.1, 6 & 7, which contained provisions aimed at curbing ill-treatment by the prison guards, were framed with reference to prisoners awaiting trial only.

of heresy had to be incarcerated, depended on the type of sentence which would otherwise have been imposed on him: incarceration would be for life, where the slave would otherwise have been sentenced to the public works for life (discussed above), and for a fixed term, where the sentence would otherwise have been a condemnation to the public works for a given period (discussed above). The incarceration of the slave by his master in no way implied a mitigation of the sentence which was normally applicable, since the conditions in the private slave prisons were usually atrocious. If an owner refused to accept a convicted slave for incarceration, this constituted an abandonment of his ownership of the slave. The slave was then put up for sale, subject to the condition of execution of the sentence by the buyer; or, if nobody wished to buy him (as would probably have been the case, if he was to be incarcerated for a lengthy period, or for life), he was condemned to the public works for life.⁷²

2.2.4. Confiscation of estate

Although the confiscation of a convicted criminal's estate (or a share thereof) was, as a rule, only encountered as a subsidiary punishment, which was accessory to the capital punishments and to *relegatio* for life, it also occasionally figured in the Theodosian Code as an independent, principal punishment for certain crimes.⁷³ To cite but two examples found in the context of heresy: certain provisions in the Theodosian Code provided for the confiscation of the entire estates of those who administered rebaptism;⁷⁴ and for the confiscation of a third of the personal estates of *coloni* who persevered in their adherence to Donatism, despite having been flogged by their masters.⁷⁵ The latter provision is, in this context, the only instance involving partial confiscation - all other cases relate to the confiscation of the proscribed person's entire estate. Nevertheless, in interpreting these latter provisions it must be borne in mind that, in practice, a certain portion of the proscribed estate was conceded to the proscribed person's close relatives.⁷⁶ Indeed, Honorius provided that the entire forfeited estate would accrue to those who would have been the proscribed person's intestate heirs - provided, of course, that such relatives were not heretics themselves.⁷⁷

⁷² On the punishment of incarceration for slaves, see, generally, Ferrini *op cit* para 123 p 156; Mommsen *op cit* 962-963.

⁷³ Contra Mommsen *op cit* 1006, who states that the criminal law knew confiscation of the estate, or part thereof, as a subsidiary punishment only, and that it never figured as an independent punishment.

⁷⁴ CTh 16.6.4 pr, 16.6.5.

⁷⁵ CTh 16.5.54.8.

⁷⁶ See CTh 9.42 *passim*.

⁷⁷ CTh 16.6.4 pr, 16.5.40.2.

Confiscation was a form of, and followed the principles of universal succession.⁷⁸ Strictly speaking, this should have precluded the possibility of the confiscation of particular objects in an estate. However, in post-Classical development the distinction between universal succession and succession to a specific object had become blurred;⁷⁹ one therefore finds provisions relating to the confiscation of specific assets, such as the property on which a landowner had permitted heretics to congregate,⁸⁰ or the houses in which assemblies had been held.⁸¹

2.2.5. Mutilation

In the post-Classical period (unlike earlier periods), convicted criminals were frequently subjected to mutilation, e.g. the cutting off of their noses, ears or a limb.⁸² However, this was prescribed as an independent punishment in a few exceptional cases only;⁸³ it was never so prescribed for heresy. Nevertheless, a sentencing judge had a discretion to aggravate the legally prescribed punishment by ordering mutilation as an additional, subsidiary punishment.⁸⁴

2.2.6. Corporal punishment

Although corporal punishment⁸⁵ was usually administered as an accessory punishment in cases of condemnation to a capital punishment (excluding death by decapitation)⁸⁶ and, at the discretion of the sentencing judge, to *relegatio*,⁸⁷ it could also be imposed as an independent, principal punishment. This usually took place in cases involving less serious crimes committed by slaves, or by those who were too poor to afford any fines (discussed immediately below).

Corporal punishment could be administered either with a lash (*flagella*), or with a truncheon (*fustis*). The former instrument was generally used in punishing slaves, and the latter in punishing freemen.

⁷⁸ Mommsen op cit 1005.

⁷⁹ Cf Kaser op cit vol 2 para 198 III pp 64-65.

⁸⁰ E.g. CTh 16.5.21, 16.5.34 pr.

⁸¹ E.g. CTh 16.5.8, 16.5.34 pr, 16.5.36.1.

⁸² Ferrini op cit para 125 p 157.

⁸³ Cf CTh 1.16.7; Biondi op cit vol 3 para 510 p 453.

⁸⁴ Mommsen op cit 983. Cf also p 136 above.

⁸⁵ The following account is based on Mommsen op cit 981-985.

⁸⁶ Cf p 135 above.

⁸⁷ Cf p 140 above.

This form of punishment could in practice be made very severe, and even fatal, by the affixing of lead points or tips (*plumbatae*) to the instrument used. Unless specifically prescribed in the imperial legislation (as was done in the case of Jovinian),⁸⁸ the decision whether or not *plumbatae* were to be affixed fell in the discretion of the sentencing judge.

2.2.7. Fines

The imposition of fines was generally regarded as a mild punishment, which was appropriate for the less serious offences.⁸⁹

Nevertheless, the fines provided for in the antisectarian legislation of the Theodosian Code are for such large sums of money that they may be described as crushing. Clerics, for example, or those who ordained clerics or were themselves ordained, were liable for a fine 10 lb gold, while members of the Donatist sect were liable for fines of the order of 20 lb gold (chief *decurions*), 5 lb gold (ordinary *decurions*, traders, and peasant freeholders) and 10 lb silver (*Circumcellions*, here bearing the sense of the lowest class of the free peasants). In many cases, this must have amounted to a very significant proportion, or even all of the convicted person's estate. For example, the property qualification for being an ordinary *decurion* was an estate of 300 *solidi*,⁹⁰ which was the equivalent of just over 4 lb gold;⁹¹ thus, the fine imposed for Donatism would have exceeded the value of the poorer *decurions'* estates. On average, the estates of traders would have been worth approximately the same as that of poor *decurions*, or slightly less;⁹² therefore, a fine of 5 lb gold would have been crippling for them, too. These examples suffice to illustrate the severity of the fines prescribed, and to show that the imposition of fines in the present context was not a mild punishment, but would mostly have seriously affected the convicted heretics' economic position (even to the point of bankruptcy) and, as a result of this, their social status.

2.2.8. Intestability

The punishment of intestability - which was developed during the post-Classical era into an independent, principal punishment, primarily applicable to crimes against the Catholic

⁸⁸ CTh 16.5.53.

⁸⁹ Cf Mommsen op cit 985, where it is stated that flagellation was regarded as a more severe form of punishment than the imposition of a fine.

⁹⁰ Jones op cit 738-739.

⁹¹ In terms of the Constantinian currency regulations (which were in force at this period) the metal base of the *solidus* was 1/72 of a pound of gold. See Fritz M Heichelheim *An Ancient Economic History* vol 3 (tr Joyce Stevens) (1970) 282.

⁹² Cf Jones op cit 871, where it is stated that the great majority of *negotiores* were plebeians, who might, if they succeeded in acquiring sufficient wealth, become eligible for membership of the municipal senate of a minor city.

religion⁹³ - related to the curtailment of the affected person's capacity to perform juristic acts. Essentially, it precluded the person declared *intestabilis* from being able to participate in private juristic acts involving witnesses, notably in the making of a will.⁹⁴ However, it could extend beyond this, depending on the wording of the constitution imposing this punishment; loss of the capacity to donate, or to accept a donation was often included under this punishment,⁹⁵ and occasionally the affected person was deprived of the capacity to buy, sell or enter into any contract whatsoever.⁹⁶ The following constitutions even seem to suggest that a sentence of intestability deprived the affected heretic of any access to the Roman private law whatsoever:

CTh 16.5.7 pr (Gratianus, Valentinianus II & Theodosius I, 381) [Q]uoniam isdem [sc Manichaeis] sub perpetua inustae infamiae nota testandi ac vivendi iure Romano omnem protinus eripimus facultatem neque eos aut relinquendae aut capiendae alicuius hereditatis habere sinimus potestatem, totum fisci nostri viribus imminentis indagatione societur.

"[I]nasmuch as We forthwith deprive the [said Manichaeans] under the perpetual brand of just infamy of all right to make a will and to live under the Roman law, and since We do not permit them to have the right to bequeath or to take any inheritance, the whole of such property, after due investigation conducted by Our fisc, shall be appropriated to its resources."

CTh 16.5.23 (Theodosius I, Arcadius & Honorius, 394) Eunomianis, ne caperent aliquid vel relinquerint testamento, legem dudum credidimus promulgandam, quam quidem nunc consilio pleniore revocamus. Vivant iure communi, scribant pariter ac scribantur heredes.

"We formerly believed that a law ought to be promulgated with reference to the Eunomians, to the effect that they should neither take nor leave anything by testament; on fuller deliberation, indeed, We now revoke the aforesaid law. They shall live under the common law; they may appoint and likewise be appointed heirs in written wills."

Thus, the imposition of the punishment of intestability seriously impaired a convicted sectarian's legal capacity. Indeed, the phrasing of the following constitution seems to suggest that intestability deprived the affected person of Roman citizenship:

CTh 16.5.36 pr (Arcadius & Honorius, 399) Eunomianis poenam adimendae testamenti factionis peregrinorumque mutandae condicionis remittimus....

"For the Eunomians We remit the penalty of being deprived of testamentary capacity and of having their status changed to that of foreigners."

Here, one finds an echo of the fact that the capacity to make a will or to inherit under Roman law, was the criterion by which citizens and foreigners were distinguished.⁹⁷ It is not clear

⁹³ Mommsen op cit 986, 992.

⁹⁴ See id 992.

⁹⁵ Cf i a CTh 16.5.9 pr, 16.5.49, 16.5.58.4.

⁹⁶ Cf CTh 16.5.40.4, 16.5.54 pr.

⁹⁷ Kaser op cit para 208 I p 120.

that a declaration of intestability indeed resulted in a technical loss of citizenship.⁹⁸ Be that as it may, it is clear that a declaration of intestability approached a capital punishment in its effect on the heretic's legal capacity and status, and in effect rendered him a second-class citizen.⁹⁹

2.2.9. Infamia

A declaration of infamia deprived the affected person of all worthiness. Apart from the social consequences of this, it also deprived the infamis of the capacity to appear on another's behalf in a civil or criminal trial,¹⁰⁰ and of the capacity to hold certain offices. The emperors specifically prescribed that no heretic was allowed to hold a position in the imperial service, or in the provincial government.¹⁰¹ However, the demographic and economic realities of the late Empire¹⁰² made it impossible for the emperors to exclude heretics from service in the armies, on the provincial governors' office staffs, or in municipal senates; heretics were therefore employed in these posts, although they were infames.¹⁰³

2.3. Factors Affecting Sentencing

In determining which form of the prescribed sentence (e.g. the death sentence, or a capital sentence) he would impose, or in determining the appropriate punishment in cases where, by way of exception, the sentence had been left to his discretion, a judge had to take certain factors into account.¹⁰⁴

The question whether the convicted heretic was of free or servile status, was an important consideration. Generally speaking, servile status operated as an aggravating factor.¹⁰⁵ Depending on the case, slaves and serfs (*glebae adscripti*) found guilty of a relatively grave crime - for example, tumultuous assembly - were usually sentenced to death (usually by one of the aggravated forms of execution), or condemned to the mines.¹⁰⁶ They could not be

⁹⁸ Cf id para 208 III 2 p 123 : "Nicht wirklich einen Verlust oder eine Vorenthaltung des Bürgerrechts bedeuten ... trotz gewisser Anklänge die rechtlichen Verkürzungen, die mit ... der Anhängerschaft an verbotene Sekten verbunden wurden".

⁹⁹ So too Mommsen op cit 959, 993.

¹⁰⁰ Cf id 994.

¹⁰¹ CTh 16.5.25.1, 16.5.42, 16.5.58.7.

¹⁰² Cf Wolfgang Kunkel *An Introduction to Roman Legal and Constitutional History* 2 ed (tr J M Kelly) (1973 repr 1975) 138-139.

¹⁰³ For heretics' continued liability to serve in the armies, see CTh 16.5.65.3; for their continued liability to serve on the provincial office staffs, see CTh 16.5.48, 16.5.61, 16.5.65.3; for their continued liability to be municipal senators, see CTh 16.5.48.

¹⁰⁴ See, generally, Mommsen op cit 1042-1044.

¹⁰⁵ Id 81.

¹⁰⁶ Cf id 951.

sentenced to any form of banishment, as they were not in a position to relocate freely.¹⁰⁷ Furthermore, slaves were not sentenced to forced labour in the public works, as such a sentence would not have constituted any additional punishment for persons who were already in forced labour, but would only have affected their owners;¹⁰⁸ as already indicated, incarceration in the owner's private slave prison was usually substituted for this sentence.¹⁰⁹ Since slaves did not have any legal status, it follows that the penalties of intestability and infamy were not applicable to them.

The convicted heretic's rank was a further important factor in sentencing. As a rule, inferior social status operated as an aggravating factor.¹¹⁰ Persons of higher rank, termed *honestiores* (i.e. those of senatorial rank, those who had held office in the imperial and provincial service, soldiers, veterans, members of the municipal senatorial orders, and descendants of the foregoing persons)¹¹¹ enjoyed certain penal privileges. Unlike the lower orders (*humiliores*), they could not be sentenced to death by garotting or at a public game; could not be condemned to the mines, or to forced labour in the public works; and could not be subjected to flagellation.¹¹²

The question of the convicted heretic's economic position could be an important consideration. Inferior financial standing operated as an aggravating factor in so far as the punishments of *deportatio* and *relegatio qualificata* were only imposed on those who were rich enough to maintain themselves in the domicile to which they would be confined; those who were not rich enough to afford the financial implications of these sentences, were condemned to the mines instead.¹¹³ Furthermore, economic want served as an aggravating factor in the sense that convicted criminals who were too poor to pay fines, were instead sentenced to flagellation.¹¹⁴ However, the converse was true as regards the determination of the amount of the fine: the wealthier the transgressor, the higher the amount of the fine imposed.

Transgression in office, the high incidence of the crime concerned in a given region, and recidivism operated as aggravating factors.

¹⁰⁷ Id 968.

¹⁰⁸ Id 953.

¹⁰⁹ See p 141 above.

¹¹⁰ Cf Mommsen *op cit* 1031 et seq.

¹¹¹ See id 1033-1036.

¹¹² Id 1036, but substituting "Erdrosselung am Galgen" for "Kreuzigung" - cf id 921.

¹¹³ Id 969.

¹¹⁴ Id 985.

The fact that the convicted heretic was of youthful age or a woman, the fact that the crime concerned had only been attempted, but had not been completed, the fact that the convicted heretic had been a minor participant in the crime,¹¹⁵ and the fact that the crime had been committed by a slave on the order of his owner¹¹⁶ served as mitigating factors.

3. OVERVIEW OF PUNISHMENTS

The catalogue of penalties furnished above, and commented on in the discussion of the various punishments listed in it, reflects the complexity of the punishments prescribed for religious sectarianism. To conclude this chapter, I shall furnish an overview of the general aspects discernible in the penal measures concerned, and of their effect. It must be stressed that this overview represents a generalization, and even an over-simplification;¹¹⁷ nevertheless, it will convey a global impression of the sentences imposed in the majority of cases.

The basic punishment for heresy was intestability, coupled with infamia. Mere adherence to any heretical or sectarian sect was sufficient to attract this punishment, which significantly curtailed the affected person's legal capacity. Sectarrians' freedom of movement and of residence was also curtailed. Generally speaking, all sectarians were prohibited from entering or residing in the larger cities (that is, the imperial and provincial capitals); as a given city's territory also included the area within a hundred mile radius of it,¹¹⁸ this restriction in effect meant that heretics were cut off from any social and economic intercourse with the residents of the cities, and were moreover prevented from practicing any sophisticated trades or callings. Heretics were moreover excluded from all official posts, except from those that were of a burdensome nature.

Adherents of non-Catholic sects were thus subjected to punishments and disabilities which had the effect of marginalizing them legally, socially, economically and geographically; and indeed, as stated by Biondi,¹¹⁹ of creating a new *summa divisio personarum*, in terms of which only Catholics enjoyed the full benefits of citizenship, while sectarians were relegated to an inferior status.

¹¹⁵ The statement appearing on p 64 above regarding the equal liability of all co-perpetrators is not contradictory, since the issue there is merely the fact of liability in itself. - Note that while Mommsen op cit 1043 states it as a rule that a minor degree of participation operated as a mitigating factor, this does not seem to have been true as regards assistance in the case of crimes of heresy: as emerges from pp 128-131 below, those who rendered assistance to heretics were usually punished more severely than the heretics themselves.

¹¹⁶ Cf p 62 above.

¹¹⁷ The following account does not fully reflect the punishments imposed on Manichaeans (and groups identified with them), who were usually treated much more severely than other sects.

¹¹⁸ See Gothofredus op cit 204-205; Mommsen op cit 604.

¹¹⁹ Biondi op cit vol 1 para 82 p 254, 259.

The clergy of heretical or schismatic sects were subject to even more significant restrictions on their freedom of movement and residence, as they were not only prohibited from not only the cities, but also all municipalities and towns; on occasion, they were even forbidden to leave their regions of origin. Members of the clergy who conducted congregations, or who participated in the ordination of new priests or the rebaptism of new converts, were moreover subjected to the confiscation of their estates, and banished to isolated localities. The effect of these provisions was that the clergy were isolated as much as possible from the rest of the community, and were restrained (as far as the criminal law could accomplish this) from doing anything whereby the sect to which they belonged, could be propagated, or even maintained.

From a modern perspective, the disabilities to which sectarians were subjected seem fairly severe. Nevertheless, the punishments prescribed should be viewed in their historical context. The post-Classical criminal law was notoriously severe; normally, extremely harsh punishments were imposed.¹²⁰ Capital punishments were frequent; the death penalty, often in one of its aggravated forms, was the normal punishment for the graver crimes at this stage.¹²¹ Seen from this perspective, the punishments imposed on religious sectarians, adherents and clerics alike, were very lenient - a point to which I shall return.¹²²

This concludes my description of the provisions relating to the criminal prosecution of heresy during the seminal period of this crime. In the next and final chapter, I shall turn from analysis of the antiheretical legislation in the Theodosian Code, to assessment.

¹²⁰ Cf Carlo Gioffredi *I Principi del Diritto Penale Romano* (1970) 54-60; Carl Ludwig von Bar et al *A History of Continental Criminal Law* (tr Thomas S Bell et al) (1916 repr 1968) 56, read with 48-49, 17-18, 19-21, 22.

¹²¹ Cf Mommsen op cit 943.

¹²² Cf pp 166-170 below.

CHAPTER SIX

ASSESSMENT

1. INTRODUCTION

In chapters three to five, I analysed the provisions relating to sectarianism in the Theodosian Code against the backdrop of the Roman criminal law and criminal procedure. This analysis has provided a frame of reference for the consideration of the problem stated in chapter one, and will enable me to offer a considered answer to the question of whether the antiheretical constitutions contained in the Theodosian Code bear the stamp of legislation inspired by social and political, rather than religious concerns, so as to warrant the conclusion that the Roman authorities of the late fourth and early fifth centuries perceived religious sectarianism as an expression of secular discontent, and acted against it in order to suppress the eruption of any latent rebellion, thus validating the socio-political theories advanced with regard to the prosecution of heresy and schism.

Before attempting to consider this problem, however, it is necessary to state the issues requiring examination very clearly, in the interests of rigorous analysis. First, at issue is the acceptance or refutation of a socio-political aim behind the criminal prosecution of sectarianism *in general*, and not merely behind the prosecution of those sectarians who actually committed excesses in the furtherance of their cause. By holding that the mere existence of heretical movements in itself disclosed a threat to the secular status quo which privileged those in power, and by holding that the protection of the authorities' temporal interests constituted the real rationale for their prosecution of sectarianism, the adherents of the socio-political interpretation state the issue in very broad terms: they do not confine their interpretation to those cases in which heretics or schismatics actually erupted into violent or turbulent conduct, but instead contend that the authorities acted out of secular motives in the suppression of sectarianism *per se*, howsoever expressed - including sectarianism finding its expression in passive religious contemplation, in simple worship, or in any other peaceable form. In order to consider their interpretation, it will therefore be necessary to determine whether socio-political aims can be detected in the constitutions suppressing not only real excesses by heretics, but also peaceable manifestations of sectarianism. It will accordingly not suffice to validate their interpretation if evidence can be detected in the Theodosian Code that some members of heretical sects on occasion conducted themselves in a manner actively dangerous to the social order, and secular concerns can be identified as the rationale for the criminal prosecution of *such* conduct. It may readily be granted that such conduct occurred from time to time, in what was plainly a period characterized by religious turbulence (on all parts) - the freeing of slaves and humiliation of rich landowners by Donatist Circumcellions,¹ and the riots by John

¹ See Aug *Ep* 108.6.18, 185.4.15 in Al Goldbacher (ed) *S. Aureli Augustini Hipponiensis Episcopi Epistulae* in *Corpus Scriptorum Ecclesiasticorum Latinorum* vols 34(2) (1898), 57 (1911).

Chrysostom's supporters after his deposition as bishop of Constantinople in 404 AD,² are but two examples of this. It may furthermore be granted that such conduct was criminally prosecuted, and that secular considerations dictated such prosecution. However, the fact that such conduct was prosecuted for the protection of what were evidently secular interests, does not advance the argument. For such conduct *already* constituted criminal acts (motive being irrelevant for the purposes of criminal liability),³ and could be prosecuted in terms of the framework provided by the existing criminal law, as is shown by the correspondence between crimes of heresy based on conduct of this nature, and crimes such as sedition and violence.⁴ What *did* represent a new introduction, was the Christian emperors' criminalization of the peaceable manifestations of heresy;⁵ and it is accordingly an examination of the criminal provisions relating to *these* manifestations which will enable one to arrive at the true explanation for the emperors' criminalization of sectarianism as such. The fact that sectarians were on occasion guilty of violent or seditious conduct, still leaves unanswered the question as to why the emperors felt it necessary to criminalize sectarianism as such. In order for the socio-political thesis to be validated, it must therefore be possible to discern indications that the protection of socio-economic or political interests informed the criminal prosecution of not only violent or seditious conduct by sectarians, but also peaceable manifestations of heresy and schism.

The second preliminary point is that the present analysis must be concerned with determining whether the emperors' actions were inspired by a concern that heretical movements represented an *immediate* secular threat. The point is worth making, because there are suggestions that the emperors' antiheretical programme was informed, at least to some extent, by their conviction that taking measures against the perceived enemies of the true faith and their doctrines would attract divine goodwill upon their reigns, while tolerating the presence of heretics, and therefore heresy in whatever manifestation, in the community would bring divine disfavour. This appears from the following constitution:⁶

² See CTh 16.2.37, 16.4.4-6, read with Iacobus Gothofredus *Codex Theodosianus cum Perpetuis Commentariis* vol 6(1) (1743 repr 1975) 113-115; Henry Chadwick *The Early Church* (1967 repr 1984) 189-191.

³ Cf pp 23, 60 above. Cf Th Mommsen *Römisches Strafrecht* (1899 repr 1955) 87.

⁴ See pp 56-57 above.

⁵ That this dichotomy between dangerous manifestations of heresy and heresy in its peaceable forms was also grasped at the time, is instanced by the fact that the compilers of the Theodosian Code placed the relevant constitutions under two distinct titles: the first, *De his, qui super religione contendunt*, contained the constitutions dealing with the provocation of religious tumult (whether by heretics, or by Catholics); and the second, *De haeresibus*, contained the constitutions outlawing heresy in general, and dealing with it in its peaceable manifestations. Cf also Aug *Ep* 185.26: "[I]am enim lex fuerat promulgata, ut tantae immanitatis haeresis Donatistarum ... non tantum uiolenta esse, sed omnino esse non sineretur ...".

⁶ Contra Guglielmo Nocera " 'Cuius regio eius religio' " in *Atti dell'Accademia Romanistica Costantiniana (VI Convegno Internazionale)* (1986) 313 read with 310-311, who also refers to this constitution but gives it a purely secular interpretation by equating "activities dangerous to all" with "compromising the cohesion of the Empire".

CTh 16.5.40.1 (Arcadius, Honorius & Theodosius II, 407) Ac primum quidem volumus [haeresia] esse publicum crimen, quia quod in religionem divinam committitur, in omnium fertur iniuriam.

"In the first place, indeed, it is Our will that such heresy shall be considered a public crime, since whatever is committed against divine religion redounds to the detriment of all."

and to some degree from the following constitution, issued by Honorius in the period when Rome was under threat from Alaric:

CTh 16.5.47 (Honorius & Theodosius II, 409) Si quis contra ea, quae multipliciter pro salute communi, hoc est pro utilitatibus catholicae sacrosanctae ecclesiae, adversus haereticos et diversi dogmatis sectatores constituta sunt, etiam cum adnotationis nostrae beneficio venire temptaverit, careat impetratis.

"If any person should attempt to contravene those provisions which have been enacted many times for the common salvation, that is, for the interests of the sacrosanct Catholic Church, against the heretics and the adherents of a different dogma, he shall be deprived of what he has impetrated, even though he should attempt to come with the benefit of Our annotation."

Therefore, the view that the existence of heretics represented a threat to society and to the state, inasmuch as the state's destiny was dependant on divine favour, prevailed to a certain extent, and it may thus be argued that, to this extent, the emperors' antiheretical legislation was inspired by "social" or "political" considerations, in the very broadest sense of these terms. However, this secular concern is itself only an indirect implication of the emperors' theological views, and must be seen as merely an incidental reason for the suppression of heresy, the primary reason still appearing to be religious conviction. It is, moreover, not this type of attenuated threat which the interpreters of the socio-political school have in mind when they accept that the phenomenon of heresy was essentially conditioned by secular factors, and was also suppressed because of secular considerations. In their view, heresy was suppressed because it represented an immediate, direct secular threat - because it was a sign of secular discontent, and a source of dormant rebellion which, unless suppressed, would erupt at some stage in the foreseeable future. Thus, they seek to ascribe purely temporal motives for the suppression of heresy; and it is only *this* type of motive which is at issue for present purposes.

In conclusion, then: the crisp issue to be considered is whether there are any indications in the antiheretical legislation contained in the Theodosian Code that the emperors perceived heresy per se as indicative of a direct temporal danger, and on this ground subjected it to criminal prosecution.

I shall now consider this issue, having regard to first the explicit reasons for the prosecution of heresy enunciated in the Theodosian Code, and thereafter the implicit indications provided by an examination of the nature of the criminal measures instituted by the emperors.

2. ASSESSMENT

2.1. Reason conveyed by Emperors for Criminal Prosecution of Heretics

The explicit message that is very strongly conveyed in the Theodosian Code, is that the emperors instituted the antiheretical measures purely out of considerations of religious piety. This emerges from, amongst others, the following constitutions, where the interest to be protected by these measures was stated simply as the Catholic faith, in its own right:

CTh 16.5.4 (Valens, Gratianus & Valentinianus II, 376/378) *Olim pro religione catholicae sanctitatis, ut coetus haeretici usurpatio conquiesceret, iussimus, sive in oppidis sive in agris extra ecclesias, quas nostra pax obtinet, conventus agerentur, publicari loca omnia, in quibus falso religionis obtentu altaria locarentur...*

"Previously, in behalf of the religion of Catholic sanctity, in order that the illicit practice of heretical assembly should cease, We commanded that all places should be confiscated in which their altars were located under the false guise of religion, whether such assemblies were held in towns or in the country outside the churches where Our peace prevails."

CTh 16.5.44 (Honorius & Theodosius II, 408) *Donatistarum haeticorum Iudaeorum nova adque inusitate detexit audacia, quod catholicae fidei velint sacramenta turbare. Quae pestis cave contagione latius emanet ac profluat. In eos igitur, qui aliquid, quod sit catholicae sectae contrarium adversumque, temptaverint, supplicium iustae animadversionis expromi praecipimus.*

"The new and unaccustomed audacity of the Donatists, heretics and Jews has disclosed that they wish to throw into confusion the sacraments of the Catholic faith. Such audacity is a pestilence and a contagion if it should spring forth and spread abroad more widely. We command, therefore, that the penalty of a just chastisement shall be inflicted upon those persons who attempt anything that is contrary and opposed to the Catholic sect.

CTh 16.5.56 (Honorius & Theodosius II, 415) *Sciunt cuncti, qui ad ritus suos haeresi superstitionis obrepserant, sacrosanctae legis inimici plectendos se poena et proscriptionis et sanguinis, si ultra convenire per publicum exercendi sceleris sui temeritate temptaverint, ne qua vera divinaque reverentia contagione temeretur.*

"All men who stealthily resort to their own rites of heretical superstition shall know that, if they should attempt further to assemble in public, as enemies of the sacrosanct rule of faith, they will incur the penalty both of proscription and of their life, on account of their rash lawlessness in practicing their crime, so that the true and divine worship may in no way be desecrated by such contagion."

Here, the emperors' antiheretical legislative programme is portrayed as the defence of Christianity required of confessing Christian rulers against all who threatened Christianity: which, in terms of the prevailing theology and its doctrine of apostolicity, necessarily meant all who threatened the mere unity of the Church. The motives which the emperors expressed for their combatting of heresy and schism, were thus stated in essentially religious terms.

2.2. Assessment of Emperors' Statement of Intent

The question now arises whether their explicit statement of purpose reflects the emperors' true motive in suppressing sectarianism, or whether an analysis of the antiheretical legislation will uncover indications that these ostensible religious considerations were a veneer for underlying socio-political concerns.

In answering this question, I shall focus on the two variants of the socio-political interpretation of heresy identified in chapter one,⁷ viz first the socio-economic, and thereafter the nationalist interpretations.

2.2.1. Socio-economic interpretation

According to this interpretation, religious sectarianism was, to summarize the argument again, an expression of the socio-economic discontent felt by the poor and humble, who suffered the abuse and exploitation that was their hopeless lot; and a form of protest against the institutionalized class structures which made such exploitation possible.

In order to validate this interpretation from a legal perspective, and to establish that it should be preferred over the emperors' statement of intent, it will need to be shown that the Theodosian Code contained either explicit or implicit indications that the authorities perceived sectarianism in the way argued.

I have not discovered any explicit indications to this effect in the Theodosian Code. The only implicit evidence I can conceive of, would be furnished by uncovering an assumption in the legislation that heretical movements typically attracted people from, and flourished amongst the lower orders of Roman society, which might be expected to provide the strongest numerical support for movements of social revolution. In other words, the question would be whether the Theodosian Code's antiheretical legislation betrays an unspoken assumption that sectarians were primarily humble and poor.

If there is any unspoken assumption to this effect, it might be discovered by an examination of the antiheretical measures concerned with those two areas of Roman criminal law where distinctions were drawn between people on the basis of rank and wealth, and different treatment was accorded the higher and lower orders: first, the procedure concerning detention and interrogation, and secondly the matter of punishment.

⁷ See pp 5-6 above.

There is only one constitution in the title *De haereticis* itself which in any way relates to the *detention and interrogation* of suspected sectarians, viz:

CTh 16.5.41 (Arcadius & Honorius, 407) ... [E]tiam si maxime reos poena videatur urgere, sufficiat ad abolitionem errorem proprio damnavisse iudicio et dei omnipotentis nomen, inter ipsa quoque pericula requisitum, fuisse complexum, quia nusquam debet in miseris invocatum religionis deesse subsidium ...

"[A]lthough punishment seems to be especially urgent for the guilty, it shall suffice for annulment that they should condemn their false doctrine by their own judgment and should embrace the name of Almighty God, which they may call upon even in the midst of their perils; for when the succor of religion has been invoked, it must nowhere be absent in afflictions."

The terms "pericula" and "in miseris" in this constitution may be a reference to the torture which could accompany interrogation, or precede certain forms of punishment, and the application of which was, as detailed elsewhere,⁸ in principle confined to humiliores. If this is the case, the use of these terms may serve as an indication that this constitution was formulated on the assumption that the persons affected by its provisions would typically be people of humble status. However, it is at least equally possible that these terms may refer to the punishment itself, and that the avoidance of punishment, and not merely the avoidance of torture, was used as a means to induce recantation. If so, the constitution would have pertained to rich and poor alike; and then the use of these terms does not betray a clear social bias. On consideration, this constitution does not contain any clear, or conclusive evidence.

I now turn to the question whether an indication of any socio-economic assumptions is to be found in the context of the *punishments* prescribed for the crimes of heresy. I would submit that a study of the punishments prescribed for heresy (as summarized in the conspectus of punishments in the previous chapter)⁹ indicates that the emperors did *not* view religious sectarianism as being an offence committed typically by the humble or poor; nor did they punish it on such a basis. This appears from two considerations. First, the entire spectrum of society comes into consideration in the antiheretical legislation. This is nowhere shown more clearly than in the punishments prescribed for Donatism, the schism usually claimed by the proponents of a socio-economic interpretation of sectarianism as the most telling illustration of their theory. As set out, adherents of Donatism who were of Illustrious rank were subject to a fine of 50 pounds of gold; those who were Spectabiles, 40 lb gold; those who were of senatorial rank, 30 lb gold; those who were Clarissimi, 20 lb gold; those ranking in the civil priesthood, 30 lb gold; chief municipal decurions, 20 lb gold; other decurions, 5 lb gold; tradesmen, 5 lb gold; plebeians, 5 lb gold; and Circumcellions (here portrayed as a separate social category, at the lowest end of the independent

⁸ See p 101, and cf pp 135, 136 above.

⁹ At pp 120-128.

peasantry),¹⁰ 10 lb silver; while coloni and slaves were subject to corporal punishment.¹¹ The crime of congregation by Donatists, again, was punishable as follows: those who were of Illustrious rank or who were Spectabiles were subject to a fine of 200 pounds of silver for the first four convictions; those ranking in the senatorial order or in the civil priesthood were fined 100 lb silver; chief municipal decurions, 50 lb silver; other decurions, 10 lb silver.¹² It is noteworthy that provision was made for the potential punishment of all ranks of society, from the lowest slaves to the highest personages in the state, so that the expectation seems to be that the schism concerned attracted a cross-section of society; there is therefore no trace of the type of social assumptions required for the validation of the socio-economic thesis. - Secondly, there are indications that the typical sectarians envisaged at the drafting of the constitutions, were persons of at least some substance. This perception of a typical offender as a person of some means, appears from the fact that confiscation of property was viewed as an effective sanction; for example, it was provided in 405 AD that rebaptism by Donatists would be punished with the confiscation of their estates, so that the penalty of poverty could be inflicted on them; and that their children would be accorded the confiscated estates, provided that they were not themselves Donatists, or else were prepared to recant.¹³ The above two considerations strongly suggest that sectarianism was not regarded by the authorities as a phenomenon primarily encountered among the very lowest orders of society, and that the notion that the antiheretical measures reflect a perception that religious sectarians were predominantly drawn from discontented classes of society, would be without foundation.

The conclusion to be reached on this point, is that the legislative measures instituted by the emperors do not offer any support, whether explicit or implicit, for the socio-economic interpretation placed upon the emperors' criminalization of heresy.

I now turn to consider the second variant of the socio-political interpretation of the emperors' antiheretical programme.

2.2.2. Nationalist interpretation

According to the nationalist interpretation, heretical movements were, to briefly restate the argument, an expression of suppressed national identity in the various regions of the supranational, monistic Empire - in terms of this interpretation, Donatism would be an

¹⁰ This text seems to bear out Tengström's interpretation (see p 8 above) of the Circumcellions as roving bands of casual farm labourers (cf A H M Jones *The Later Roman Empire: 284-602* vol 2 (1964) 792).

¹¹ CTh 16.5.52 pr & 4.

¹² CTh 16.5.54.3-4.

¹³ CTh 16.6.4 pr. See also CTh 16.6.5.

expression of Berber nationalism, and so on - so that the reason for the prosecution of heresy, in whatever form, lay in the emperors' concern for political unity and stability.

There are two arguments which are sometimes advanced in support of this interpretation.¹⁴ The first of these is that the emperors above all prohibited *assembly* by heretics, betraying their concern for politically significant conduct by this focus on mass participation. The second argument is that the emperors' penal measures were ultimately aimed at ensuring formal conformance to Catholic Christianity only, as evidenced by the fact that they were prepared to accept feigned recantation for the purposes of extinction of criminal liability for crimes of heresy; this circumstance would indicate that their concern was not for the heretics' inner conversion, but rather the cessation of any expression of a separate group identity. The first argument is not convincing, simply because assembly was only one of many different forms of conduct prohibited by the emperors - as appears quite clearly from the conspectus of the forms of heretical conduct which were criminalized¹⁵ - and it would be quite wrong to suggest that the emperors primarily concentrated on this form of conduct. The argument must further be rejected, because a prohibition on assembly does not necessarily indicate a political motive, but can as easily indicate a desire to prevent the entrenchment and extension of unacceptable religious sects by the deprivation of one of their most important means of propagation and recruitment. The second argument is also not decisive. Granted, a simulated recantation sufficed to protect sectarians from criminal liability, as may indeed be deduced from a text stating that apostates, unlike sectarians, will not secure acquittal through real or feigned repentance;¹⁶ however, it does not necessarily follow that the emperors desired no more than outward conformance. A counterargument may just as well be advanced that outward conformance was all that was humanly perceptible, and that the realization that feigned recantation by sectarians could occur in some instances, and would have to be accepted as sufficient, simply amounted to realism. Moreover, the emperors' approach on this point was in complete accordance with, and reflected Augustine of Hippo's point of view that a feigned recantation under compulsion would - after the heretic's exposure to the salutary influence of Catholic doctrine and church practice - probably result in a genuine conversion, and could be supported on that ground.¹⁷ Thus, although the two arguments concerned are not without weight, their persuasive force is insufficient, in the absence of additional evidence, to bring into question the emperors' express statement that they were acting for considerations of religious piety.

¹⁴ See e.g. Nocera op cit 303-339 at 310 n 14, 323 n 31 in fin.

¹⁵ See pp 40-48 above.

¹⁶ See CTh 16.7.4.1.

¹⁷ See p 21 above.

This brings me to the question whether any evidence may be discovered in the emperors' antiheretical legislation which will either confirm, or alternatively contradict the nationalist interpretation; whether this legislation contains any clues that the emperors, contrary to their stated pious concerns, in reality reacted to sectarianism in the same way as they were accustomed to react to factions aiming to overthrow the political status quo, or disrupt the constitutional structure in any way.

To answer this question, it will first be necessary to determine how the criminal law generally dealt with such political threats in this era. This necessitates a brief discussion of the criminal category of *crimen laesae maiestatis* (or simply *maiestas*).¹⁸ *Maiestas* was a very broad and flexible concept; generally speaking, any manifestation of a hostile intent against the state, or against the state administration constituted *maiestas*. The principal example of *maiestas* was high treason (*perduellio*), which consisted of conducting oneself as an enemy of the Empire, or aiding the enemies of the Romans. However, the ambit of *maiestas* was much greater than this, and also included such diverse acts as arrogating any of the emperor's powers; attacking the emperor; and sedition, the refusal by a tumultuous multitude to respect or obey the state authorities (although it was usual to confine the charge of *maiestas* to the instigators and leaders of the sedition, and to prosecute the ordinary participants on the lesser count of violence). Thus, the law of *maiestas* covered all internal political threats to the Empire. As conduct constituting *maiestas* represented a direct threat to the emperors' power and constitutional position, the opportunities which the criminal law offered concerning its detection, prosecution and punishment, were exploited to the fullest extent. *Maiestas* was a *crimen publicum*, and could therefore be prosecuted in terms of an *accusatio* procedure by any competent member of the public; in addition, it could be (and in practice, usually was) prosecuted by *cognitio*, in any of the three forms thereof - that is to say, the *cognitio* could be initiated by a private informer's denunciation, by the report of a public official with security functions, or by the judge *suo motu*, so that the full range of inquisitorial proceedings was applied to political crimes. Indeed, the inquisitorial powers of the trial judge extended even beyond the normal boundaries, since the rules that *nobiles* were not to be questioned under torture and that slaves could not be interrogated in order to extract evidence against their owners, were not applicable in trials involving charges of *maiestas*. Furthermore, those charged with *maiestas* were always excluded from the general pardons issued by the emperors from time to time. (The rank and file of participants in seditious uprisings, whose charges had been commuted to violence, could likewise be prosecuted both by *accusatio*, and by the judge's *cognitio*; moreover, such

¹⁸ On *maiestas*, see, generally, Biondo Biondi *Il Diritto Romano Cristiano* (1954) vol 3 para 522 pp 492-496; Prof Contardo Ferrini *Diritto Penale Romano: Esposizione Storica e Dottrinale* (1976) para 268-274 pp 337-343; Mommsen *op cit* 537-594.

prosecutions took precedence over all other cases, and had to be tried immediately.)¹⁹ As regards the penalties, the normal punishment for maiestas in post-Classical times was execution; for humiliores, this often took one of the aggravated forms of death at the stake, or execution at the public games. Those guilty of perduellio, specifically, were regarded as enemies of the state from the moment they had committed treason, with the result that their property became subject to confiscation, and their patrimonial dispositions (such as donations, and the making of a will) were invalid from that moment on, rather than from the date of conviction. Thus, even if a traitor had died before the institution of proceedings against him, his will and other dispositions were invalid with retroactive effect, and his estate was confiscated. Those found guilty of other forms of maiestas and condemned to a capital sentence, were also faced with the confiscation of their estates as an incidence of the capital punishment; and, since those convicted of maiestas were always expressly excluded from the post-Classical indulgence whereby the family of a convicted criminal was afforded a certain share of his confiscated estate,²⁰ this had serious implications for the future of the convict's dependants. In addition, the children of those convicted of maiestas on a capital charge were (regardless of their own political sympathies) deprived of the capacity to serve in the army or in public office, and of the capacity to acquire any form of inheritance - a departure from the normal rule²¹ that kinsmen were not criminally punishable for each others' transgressions.

I now return to the question whether a significant correspondence existed between the way in which the criminal law addressed maiestas, as an illustration of the state's response to political offences, and the way in which it addressed religious sectarianism.

In answering this question, I shall first compare the *theoretical framework* of maiestas and heresy respectively. As I have indicated, maiestas was a very general concept, encompassing in principle any conduct disruptive of state stability. Its broad formulation meant that the concept could be employed to cover an extremely wide range of conduct, depending on the determination of the authorities. The fact that they determined its contents, made it possible for them to manipulate their description of this crime to suit the needs of the moment. The description of maiestas thus afforded the government a very high degree of flexibility, and even arbitrariness, as is required by authoritarian regimes in the context of security measures. By contrast, the various crimes of heresy were much more distinctly and precisely described in the legislation by which they were instituted. As I have

¹⁹ See Mommsen op cit 666, 666 n 2.

²⁰ Cf CTh 9.42.2 & 6. Note, however, CTh 9.42.8.3, where it was provided that a sixth of the estate of those who were found guilty of maiestas, but were only condemned to deportatio, would be conceded to the condemned person's descendants. This is, though, still an amount significantly smaller than the half otherwise conceded to the families of condemned criminals.

²¹ Cf CTh 9.42.15.

shown,²² heresy was not declared illegal by means of general legislation; instead, specific manifestations of heretical conduct were declared punishable on an ad hoc basis, with the result that a high level of particularity was reached in the description of the crimes so created. The crimes of heresy were thus defined with reference to exact, fixed criteria. Moreover - and I think that this is highly significant - the concept fundamental to all the crimes of heresy, viz that of "heresy", was essentially regulated by an external agency, the Catholic Church: for, as I have sought to establish earlier,²³ the emperors did not introduce a secular concept of heresy into their legislative measures, but rather defined this phenomenon in terms of established theological criteria, and in such a way that ongoing recognition had to be awarded to developing theological views.²⁴ By subjecting the fundamental concept of heresy to external regulation, the emperors deprived themselves of any control they might otherwise have been able to exercise over the applicability of the crimes of heresy, and in effect made these crimes unamenable to any real manipulation by them and their officials. This is, to my mind, an indication that the crimes of heresy were *not* designed to be used as an instrument for the protection of the regime's political interests, and points to a marked difference between the law of maiestas and the laws of heresy.

Secondly, a comparison may be drawn between the *procedures* whereby maiestas and heresy were prosecuted. As set out previously, both maiestas and heresy could be prosecuted according to the *accusatio* as well as the *cognitio* procedures, and all three of the ways in which *cognitio* proceedings could be instituted, could be used.²⁵ Thus, the full range of the post-Classical procedural spectrum was available in the case of both crimes. However, this correspondence is not necessarily significant, since this characteristic was shared by a number of other crimes: First, *accusatio* trials by any competent member of the public was the norm for all crimes; very few crimes could be prosecuted by interested parties only.²⁶ Secondly, *cognitio* trials following private denunciations were also permitted in the case of counterfeit, parricide, magic, violence, incest, abduction, sexual relations by a woman with her slave, fraud, corn usury, and anonymous libel²⁷ - a hotchpotch of crimes, which have nothing in common except that they were regarded as very serious crimes, or were of such a nature that a person who was competent to bring a formal accusation would, in practice, often not have been available. Finally, *cognitio* trials instituted as a result of

²² Cf p 39 above.

²³ See pp 36-37 above.

²⁴ It was possible, of course, for the state to influence these general theological developments, by measures such as imperial pressure on the ecumenical councils; but such interference would not seem to have occurred when heresy was criminalized, during the period between Gratian and Theodosius II, and could, in any event, have amounted only to indirect, non-immediate manipulation of the criminal law's principles, so that this possibility may be discounted for the period of the Theodosian Code.

²⁵ See pp 83-87 (heresy), 159 (maiestas).

²⁶ Cf Mommsen *op cit* 366-368.

²⁷ *Id* 350-351.

official action were also encountered elsewhere: the minor officials charged with security duties were required to report armed robbery to the provincial governors for trial;²⁸ while the provincial governors themselves were required to take all steps necessary to act against temple robbers, armed robbers, and those who captured free persons or appropriated others' slaves (and also, perhaps, thieves)²⁹ and could therefore also *mero motu* initiate the prosecution of such persons.³⁰ Therefore, this procedural correspondence between *maiestas* and heresy should not be accorded undue significance.

A further procedural correspondence is that both those awaiting trial on a charge of *maiestas*, and those awaiting trial on a count of heresy, were excluded from the general pardons issued at various times. However, this procedural feature was shared with other diverse crimes, such as (at different times) magic, poisoning, homicide, counterfeit, adultery, incest, seduction, rape, and the violation of tombs.³¹ This correspondence therefore points to the fact that both *maiestas* and heresy were regarded as grave crimes; nothing more.

A final procedural correspondence between *maiestas*, in the form of *perduellio*, and heresy, is that the prosecution of both crimes could be commenced *post mortem*, in order to retroactively subject the deceased to patrimonial sanctions. This correspondence merits very close investigation, since a departure from the rule that the person to be charged with a crime had to be alive at the commencement of the prosecution, was encountered in the case of these two areas alone. Furthermore, there is an express reference to this similarity in the Theodosian Code, and on first reading even a suggestion that the relevant provision was consciously introduced from the law regarding *maiestas* into the legislation on heresy due to a perceived connection between the two crimes:

CTh 16.5.40.5 (Arcadius, Honorius & Theodosius II, 407) *In mortem quoque inquisitio tendit. Nam si in criminibus maiestatis licet memoriam accusare defuncti, non inmerito et hic debet subire iudicium. Ergo et suprema illius scriptura inrita sit, sive testamento sive codicillo sive epistula sive quolibet genere reliquerit voluntas qui aut Manichaeus aut Fryga aut Priscillianista fuisse convincitur ...*

"Moreover, the inquisition shall extend beyond death. For, if in crimes of high treason it is permitted that the memory of the deceased may be charged with crime, not undeservedly must the deceased undergo judgment in this case also. Wherefore, if any person is convicted of having been a Manichaeus or a Phrygian or [Montanist],³² the document of his last will shall be void, whether he has left it in the form of a testament, a codicil, a letter, or any kind of will whatsoever."

²⁸ Id 306, 307, 309.

²⁹ Id 313, 313 n 1.

³⁰ Cf id 314-315.

³¹ Cf CTh 9.38 *passim*.

³² See p 51 n 30 above.

However, the reading that the post mortem accusability of heretics was first introduced in 407 AD, based on the model of the provisions relating to *maiestas* (sc in the form of *perduellio*) is incorrect. As I have shown, Manichaeism was arguably already subject to post-mortem prosecution during the Diocletianic era, when (being perceived as a pro-Persian movement) it was regarded as a form of treason;³³ in any event, it was clearly prosecuted post mortem by the last quarter of the fourth century AD.³⁴ The present constitution merely confirms that Manichaeism can be prosecuted post mortem, and then employs the position regarding Manichaeism as a springboard for the extension of this procedural provision to another form of sectarianism - here, the Montanists,³⁵ who stood in the ascetic, quartodeciman tradition.³⁶ Thus, the provision concerning post-mortem accusability was introduced to sectarianism from Manichaeism, not from the category of crimes against the state. In sum: I do not interpret CTh 16.5.40.5 as indicating that the post mortem accusability of heretics was first introduced in 407 AD, on the model of the provisions relating to *maiestas*. Instead, it is my understanding that it merely confirms the existing position regarding Manichaeism, and then extends this to other forms of sectarianism; the reference to *maiestas* appears merely as a rationalization of this affirmation and extension, the suggestion being that the exceptional procedural position concerning heresy is justifiable, since a similar exceptional position is encountered in the case of *maiestas*, a crime of comparable gravity. The explanation for the fact that both sectarianism and political crimes could be prosecuted post mortem, seems to historical, going back to Diocletian's interpretation of Manichaeism as a form of treason.³⁷ There was therefore arguably some historical connection between heresy and *maiestas* through Manichaeism; but I think it would be unwarranted to translate this historical link into a contemporary conceptual connection. Therefore, in my view this constitution is *not* indicative of a direct conceptual association between heresy and *maiestas*.

It is submitted that the procedural correspondences between *maiestas* and heresy are not of major significance. Moreover, as a counterbalance to these correspondences, one should take note of certain significant procedural divergences. First, there were important differences in the rules of evidence. In *maiestas* trials (as in trials for magic), *all* parties and witnesses were subject to interrogation under torture, contrary to the general rule that *honestiores* were exempt from torture. By contrast, *honestiores* charged with crimes of

³³ See pp 29-30 above.

³⁴ See pp 87-88 above.

³⁵ The Phrygians mentioned in the constitution were simply a Montanist sect - see Gothofredus op cit vol 6(1) 178. Cf also p 51 n 30 above for the identification of the "Priscillianists" as Montanists.

³⁶ Cf Jean Daniélou & Henri Marrou *The Christian Centuries. Vol 1. The First Six Hundred Years* (tr Vincent Cronin) (1964 repr 1983) 101, 103. - This offers a further illustration of the way in which antimaterial sectarians were associated with the Manichaeans, making possible the extension, to the former sect, of the rules already applicable to the latter.

³⁷ See pp 29-30 above.

heresy enjoyed the normal exemption. Their torture could occur in cases where their conduct had also constituted the crimes of *maiestas*,³⁸ or magic,³⁹ and they had been simultaneously charged with such crimes; however, this then occurred by virtue of the charge of *maiestas* or magic, and *not* the charge of heresy as such. Secondly, the commission of *maiestas* irrevocably attracted punishment; someone who had committed this crime remained liable to punitive measures even if he had subsequently repented, and had ceased to represent a threat to the state.⁴⁰ This reflected the normal principle of Roman criminal law that penitence did not absolve liability. By contrast, those charged with, or even condemned of heresy (or, for that matter, any other religious crime, excepting apostasy) could recant at any stage, and thereby be absolved from all further penal measures.⁴¹ This is a highly significant difference, indicative of an approach to heresy which differed radically from that adopted with regard to crimes against the state, and suggestive of fundamental differences in the aims of, and considerations underlying the suppression and prosecution of these two categories. In the case of *maiestas*, the dominant considerations are very clearly retribution and repression; while in the case of heresy, as I have shown elsewhere, the predominant concern was for the correction of the criminal.⁴²

This difference in approach is also encountered in the final area to be compared under the present heading, viz the *punishments* imposed for *maiestas* and heresy respectively. As indicated above, the post-Classical punishment for *maiestas*, on the one hand, was usually the death sentence, often in one of the aggravated forms; in addition, the estates of persons found guilty of treason were confiscated, without the normal concessions on behalf of the family of the condemned being applicable.⁴³ Those found guilty of *perduellio* were moreover subject to retroactive loss of the capacity to make any dispositions, for example by testament or donation. Furthermore, the children of those condemned of *maiestas* were subjected to serious professional and economic disabilities, which in effect deprived them,

³⁸ As e.g. envisaged in CTh 16.4.1, which concerned heretics engaged in seditious agitation (evidently, after the emperor had confirmed an ecclesiastical council's condemnation of their sect).

³⁹ As e.g. envisaged in CTh 16.5.34.1, which provided that possession of Eunomian writings constituted the crime of magic - cf further pp 55-56 above.

⁴⁰ An exception to this was encountered in the context of third-century *maiestas* trials on the grounds of Christianity, when recantation by Christians (manifested in a sacrifice to the emperor's genius) resulted in their indemnification. However, this exceptional rule was a remnant of the earlier Christianity trials, which were conducted by *cognitio extra ordinem* and the procedure of which could thus be regulated at the discretion of the imperial authorities; and since the emperors would appear to have prosecuted Christianity out of a desire to counteract the Christians' denial of the validity of the national cult (cf G E M de Ste Croix "Why were the early Christians persecuted?" (1963) 26 *Past and Present* 24-31), and could accomplish this by bringing those charged with Christianity to reassert the validity of the national cult, it is natural enough that they introduced provisions at this stage aimed at indemnification through recantation. Thus, the possibility of recantation during the subsequent third-century Christian trials was a remnant of earlier times, when Christianity was prosecuted on essentially religious grounds (see De Ste Croix *ibid*) and should not be taken as detracting from the general principle that liability for *maiestas* could not be absolved by repentance.

⁴¹ Cf pp 113-114 above.

⁴² Cf also pp 166-168 above.

⁴³ Subject to the partial exception in CTh 9.42.8.3 - cf p 160 n 20 above.

for the future, of any socio-economic standing they would have had by birth.⁴⁴ The above penalties were, though, usually not applicable to ordinary participants in seditious uprisings; as explained above, the latter were usually only charged with violence, and were thus subject to the less grave penalties of either *relegatio*, or condemnation to forced labour (depending on their rank), in addition to the confiscation of a third of their estate and a declaration of *infamia*.⁴⁵ The punishments prescribed for heresy proper (i.e. excluding those crimes of heresy simultaneously constituting sedition, public violence, or magic, which attracted the types of punishments applicable to the latter crimes), on the other hand, were generally speaking of a far less severe character. As shown in the discussion of the penalties prescribed for crimes of heresy, the leaders of the sectarian movements - that is to say, the bishops, clergy and preachers - were usually only subjected to proprietary penalties (subject to the normal concessions), to relegation from all cities and municipal towns and, in some instances, to *relegatio qualificata*, *deportatio*, or condemnation to forced labour (depending on their rank). The ordinary body of sectarians were normally only punished by the imposition of *infamia* and *intestabilitas*, and by being relegated from all the larger cities; the adherents of certain sects only were additionally subject to certain fines.⁴⁶ In comparing the sets of punishment applicable to crimes against the state and crimes of heresy respectively, it seems clear that they differed markedly in their effect. In the case of *maiestas*, the effect achieved by the prescribed punishments was the permanent elimination of any person constituting a significant threat to the political status quo, and the effective neutralizing of his followers and even his children (who might be expected to revive the threat posed by their parent). In the case of heresy, by contrast, the leaders of the heretical movements were not normally subjected to the death penalty, and the only effect achieved by the generally applicable punishments was, as shown above,⁴⁷ the social and geographical isolation of all heretics, leaders and followers alike.

The differences revealed by the above comparison of the rules of procedure and punishment, were of such a nature as to render a prosecution for heresy unamenable to control by the authorities, and less drastic in its effect than a trial for *maiestas* (or violence). Those prosecuted on charges of heresy could, at their will, terminate the prosecution, or evade punishment by recantation; and, if they were punished, the gravest effect of the penalties applicable to them was only their isolation from society, and not their permanent elimination, as was the case with *maiestas*. These factors rendered prosecution on a charge of heresy a wholly unsuitable device by which to conduct political trials; and, taken together with the fact that the fundamental concept of "heresy" was determined by an independent

⁴⁴ See p 160 above.

⁴⁵ Cf Mommsen *op cit* 569.

⁴⁶ See, generally, the conspectus of punishments prescribed for heresy at pp 120-128 above.

⁴⁷ See p 148-149 above.

agency, strongly indicate that the crimes of heresy could not have been designed as a political instrument.

The thesis that the emperors' antiheretical measures represented a reaction to a perceived political threat therefore finds no support in the Theodosian Code, but, on the contrary, appears to be invalidated by an examination of the antiheretical legislation.

2.2.3. Religious interpretation

From the above analysis, it has emerged that the socio-political interpretations currently placed upon the Roman emperors' antiheretical programme can claim no support in the antiheretical legislation. There are no indications in this legislation that the emperors perceived sectarianism as a socio-economic or political phenomenon posing a threat to the status quo, and that they in reality, regardless of any ostensible concerns of piety, acted to suppress it on this basis.

The above conclusion is essentially negative: it amounts to a statement that the socio-political interpretation is not validated in the Theodosian Code and that a case has not been made out against acceptance of the religious reasons for the prosecution of heresy stated by the emperors. It now remains to be determined whether it is possible to proceed beyond this negative statement, and to reach the positive conclusion that the antiheretical legislation in the Theodosian Code in fact supports the emperors' declared religious intent, so as to further strengthen the argument for the rejection of the socio-political interpretation.

I would submit that very strong support for the veracity of the emperors' stated religious intent is to be found in an area already foreshadowed to some extent: the penology informing the emperors' antiheretical measures.

The essential principles of this penology may be deduced from, among others, the following three constitutions:

CTh 16.5.41 (Arcadius, Honorius & Theodosius II, 407) Licet crimina soleat poena purgare, nos tamen pravos hominum voluntates admonitione paenitentiae volumus emendare. Quicumque igitur haereticorum, sive Donatistae sint sive Manichaei vel cuiuscumque alterius pravae opinionis ac sectae profanis ritibus adgregati, catholicam fidem et ritum, quem per omnes homines cupimus observari, simplici confessione susceperint, licet adeo inveteratum malum longa ac diuturna meditatione nutriverint, ut etiam legibus ante latis videantur obnoxii, tamen hos, statim ut fuerint deum simplici religioni confessi, ab omni noxa absolvendos esse censemus ... Ut igitur priores quas statuimus leges in excidium sacrilegarum

mentium omni executionis urgueri iubemus effectu, ita hos, qui simplicis fidem religionis licet sera confessione maluerint, censemus datis legibus non teneri...

"Although it is customary for crimes to be expiated by punishment, it is Our will, nevertheless, to correct the depraved desires of men by an admonition to repentance. Therefore, if any heretics, whether they are Donatists or Manichaeans or of any other depraved belief and sect who have congregated for profane rites, should embrace, by a simple confession, the Catholic faith and rites, which We wish to be observed by all men, even though such heretics have nourished a deep-rooted evil by long and continued meditation, to such an extent that they also seem to be subject to the laws formerly issued, nevertheless, as soon as they have confessed God by a simple expression of belief, We decree that they shall be absolved from all guilt ... Therefore, just as We order that the previous laws which We have issued for the destruction of sacrilegious minds shall be forcefully pressed to the full extent of their execution, in like manner We decree that those persons who have preferred the faith of pure religion, even though by late confession, shall not be bound by the laws which have been issued."

CTh 16.5.63 (Theodosius II & Valentinianus III, 425) ... [H]aec quoque clementiae nostrae statuta poena comitetur et noverint sacrilegae superstitionis auctores participes conscios proscriptione plectendos, ut ab errore perfidiae, si ratione retrahi nequeunt, saltem terrore revocentur ...

"...[T]his statutory punishment ... of Our Clemency shall attend them, and they shall know that, as authors of sacrilegious superstition and as participants and accomplices, they will be punished with proscription, so that if they cannot be recalled by reason from their perfidious false doctrine, at least they may be restrained by terror."

CTh 16.5.64 (Theodosius II & Valentinianus III, 425) Manichaeos haereticos sive schismaticos omnemque sectam catholicis inimicam ab ipso aspectu urbium diversarum exterminari praecipimus, ut nec praesentiae criminorum contagione foedentur. Omnes igitur personas erroris infausti iubemus excludi, nisi his emendatio matura subvenerit.

"We command that Manichaeans, heretics, schismatics, and every sect inimical to the Catholics shall be banished from the very sight of the various cities, in order that such cities may not be contaminated by the contagious presence of the criminals. We therefore order that all adherents of this unholy false doctrine shall be excluded unless a speedy reform should come to their aid."

These constitutions show that the antiheretical measures were informed by two broad penological principles: correction and preventative repression. The ultimate purpose which the antiheretical measures sought to achieve, was the correction of the transgressors - that is to say, the conversion of heretics, and the reconciliation of schismatics.⁴⁸ Both the provision that all further penal measures would be avoided by repentance, and the non-imposition of the death sentence appear to have been measures designed to give those charged with, or convicted of heresy, the opportunity and the incentive for reconsideration and recantation. Preventative repression played a subsidiary role: those heretics who remained unrepentant, or who had not yet repented, were to be excluded, under adverse conditions, from the rest of society, while penalties were provided for any conduct whereby the propagation and spread of sectarianism would be promoted, such as ordaining new priests, congregating to worship, baptising new members into the sect, and possessing

⁴⁸ That this sentiment was indeed implemented in practice, is shown by Sozomen's statement that "Novatiani ... nihil fere detrimenti ex hac lege passi. Nam et imperator sua sponte vigorem legis imminuebat, quippe qui perterrefacere potius quam perdere subditos in animo haberet" (*HE* 90 fin-91 in J-P Migne (ed) *Hermiae Sozomeni Historia Ecclesiastica in Patrologiae Cursus Completus, Series Graeca Prior* vol 67 (1864).

heretical writings. In this way, a two-fold end could be achieved: the convicted sectarians themselves could be prevented, as far as possible, from continuing their illicit practices, while the Catholic community, for its part, would be sheltered from the insidious influence of heresy.

This concern with correction and the subsidiary consideration of preventative repression contrasts very sharply with the general penology of the Roman criminal law of this period.⁴⁹ Despite the moralising to the contrary sometimes encountered in the sources, it is clear that the concepts of retribution, and thereafter deterrence predominated in post-Classical sentencing theory. The concept of the criminal's correction found virtually no application, as is amply illustrated by the ubiquity of the death penalty, execution having by now developed into the usual punishment for the more serious crimes.⁵⁰

The divergent penological approach encountered in the context of heresy appears to be attributable to the special impact on this area of the criminal law, of Christian conceptions regarding the role and purpose of temporal punishment; for there is a clear correspondence between the penology informing the prosecution of heresy, and the penological theories developed by the theologians of this era.

According to Christian thought of this period, the imposition of punishments - even the death penalty - by the temporal powers was wholly legitimate; the state, *qua minister Dei*, derived its authority to punish offenders and protect the peaceful, from God, and was wholly justified in exercising this authority.⁵¹ However, while the Church did not deny the legitimacy of punishment, it urged the exercise of clemency and moderation in its practice.⁵² It insisted that any measures against an offender had to be primarily aimed at the latter's salvation and reformation. Punishment should only be imposed where an offender remained unrepentant, in which case the justification would be the protection of the other members of the community against his corrupting influence and against other harm; however, even then, the punishment imposed had to be of such a nature that it would facilitate the offender's eventual correction.⁵³

⁴⁹ Cf Carl Ludwig von Bar et al *A History of Continental Criminal Law* (tr Thomas S Bell et al) (1916 repr 1968) 56, read with 48-49, 17-18, 19-21, 22; Carlo Gioffredi *I Principi del Diritto Penale Romano* (1970) 54-60.

⁵⁰ Cf Mommsen op cit 943. The death penalty was applicable to e g *maiestas*, counterfeit, magic, arson, adultery, abduction of a woman for sexual purposes, sodomy, certain instances of violation of tombs and (for *humiliores*) murder and grave forms of violence.

⁵¹ See Biondi op cit vol 3 para 508 pp 447-449 for the views of Ambrose and Augustine, as well as scriptural and canonic authority.

⁵² Cf id vol 3 para 508 p 448, para 505 p 437.

⁵³ Cf id vol 3 para 500 p 426.

On analysis, therefore, the Church did not admit of a penology of retribution; and while it did accept the concept of deterrence to some extent, it accorded it only a subsidiary place, giving primary importance to the idea of correction.

According to theological perceptions, the foregoing considerations were generally also applicable to the punishment of heretics by the imperial authorities. It was felt that appropriate punishments had to be imposed which would isolate the heretics from Catholic society, and prevent the spread of their doctrines to the latter; but, at the same time, it was insisted that the punishments imposed had to be of such a nature that they would promote the eventual reconciliation of schismatics to the Catholic church (at which stage punishment would no longer serve a purpose, and therefore had to be terminated). For this reason, the death penalty was rejected as a wholly inappropriate punishment for crimes of heresy, inasmuch as it would preclude any possibility of subsequent reform.⁵⁴ This is borne out by the following excerpt from Augustine of Hippo's plea on behalf of certain Circumcellions and Donatist clerics:

Aug *Ep* 133.1: "... hoc magis sufficere uolumus, ut uiui et nulla corporis parte truncati uel ab inquietudine insana ad sanitas legum cohercitione dirigantur uel a malignis operibus alicui utili operi deputentur. uocatur quidem et ista damnati, sed quis non intellegat magis beneficium quam supplicium nuncupandum, ubi nec saeuendi relaxetur audacia nec paenitenti medicina subtrahatur?"

"We rather wish this to be the sufficient punishment, that they should be left alive and totally unmaimed in their bodies, and that they should either be steered by the compulsion of the laws from insane frenzy to sanity, or be cut off from evil activities by some useful work. For although this is, indeed, also called a form of punishment, who would not realise that it should rather be called a blessing than a punishment, when neither the audacity of one who is in a state of fury is left unrestrained, nor is a person who is penitent deprived of the means of remedy?"⁵⁵

The extent of the correspondence between the above theological perceptions and the penology informing the emperors' antiheretical measures, is striking. Granted, there are certain instances of discrepancy; on occasion, the emperors did not conform to the principle that death was an inappropriate penalty for heresy, and prescribed this punishment. Nevertheless, this occurred in isolated instances only and normally only in those cases where the crime of heresy was linked to sedition,⁵⁶ violence⁵⁷ or magic,⁵⁸ and where strong secular concerns thus entered into the prosecution. In the overwhelming majority of cases, the emperors' penalties therefore complied with theological criteria.

⁵⁴ See Lucio de Giovanni *Il Libro XVI del Codice Teodosiano: alle Origini della Codificazione in Tema di Rapporti Chiese-Stato* (© 1985) 79-80 for the views of John Chrysostom and Augustine. Adde Aug *Ep* 100.2, 133.1; cf also Aug *Ep* 134, 139. Cf also p 22 above.

⁵⁵ My translation.

⁵⁶ Cf CTh 16.4.1

⁵⁷ Cf CTh 16.5.44, 16.5.51, 16.5.56

⁵⁸ Cf CTh 16.5.34.1; as well as CTh 16.5.9.1-2, relating to Manichaeans (or sects identified with them) who were commonly suspected of magic - cf p 30 above.

Given this marked and extensive correspondence, it seems fair to conclude that the secular authorities' penology on this point was directly inspired by theological ideals. That is to say, in this sphere the authorities abandoned the general penological approach characteristic of this period and instead implemented an approach dictated by the theologians.⁵⁹ This factor very strongly suggests that the desire to attain an essentially religious, rather than a secular goal, inspired and informed the entire antiheretical legislative programme; and very strongly supports the emperors' claim that their simple purpose in criminalizing and prosecuting heretics and schismatics, was the defence, as Christian rulers, of the Catholic faith and the Catholic church.

3. CONCLUSION

From the above discussion, it appears that the antiheretical legislation in the Theodosian Code contains no indications that sectarianism was perceived to be a socio-economic phenomenon. While there are certain correspondences between the way in which the authorities responded to those threatening state security, and to those regarded as heretics, which would at first glance support the nationalist interpretation of the prosecution of heresy. However, analysis reveals that these correspondences are either features which are encountered more generally in Roman criminal law, and are, at most, indicative of the perceived gravity of the crimes of both heresy and *maiestas*; or else, seem ascribable to the third-century links between *maiestas* and Manichaeism, the precursor of the crimes of heresy, thus only constituting clear evidence for the known historical, but not necessarily for the argued conceptual connection between *maiestas* and heresy. Moreover, any correspondences between the rules relating to *maiestas* and those relating to heresy, are outweighed by the significant differences of approach indicated by the contrary effects of repentance, and the divergent punishments applicable to the two categories; these strongly suggest that the emperors' concern with heresy was radically different than that with *maiestas*. On balance, it cannot be accepted that the way in which post-Classical criminal law addressed the phenomenon of religious sectarianism corresponded to, or reflected the way in which it addressed political threats, and that the antiheretical constitutions in the Theodosian Code bear the stamp of politically motivated legislation. Therefore, there is not sufficient evidence in the legislation of the fourth and the fifth centuries AD to indicate that the programme of criminalization of heresy was primarily inspired by any other reason than the considerations of religious piety expressly adduced by the emperors of this period. On the contrary, the evidence, and especially the penological evidence, preponderantly suggests that heresy was *indeed* combatted for the reasons advanced by the emperors.

⁵⁹ So, too, De Giovanni op cit 79.

The final conclusion must be that the Theodosian Code offers no sustainable proof that the imperial authorities responsible for the formation of the crime of heresy, perceived or experienced heresy as a socio-political phenomenon; and thus offers no sustainable evidence which might support, in any way, the socio-political interpretations which various modern authors have offered regarding the sectarian movements of this era. Any attempt to impose a socio-political interpretation (on the basis of theories of religious history and the sociology of religion which have already, in the disciplines where they originated, been shown to be suspect, if not wholly unfounded) on the antiheretical legislation contained in the Theodosian Code, when this legislation is, on analysis, not capable of supporting such an interpretation, would be unwarranted. In the light of current knowledge, it would be unscientific to reject the explanation for the criminalization and prosecution of heresy stated by those actually engaged in this process, and to transpose modern motives and theories onto that which was informed by the ideology of a different era.

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