CONSTANTINE AND SLAVERY[1]

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RESUMEN: El estudio pretende de investigar la relación entre la legislación de Constantino y la esclavitud. Se trata de un tema clásico, y en el pasado la doctrina habló de una inspiración cristiana en la legislación de Costantino. Serán objeto de una detenida revisión las medidas relativas al estatuto del esclavos: procedimiento decisorio de la situación juridical; condiciones de los esclavos y de su familia; disciplina de la *manumissio in Ecclesia.*

KEYWORDS: Constantino; Esclavitud; Libertad; Religión; Manumisión.

ABSTRACT: The research aims to investigate the relationship between the legislation of Constantine and the slavery. It is a 'classic' theme, which in the past made the doctrine assume a Christian inspiration in the laws of Constantine. We intend to reassess the measures that affect the status of the slaves: the procedure for his own recognition, the conditions of the slave and his family, the discipline of *manumissio in ecclesia*.

KEYWORDS: Constantine, Slavery, Freedom, Religion, Manumission.

RIASSUNTO: La ricerca si propone di indagare il rapporto tra la legislazione di Costantino e la schiavitù. Si tratta di una tematica ‘classica’, che in passato aveva condotto la dottrina a parlare di un’ispirazione cristiana nella normazione costantiniana. Si intende sottoporre a rinnovato esame provvedimenti che incidono sullo status di schiavo: sulla procedura di accertamento dello stato, sulle condizioni dello schiavo e della sua famiglia, sulla disciplina della manumissio in Ecclesia.

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PAROLE CHIAVE: Costantino, Schiavitù, Libertà, Religione, Manomissione.

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1. SCOPE AND STRUCTURE OF THE WORK

The investigation of the relationship between Constantinian legislation and slavery is a 'classic' topic. The oldest reading - which is in fact now obsolete - conforms to the ideas of Eusebius of Cesarea[2], as well as of the successors to the Emperor[3], which in Constantine's constitutions envisaged, for example, the freedom of slaves and limitations to the free will of their *domini*, clearly of Christian inspiration.

The aim of this work is to illustrate briefly the contents and purposes of a certain set of constitutions which exemplify the imperial attitude with regard to slavery. This is necessarily a limited selection in both number and topic, compared to the innumerable, varied laws produced, which makes it impossible to examine them all thoroughly. A further common element shared by the provisions analysed is the dating, as the laws analysed are almost exclusively those issued within one decade after the Edict of Milan. This choice is due to the fact that the brief analysis of these constitutions represents a preparatory study. The analysis of these constitutions will help to introduce a more in-depth examination of the laws dedicated to the *manumissio in ecclesia*[4]: these are *Cod. Iust.* I. 13. 1 (conserved, in point of fact, only in the *Codex Justinianus*) and *Cod. Theod.* IV 7. 1 (which corresponds in *Justinianus* to *Cod. Iust.* I. 13. 2), by which the emperor passed a legal ruling for an institution which was already in force in practice. As will be better illustrated below, this was a phenomenon that rejected the forms and methods of official law: the latter was replaced by simpler and more informal methods which could also be understood by lay members of the community. In other words, the *manumissio in ecclesia* replaced the forms of granting freedom recognised by *ius civile* and was to work alongside official law until its full recognition in Constantinian times, as we shall see in the provisions analysed[5].

The procedure for freeing slaves governed by Constantine that we have examined is an important indication not only of the imperial conception of slavery but also of the relations between the Empire and the Church. For this purpose both legal, literary and patristic sources are important and taken into account.

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[2] The panegyrist describes Constantine as a faithful servant of God, and his legislative activities as a divine service, opposing the figure of Licinius, who on the other hand had promulgated barbarous, iniquitous and illegitimate laws (*v.C.* I. 1; IV. 26). About Eusebius and his work, *Vita Constantini*: Farina 1966, pp. 16-17; Silli 1987.

[3] Zenone, in *Cod. Iust.* V. 27. 5, in 447 AD, described Constantine as the man who *veneranda christianorum fide romanum munivit imperium*.

[4] *Manumissio in ecclesia* is a process of liberation of the slaves that took place before an assembly of the faithful and under the supervision of religious authority.

[5] This phenomenon can be likened to the informal manumissions of the classical period. These were, in fact, manumissions, recognised and protected by the *praetor*, which obtained a legal seal only through the *lex Iunia Norbana*, probably issued in 19 AD.

2. STUDIES ON THE RELATIONSHIP BETWEEN CONSTANTINE AND CHRISTIANITY

The relationship between Constantine and the Christian faith has always been a subject of lively debate, even among the Emperor's own contemporaries[6].

Within the panorama of Romanist literature, Biondo Biondi's interpretation is undoubtedly worthy of mention. In his *Diritto romano cristiano*, the scholar aims to demonstrate that the results of the Justinian legal experience must be retrospectively considered in comparison with the Constantinian period; in particular, the emperor is acknowledged for the merit of having transferred the Christian principles of humanity and piety into the law[7]. Yet it is difficult to glean from the sources we examined the same impression as the one described by Biondo Biondi, where he states that these are texts bursting with spirituality and are totally extraneous to previous laws[8]. At least in the provisions we examined, it does not seem possible to recognise either the tendency to defend the new religion or to encourage people to embrace the Catholic faith in a perspective of a radical review of human values.

On the other hand, Biondi appears to share the idea that pro-Christian attitudes cannot be confirmed prior to 312, the year from which the sources confirm specific interventions on sacred buildings, in Rome, Bethlehem and Trier[9].

Be that as it may, the new historiographical view, beginning with the works of Chastagnol and Arnheim, aimed to phase out the discontinuity between Diocletian and Constantine and, more generally, to reduce the importance of the religious element in the choices of imperial politics[10].

With regard in particular to slavery, the Church does not formally propose its abolition; if anything, in the deeds of the Church Fathers, the freeing of slaves is described as a duty of conscience of the *dominus* and a highly praiseworthy act[11]. The legislation was obviously influenced by this new standpoint, which, for example, interpreted the

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[6] On Constantine and his relationship with the Christian religion, *ex multis*: Calderone 1962; Amarelli 1978; Scevola 1982; Leeb 1992; Marcone 2002, pp. 81-145; Simonetti 2005; Drake 2006, pp. 111-136; Girardet 2010; Barnes 2011, pp. 131-140.

[7] Biondi's approach is criticised in Crifò 2003: 'Costantino e Giustiniano vengono confusi, certo a un ben diverso livello scientifico e con grande impegno di erudizione e di sapienza, ovviamente senza ingenuità ma, con in più, quello che a me è parso un fraintendimento del codice teodosiano e in ogni caso con un non troppo diverso impegno ideologico'.

[8] Thus Biondi 1952, p. 118, who asserts that one of the greatest changes in history took place in Constantine's time, when the State became Christian.

[9] Girardet 2006, p. 104.

[10] Lizzi Testa 2013, p. 353, referring to the works of Chastagnol 1960, p. 402; Arnheim 1972, pp. 38-39.

[11] *Const. App*. 4. 9; Aug. *serm.* 21. 6. See: Mc Coy, 1997, pp. 59-60.

relationship of slavery as one of service, extraneous to all forms of atrocity and violence, tending, on the other hand, to underline a sense of human dignity. On this issue, the older doctrine expressed a wide variety of positions; if the above-mentioned interpretations, which saw Constantine as an emperor driven by a 'very Christian' spirit, should be treated with caution[12], the hypotheses of those who exclude any Christian influence whatsoever appear equally limited[13]. There are many opposing intermediate views[14], two of which we report. The first considers that the legislative amendments did not directly derive from Christian influence but rather from the efforts made by the legislator to adapt to the - religious and other - situations of the time[15]. The second excludes that the legislation was influenced by the Christian faith, underlining, instead, the considerable contribution of Stoic doctrine. Stoicism is thought to have chosen Christianity as an instrument for offering religious solidity to its ideas and arguments[16].

3. PROCEDURAL INNOVATIONS. CONSTANTINE AND THE CASES FOR FREEDOM

It may be appropriate to begin with an analysis of *Cod. Theod.* IV. 8. 5, which introduces an important innovation into the procedure for cases for freedom[17]; the law was indicated as a significant example of the penetration of a forceful *favor libertatis*[18].

We must remember that the *causae liberales* were cases held to ascertain the *status libertatis*. The *causa liberalis* could be either *vindicatio in servitutem*, revendicating a slave as an individual who had until then lived as a free man, or *vindicatio in libertatem*, which aimed to confirm the freedom of an individual who had until that time lived as a

[12] I refer in particular to the position of Biondi 1952, pp. 118 ff.

[13] We may mention the work of Salvioli 1899; Baus-Ewig 1977, p. 444; Corcoran 1985; Garnsey 1996.

[14] Troplong 1843, p. 56; Ferrini 1908, p. 57; Perozzi 1928, pp. 98-100; Schulz 1934, p. 148; May 1935[18], p. 53; Riccobono 1935, pp. 61-62; Arangio-Ruiz 1968[14], p. 49; Buckland 1908 does not tackle the question.

[15] Jonkers 1933, pp. 241-280.

[16] Imbert 1949b.

[17] Among the contributions focusing on cases for freedom, we may recall Nicolau 1933; Franciosi 1961; Indra 2011; specifically, on *Cod. Theod*. IV. 8. 5, Sciortino 2010, p. 115, which underlines that the *circumductio* was limited to replacing the *proclamatio in libertatem*, by then obsolete due to the disappearance of the structurally bi-partite trial.

[18] Albertario 1933, pp. 61-77; Imbert 1949a; Castello 1956, pp. 348-361; Huchthausen 1976; Castello 1984, pp. 2175-2190; Wacke 1992; Ankum 2004, pp. 45-78; Ankum thinks that 'l'idée de la *humanitas* à partir de la fin de la République et celle de la *benignitas* (bienveillance) à partir de Marc-Aurèle ont influencé le droit de l'esclavage romain et ont provoqué une amélioration de la position réelle et juridique des esclaves par des mesures contre les abus du pouvoir des *domini* et l'application fréquente du *favor libertatis*, du principe de favoriser la liberté, aussi bien dans les travaux des juristes classiques que dans les constitutions impériales'; Ankum 2004, pp. 3-10; Ankum 2006, pp. 1-17; about *favor libertatis* as «tendenza a facilitare l'acquisto della libertà da parte degli schiavi», Starace 2006, p. 25.

slave. In both cases, as the slave, or presumed slave, could not defend himself before the court, an *adsertor in libertatem* was needed to defend or proclaim the *status* of free man. The *adsertor libertatis* was required only until the time of Justinian, who abolished this figure in *Cod. Iust.* VII. 17. 1pr. Under Constantine, however, there was a decisive change, with the introduction of the mechanism of the *circumductio*. The constitution, found in the *Codex Theodosianus* immediately after the book dedicated to the *manumissiones in ecclesia*, is addressed to *Maximus*, the urban prefect, and is dated 20 July 322.

> IMP. CONSTANTINUS A. AD MAXIMUM PRAEFECTUM URBI. *Si quis libertate utente eiusque compotes inopinatos in discrimen ingenuitatis adducat, si eos forte adsertio defecerit, circumductio praebeatur, adsertorem quaeri titulo per litteras indicante, ne causa per silentium ignoretur vel absurde etiam proclametur, ut qui comperissent vellent adserere vel cunctantes etiam cogerentur, ne, si adsertor defuerit, vincti, multis eos scientibus liberos, a dominis ducantur. ideoque sancimus, si quis, adsertoris inops atque ignotus circumlustratis provinciae populis desertus, tradatur ei, qui servum dixerit, non infracta, sed dilata libertate; adsertore invento vires recolligat et suis renovatis defensionibus resistat in iudicio, possessoris iure privilegiisque subnixus, quamquam de domo illius processerit. neque enim illa possessio est in tempus accepti, sed expectatio adsertoris in tempore non repperti; ita ut, si instaurata lite restitutisque in sua iura partibus pro libertate fuerit lata sententia, iniuriae inpudentiaeque causa adversarius pari numero servorum multetur, quot erunt, qui in servitutem petiti sunt: his vero non condemnatur, qui in ipsa fuerint lite progeniti. quod si quis ante adsertorem repertum vel ante sententiam fuerit mortuus, heredibus causam status probantibus multaticius servus tradetur: et heredes eius, qui libertatem temerabat, si inplacabilem animum indicant, eadem maneat mancipiorum lex atque condicio; si liberos sinent, quos clausos reppererint, occidunt cum personis delicta. Minorum defensores eadem manebit mancipiorum multa ac iudicio his quos defenderant reposcentibus rei male gestae dabitur aestimatio. cum id proprio periculo fecerit adsertor, ut rem salvam fore promittit, ita satis accipiat de multae redhibitione. libertatem victis hostibus victorum dominatio abstulit; leges vero iniuriosos poena adficiunt et fama spoliant, dictumque iurgio in adversarium immodestius iactatum petulantiusque fusum poenam subire cogitur: atque non erit inpunita labefactatio atque oppugnatio libertatis, quae in conviciis quoque punitur. Iniustum est autem alienum ad servum recepisse, et alterius servi abductione condemnatur*.

DAT. XIII K. AUG. SIRMIO PROBIANO ET IULIANO CONSS.[19].

If any persons who are enjoying their freedom and who are in possession of it should unexpectedly be brought to a trial involving the risk of the loss of their freeborn status and if by chance such persons should lack a sponsor for making a formal claim of freeborn status, they shall be granted the right to be conducted around bearing a written notice indicating that they seek a sponsor, in order that the grounds of a person's claim may not remain unknown through silence or should be proclaimed in an absurd manner. Thus those persons who learn of the situation may be willing to undertake the duty of sponsorship, or if they hesitate, they may even be compelled to do so, lest, if a sponsor should be lacking, the accused persons may be bound and led away by their masters, even though many persons may know that the accused persons are free. Therefore We sanction that if any person should lack a sponsor and if he should be led through the people of the province without being recognized and if thus forsaken he should be delivered to the person who claims that he is slave, his claim to freedom shall be postponed but not destroyed. When a sponsor is found, the accused shall have the right to regather his forces, to renew his defence, and to make his resistance in court, depending on the rights and privileges of a possessor, even though he had come forth to court from his possessor's house. For this is not the kind of possession that extends to the time that a sponsor has been obtained, but it is a case of expectation of obtaining a sponsor that was not found in time. Thus if the case should be renewed, when the parties are restored to their rights, and judgment should be rendered in favor of freedom, then for this outrage and his arrogance the adversary shall be subjected to a penalty of the same number of slaves as the persons whom he sought for slavery, but he shall not be condemned for any persons that were born during the pendency of the suit. But if the person thus accused should die before finding a sponsor or before judgment is pronounced, and his heirs should prove the justice of his cause regarding his status, the slave exacted as a penalty from the adversary shall be delivered to such heirs. If an implacable spirit should be shown by the heirs of the person who thus violated the freedom of any person, they shall be subject to the same law and conditions with respect to the penalty in slaves. But if the heirs should allow those persons to be free whom they found in bondage, the wrongs perish with the persons who committed them. The defenders of minors are subject to the same penalty in slaves, and on the demand of wards in a suit brought for recovery on account of mismanagement of their affairs, the guardians shall refund to the wards the estimated value of the penalty. Since the sponsor undertakes such a case at his own risk, just as he promises the satisfaction of the

[19] *Cod. Theod.* IV. 8. 5.

judgment, so he shall receive security with reference to the payment of the fine. The domination of the victors robs conquered enemies of their freedom. The law inflicts a penalty on those guilty of outrage and renders them infamous; excessively impudent and boastful language hurled forth and poured out wantonly upon an adversary in a quarrel is forced to incur a penalty; hence the undermining of the freedom of a person and the assault upon such freedom shall not go unpunished, since it is punished also in the case of insults. Moreover, it is unlawful to harbor another person's slave, and anyone guilty of such an act shall be condemned for the abduction of the slave of another[20].

It is a long provision, which in my opinion can be divided into two parts: the first, rather innovative, introducing the *circumductio*; the second which, on the other hand, merely describes more specific cases, introduced in sequence, by the hypothetical conjunction *si*.

Limiting the analysis to the first part, Constantine states that individuals who until that time had lived as free men (*libertate utente*) and found their *status* disclaimed by a *dominus*, could avoid the immediate *ductio* - which, by ancient law, would have occurred automatically without an *adsertor* - by seeking throughout the whole province anyone who was willing to take on the task of defending his freedom. If the *circumductio* should not achieve the result hoped for, or an *adsertor libertatis* was not found, the individual was *ductus*: *si adsertor defuerit, vincti, multis eos scientibus liberos, a dominis ducantur*.

The new law certainly represents an innovation in favour of protecting freedom, as it offers the possibility to avoid an unfair *ductio* and, in any case, speeds up the time needed to solve a dispute that could potentially impede the *status libertatis*. However, even if it was not possible to find an *adsertor* willing to defend or protect somebody's freedom, this would not be compromised; in fact, the text of the law states *non infracta, sed dilata libertate*. As explained in the following proposition, even if an *adsertor* was found who was willing to defend somebody's *status* subsequently, from a probative point of view it was the slave himself - via the *adsertor* - who had the burden of proving his condition: all the *commoda possessionis* were to the advantage of the *dominus* who (presumably) owned the slave. Moreover, as Cicero stated in the oration *de domo*, it would be possible to repeat the trial which ended *pro servitute* even later as the principle of *ne bis in idem* did not hold for this category of cases[21]. This rule, in force at the time of Cicero, would remain valid until the age of Constantine.

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[20] All the translations of the laws of Theodosian Code are from Pharr 1952, pp. 11 ff.

[21] Cic. *dom.* 29. 77-78: *Quid ita? Quia ius a maioribus nostris, qui non ficte et fallaciter populares, sed vere et sapienter fuerunt, ita comparatum est, ut civis Romanus libertatem nemo possit invitus amittere. Quin etiam si decemviri sacramentum in libertatem iniustum iudicassent, tamen, quotienscumque vellet quis, hoc in genere solo rem iudicatam referri posse voluerunt*. [Why? Because the law was established by our ancestors, who were not fictitiously and pretendedly

From this point of view, in my opinion, the favourable treatment of the slave was seriously limited. Indeed, the only concrete facilitation in order to gain *libertas* was the method of publicly seeking a defence counsel: *per populos et per publicum*, as we can read in the Visigothic *Interpretatio*[22]. However, some further considerations deserve attention.

First of all, from a probative point of view, in the event of a *ductio*, nothing changed compared to the normal regime. It would have been different if the burden of proof of slavery was laid on the *dominus* exercising the *ductio*.

Secondly, the field of application of the law is limited to *vindicationes in servitutem*. A more generic provision would also have considered the applicability of *vindicationes in libertatem*. Only in this way would it be possible to think that the provision had been inspired undisputedly by *favor libertatis*, the principle found throughout the case history of *causae liberales* from the very Twelve Tables.

Thirdly, as has been seen, the inadequacy of the institution of the *proclamatio* depended on the fact of being suited to the dimensions of a small community, in which the public proclamation of the magistrate *in iure* would have been known to a large portion of the community; otherwise, in the post-Classical era, in having to be applied to larger territorial areas, the institution could not have made its effects felt to the full[23].

What, therefore, might the *ratio* underlying the choice to apply the provision only to *vindicationes in servitutem* be? It seems more serious to doubt the *status* of a person living as a free man rather than that of a slave, and in this perspective, Constantine seems inclined to sacrifice the right of ownership of a slave rather than the status of a free man.

From another perspective, the condition of *morari in libertate* (living as a free man despite the legal status of *servus*) potentially heralds even greater doubts. This is, in fact,

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attached to the people, but were so in truth and wisdom, in such a manner that no Roman citizen could be deprived of his liberty against his consent. Moreover, if the decemvirs had given an unjust decision to the prejudice of any one's liberty, they established a law that any one who chose might on this subject alone, make a motion affecting a formal decision already pronounced], translation by http://perseus.uchicago.edu/perseus-cgi/citequery3.pl?dbname=LatinAugust2012&getid=1&query=Cic. Dom. 77.

[22] *Interpretatio*: *Si aliquis in libertate positum ad servitium conetur adducere, iubet pulsatum ex ordinatione iudicis per populos et per publicum duci, ut defensorem sui status inveniat, et inventum assertorem per chartam petat a iudice, ne silentio ingenuitas opprimatur*. [If any person should attempt to reduce to slavery anyone who is in a position of freedom, the law commands that the defendant, by order of the judge, shall be led through the people and through public places, in order that he may find a defender of his status, and if he should find such a sponsor, he shall petition the judge for said sponsor through a written document, lest his freeborn status should be overwhelmed through silence].

[23] Sciortino 2010, p. 119, observing how the *circumductio*, in the *vindicationes e libertate in servitutem*, acting in practice *extra ordinem*, allows the person concerned to personally seek an *adsertor in libertatem*, granting the time needed to cover the whole province.

a condition which raises the issue of *servi fugitivi*, which was already present in Republican times, when a person living as a free man could, hypothetically, even hold public offices. The rapid solution to any doubts over a person's *status* therefore responds to a principle of public order and even of state economics, and the *circumductio* procedure could accelerate the investigation into the case.

Somehow, therefore, the innovative effect of the constitution must be scaled down. Undoubtedly, it reveals one of the steps towards the emancipation from the role of the *adsertor*, but the law cannot be read *tout court* as an expression of a *favor libertatis*, and even less one of Christian inspiration. Rather, from the above-formulated observations, the provision would appear rather as a preventive remedy against situations which could potentially disturb the public order[24].

4. A NEW 'HUMANITAS' TOWARDS SLAVES?

We now propose the examination of a group of three constitutions which aimed, respectively, to protect the unity of a family of slaves, and the physical safety of the slaves in the face of unfair violence used against them by their masters. The following are three texts considered to be significant in terms of a new attitude of Christian *pietas* towards those in a condition of slavery.

> IMP. CONSTANTINUS A. GERULO RATIONALI TRIUM PROVINCIARUM. *In Sardinia fundis patrimonialibus vel enphyteuticariis per diversos nunc dominos distributis oportuit sic possessionum fieri divisiones, ut integra apud possessorem unumquemque servorum agnatio permaneret. quis enim ferat liberos a parentibus, a fratribus sorores, a viris coniuges segregari? igitur qui dissociata in ius diversum mancipia traxerunt, in unum redigere eadem cogantur: ac si cui propter redintegrationem necessitudinum servi cesserint, vicaria per eum qui eosdem susceperit mancipia reddantur et invigila, ne per provinciam aliqua posthac querella super divisis mancipiorum affectibus perseveret*. DAT. III KAL. MAI. PROCULO ET PAULINO CONSS.[25].

In the case of Our patrimonial and emphyteutic estates in Sardinia which were recently distributed among different proprietors, the division of the landholdings ought to have been made in such a way that each entire family of slaves would have remained in the possession of one landholder. For who could tolerate that children should be

[24] In any case, the constitution can be interpreted as exemplary of the fact that Constantine's legislation on *favor libertatis* marked the beginning of a new era.

[25] *Cod. Theod.* II. 25. 1.

separated from parents, sisters from brothers, and wives from husbands? Therefore, if any person has separated such slaves and dragged them off to serve under different ownership, he shall be forced to reunite them under a single ownership. If any person should lack the due number of slaves on account of the restoration of family ties, substitute slaves shall be given in return by the person who has received the aforesaid slaves. Be vigilant, in order that no complaint hereafter may persist throughout the province about the separation of the loved ones of the families of slaves.

It is said that assets and leaseholds were distributed among various owners in order to safeguard the family ties among slaves (*ut integra* […] *servorum agnatio permaneret*); this is also confirmed by the question *Quis enim ferat liberos a parentibus, a fratribus sorores, a viris coniuges segregari?* The whole question is a specifically legal one: *oportere* is the verb chosen to express the necessity of the measure; reference is made to the *agnatio* (which in the *Codex Justinianus*, *Cod. Iust.* III. 38. 11, is added to that of the *adfinitas*). Specifically, although we cannot talk of agnatic ties of slave families in the technical sense, the choice was made to qualify the nature of such families in the same way as those of free men, and in this sense it can be stated that, in the text of the constitution in question, the slave family is recognised in its moral and material unity, also by the use of terms applied to the family of free men.

It should be noted that *Cod. Theod.* II. 25. 1 is addressed to *Gerulus*, *rationalis* of the provinces of Sicily, Sardinia and Corsica. The field of application of the provision is actually limited to Sardinia, a fact that represents - whatever the solution to the problem of the general effectiveness of the imperial constitutions might be - an indication of the nature of the *ad hoc* measure, issued to meet a contingent need (as revealed by the adverb *nunc*) and limited to an individual territory (*in Sardinia*, as we have specified). It does not appear, therefore, that the law can be said to be methodically oriented to ensuring a better treatment of slaves. In any case, the limited effectiveness drastically reduces its importance within Constantinian law.

The two other provisions we aim to examine are called the *De emendatione servorum* Theodosian Code [26] and govern the powers of punishment exercised by the *domini* over their slaves. Gothofredus defined these constitutions as *humanissimae*[27]*.* Only the first law - dated 11 May 319 - falls within the time frame we refer to, the other being dated 326[28]. Although the exact day and month was doubted by Seeck on the basis of the

[26] The rubric of the title *Cod. Theod.* IX. 12 is identical to that of the Justinian *Cod. Iust.* IX. 14.

[27] Gothofredus 1975, *ad h. l.*, underlines that the two provisions were issued when Constantine was *christiana iam disciplina imbutus*.

[28] Seeck 1964[2], p. 58.

month in which the office of *praefectus urbi* was held by *Bassus*, the recipient of the provision, expired. The scholar does not however offer an alternative date.

> IMP. CONSTANTINUS A. AD BASSUM. *Si virgis aut loris servum dominus adflixerit aut custodiae causa in vincla coniecerit, dierum distinctione sive interpretatione depulsa nullum criminis metum mortuo servo sustineat. Nec vero inmoderate suo iure utatur, sed tunc reus homicidii sit, si voluntate eum vel ictu fustis aut lapidis occiderit vel certe telo usus letale vulnus inflixerit aut suspendi laqueo praeceperit vel iussione taetra praecipitandum esse mandaverit aut veneni virus infuderit vel dilaniaverit poenis publicis corpus, ferarum vestigiis latera persecando vel exurendo admotis ignibus membra aut tabescentes artus atro sanguine permixta sanie defluentes prope in ipsis adegerit cruciatibus vitam linquere saevitia immanium barbarorum*. DAT. V ID. MAI. ROMAE CONSTANTINO A. V ET LICINIO C. CONSS.[29]

If a master should beat a slave with light rods or lashes or if he should cast him into chains for the purpose of custody, he shall not endure any fear of criminal charges if the slave should die, for We abolish all consideration of time limitations and legal interpretation. The master shall not, indeed, use his own right immoderately, but he shall be guilty of homicide if he should kill the slave voluntarily by a blow of a club or of a stone, at any rate if he should use a weapon and inflict a lethal wound or should order the slave to be hanged by a noose, or if he should command by a shameful order that he be thrown from a high place or should administer the virus of a poison or should lacerate his body by public punishments, that is, by cutting through his sides with the claws of wild beasts or by applying fire and burning his body, or if with the savagery of monstrous barbarians he should force bodies and limbs weakening and flowing with dark blood, mingled with gore, to surrender their life almost in the midst of tortures.

As observed above, the provision was addressed to a certain *Bassus*, whose office is not specified; it contains a number of precepts. The *dominus* is acknowledged the right to punish his own slaves, excluding responsibility for any lethal consequences deriving from the beating.

It is then stated that it is forbidden to abuse the methods of punishment: *Nec vero inmoderate suo iure utatur*, which in fact implies responsibility for murder if the punishment is inflicted with the intention to kill: *tunc reus homicidii sit, si voluntate eum* […] *occiderit*. Substantially the *dominus* is prohibited from exercising *ius vitae ac necis*.

[29] *Cod. Theod.* IX. 12. 1 (= *Cod. Iust.* IX. 14. 1).

The legislator distinguishes *castigatio* from mere cruelty; the former is permitted only where exercised in moderation (*nec vero immoderate suo iure utatur*), or using means suited to the purpose: therefore, the master who *virgis aut loris servum adflixerit aut custodiae causa in vincula coniecerit*, even if the slave dies as a consequence, will go unpunished. He will on the other hand be considered guilty of murder if, exercising a *saevitia immanium barbarorum*, he voluntarily performs an act which leads to death[30].

In some points an interpretation that is consistent with the subsequent provision is rather complicated:

> IMP. CONSTANTINUS A. MAXIMILIANO MACROBIO*. Quotiens verbera dominorum talis casus servorum comitabitur, ut moriantur, culpa nudi sunt, qui, dum pessima corrigunt, meliora suis acquirere vernulis voluerunt. nec requiri in huius modi facto volumus, in quo interest domini incolume iuris proprii habere mancipium, utrum voluntate occidendi hominis an vero simpliciter facta castigatio videatur. toties etenim dominum non placet morte servi reum homicidii pronuntiari, quoties simplicibus quaestionibus domesticam exerceat potestatem. si quando igitur servi plagarum correctione, imminente fatali necessitate, rebus humanis excedunt, nullam metuant domini quaestionem*. DAT. XIV. KAL. MAI. SIRMIO CONSTANTINO A. VII. ET CONSTANTIO C. CONSS.[31].

Whenever such chance attends the beating of slaves by their masters that the slaves die, the masters shall be free from blame if by the correction of very evil deeds they wished to obtain better conduct on the part of their household slaves. In the case of such actions, in which it is to the interest of the master to keep a slave that is his own property unharmed, it is Our will that no investigation shall be made as to whether the punishment appears to have been inflicted with the intention of killing the man or simply as correction. For it is Our pleasure that a master shall not be pronounced guilty of homicide for the death of a slave when he exercises his domestic power in simple punishments. If at any time, therefore, slaves depart from the human scene when fatal necessity is imminent as a result of correction by beating, the masters shall fear no criminal investigation.

This excludes any investigation into the voluntary nature of the killing of a slave and, substantially, would seem to reconfirm the right to decide on his life or death. In reading the law, the dividing line falls rather on the nature of the forms of punishment used: within the limits of *simplex castigatio* the master has full freedom.

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[30] This thus excludes *dierum distinctio*, with words reminiscent of the Hebrew precept found in the Book of Exodus.

[31] *Cod. Theod.* IX. 12. 2.

More specifically, it is read that the *castigatio* can be applied in order to make the slaves better (*dum pessima corrigunt meliora suis adquirere vernulis voluerunt*): punishing the slave, therefore, takes on an ethical, not merely punitive, meaning. We also read that the *dominus* is not guilty of murder if the slave suffers from *fatali necessitate*: therefore, what is important is not so much the event of death itself but rather the intention of the agent. Moreover, the power of *castigatio* cannot go beyond the punishment for shortcomings, which can be castigated within domestic jurisdiction[32], only if *simplicibus quaestionibus domesticam exerceat potestatem*.

We can therefore see how the 319 constitution declares the *dominus* guilty of murder if he kills the slave voluntarily; the 326 constitution, on the other hand, places no importance on the distinction *utrum voluntate occidenti hominis an vero simpliciter facta castigatio videatur*. The concept of *castigatio* replaces the older term of murder committed *dolo malo* or *sine causa*.

Certainly the choice of classifying the killing of slaves as murder was in itself important; this represents an amendment clearly aiming to improve the treatment of slaves. However, there is no trace of attitudes inspired by humanity or Christian charity. The desire to govern legally a relationship - that of the master and his slave - which both lay and Christian consciences perceived in a new way, was still predominant.

5. THE TWO CONSTITUTIONS CONCERNING 'MANUMISSIO IN ECCLESIA'

The study of Constantinian legislation concerning slavery must necessarily include an analysis of the *manumissio in ecclesia*[33], whose Christian origins have usually been underlined[34]. Some authors, however, have drastically downplayed such statements, while not denying that the *manumissio in ecclesia*[35] is linked to assumptions and factors

[32] Similar contents can be found in Gaius (*inst*. I. 3. 1).

[33] We talk about *manumissio in ecclesiis* in the *Codex Justinianus*, *manumissio in ecclesia* in the *Codex Theodosianus* and *manumissio in sacrosanctis ecclesiis* in the Justinian *Institutiones*: *Inst*. I. 5. 1: *Multis autem modis manumissio procedit: aut enim ex sacris constitutionibus in sacrosanctis ecclesiis aut vindicta aut inter amicos aut per epistulam aut per testamentum aut aliam quamlibet ultimam voluntatem. sed et aliis multis modis libertas servo competere potest, qui tam ex veteribus quam nostris constitutionibus introducti sunt*. [Manumission may take place in various ways; either in the holy church, according to the sacred constitutions, or by default in a fictitious vindication, or before friends, or by letter, or by testament or any other expression of a man's last will: and indeed there are many other modes in which freedom may be acquired, introduced by the constitutions of earlier emperors as well as by our own], translation by http://www.gutenberg.org/files/5983/5983-h/5983-h.htm#link2H_4_0006.

[34] *In primis*, worth remembering are the considerations of Biondi 1952, p. 399, underlined also by Fabbrini 1965, pp. 195 ff. In addition to these we may remember Calderone 1971, pp. 379 ff.; Nörr 1971.

[35] In particular, about the *manumissio in ecclesia* see the recent work by Maiuri 2012.

connected to the Christian faith and the organisation of the Christian community within the Empire[36].

Concerning ecclesiastical manumission, the two fundamental texts are *Cod. Iust.* I. 13. 1 and *Cod. Theod.* IV. 7. 1, before which there are no specific indications on the institution and its development, even in the Christian sources of the earlier centuries[37].

> IMPERATOR CONSTANTINUS A. AD PROTEGENEM EPISCOPUM*. Iam dudum placuit, ut in ecclesia catholica libertatem domini suis famulis praestare possint, si sub adspectu plebis adsistentibus christianorum antistitibus id faciant, ut propter facti memoriam vice actorum interponatur qualiscumque scriptura, in qua ipsi vice testium signent. unde a vobis quoque ipsis non immerito dandae et relinquendae sunt libertates, quo quis vestrum pacto voluerit, dummodo vestrae voluntatis evidens appareat testimonium*. D. VI ID. IUN. SABINO ET RUFINO CONSS. (8 June 316)[38].

It has already been decided that masters can confer freedom upon their slaves in the Catholic Church, provided they do so in the presence of the people and Christian bishops; and, in order to preserve the remembrance of the act, an instrument must be drawn up, which the masters shall sign as witnesses; hence freedom is not unreasonably granted and ownership relinquished by such an agreement as any one of you may choose to accept, provided the evidence of your consent is apparent.

This is a law addressed to Protogenes, Bishop of Sardica, a city firmly under the control of Licinius, and, in Mommsen's edition, dated 316[39].

The second law is addressed to Osius[40], Bishop of Cordoba[41]:

> IMP. COSTANTINUS A. HOSIO EPISCOPO. *Qui religiosa mente in ecclesiae gremio*

[36] Sargenti 1975, pp. 281-282.

[37] Some scarce references can be found only in the *Acta martyrum*, from a period of no earlier than the V or VI century AD. Some places where clues can be found are mentioned in the studies of De Francisci 1911, p. 637 and Fabbrini 1965, p. 118.

[38] *Cod. Iust.* I. 13. 1.

[39] For more information about the relationship between the Emperor Constantine and his bishops, please refer to the comments made by Drake 2000, particularly p. 302.

[40] On Osius: Aiello 2013, p. 266, thinks that 'forse però maggiormente probabile è che questo perfezionamento della norma sia stato inviato a Ossio, stretto consigliere dell'imperatore in risposta a una precisa richiesta di cui il vescovo si era fatto portavoce, ancora una volta come intermediario fra l'imperatore e altri vescovi'. See Yaben 1945; De Clercq 1954; Rahner 1970, p. 76; Lippold 1981, pp. 1-15; Domínguez del Val 1998, p. 141.

[41] Osius of Cordoba was Constantine's advisor to the synod of Antioch, exactly one year before the Nicene synod: Thomas Maier, *Origine e sviluppo della pratica sinodale nella Chiesa di Antiochia prima di Costantinopoli 381*, as quoted by Poggi 2003.

> *servulis suis meritam concesserint libertatem, eandem eodem iure donasse videantur, quo civitas Romana sollemnitatibus decursis dari consuevit; sed hoc dumtaxat his, qui sub aspectu antistitum dederint, placuit relaxari. Clericis autem amplius concedimus, ut, cum suis famulis tribuunt libertatem, non solum in conspectu ecclesiae ac religiosi populi plenum fructum libertatis concessisse dicantur, verum etiam, cum postremo iudicio libertates dederint seu quibuscumque verbis dari praeceperint, ita ut ex die publicatae voluntatis sine aliquo iuris teste vel interprete competat directa libertas.* DAT. XIIII KAL. MAI. CRISPO II ET CONSTANTINO II CONSS.[42].

If any person with pious intention should grant deserved freedom to his favourite slaves in the bosom of the Church, he shall appear to give it with the same legal force as that with which Roman citizenship formerly was custumarily bestowed under observance of the usual formalities. But it is Our pleasure that such right to manumit in the churches shall be allowed only to those persons who give freedom under the eyes of the bishops. To clerics, moreover, We further grant that when they bestow freedom on their own household slaves, not only shall they be said to have given the complete enjoyment of such freedom when they have granted it in sight of the Church and the religious congregation, but also when they have conferred freedom in a last will or ordered it to given by any words, so that the slaves shall receive their freedom directly on the day of the publication of the will, without the necessity of any witness or intermediary of the law.

The first consitution states that for some time (*dudum*) in the Catholic church, masters were permitted to grant freedom to their slaves, if they did so before the people (*plebs*) and in the presence of Christian bishops. The requirement of the presence of both seems to replace the need to draft any kind of document and is a first step towards overcoming writing because the witnesses carried the same probative weight[43]. The ruling was found to be highly important. Only a few years later, in 339, with *Cod. Iust.* VI. 23. 15, testamentary provisions were considered valid and effective when expressed orally, provided that they were clear (*quibuscumque verbis*): in the Justinian period, however, the presence of witnesses was required in order to draft any form of testament[44].

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[42] *Cod. Theod.* IV. 7. 1.

[43] Also in classic law, for some hypotheses, a document was required as evidence of the aware determination of a new *status*: Brutti 2011[2], pp. 136-145.

[44] Referring once more to *Cod. Theod.* VI. 23. 15, attributed to Constantius: *Quoniam indignum est ob inanem observationem irritas fieri tabulas et iudicia mortuorum, placuit ademptis his, quorum imaginarius usus est, institutioni heredis verborum non esse necessariam observantiam, utrum imperativis et directis verbis fiat an inflexa. 1. Nec enim interest, si dicatur 'heredem facio' vel 'instituo' vel 'volo' vel 'mando' vel 'cupio' vel 'esto' vel 'erit', sed quibuslibet confecta sententiis, quolibet loquendi genere formata institutio valeat, si modo per eam liquebit voluntatis intentio, nec*

In the second part of the law, the *pactum* is qualified as the negotiation which gives and restores the *libertates* and is subordinate to the fact that *vestrae voluntatis evidens appareat testimonium*, meaning that the evidence of the will of manumission must be clear[45].

The provision therefore aims to govern the probative nature of the practice of granting freedom to slaves before a quantified assembly of faithful (who are, in truth, described using a term with a negative connotation, *plebs*) and the ministers of the same assembly, the bishops. The latter act as a new authority, at least for the believers. The ecclesiastic hierarchy becomes a new guide for human activity[46]. As for the choice of indicating the assembly of believers using the term *plebs*, defined as the expression of a bureaucratic and highly derogatory detachment, this seems to jar with the enthusiastic compliance to religious orders that the provision aimed to encourage, also succeeding in scaling down the importance of a provision considered pro-Christian[47].

The second text intervenes in the regulation of the *manumissio in ecclesia* in two directions. On the one hand, it identifies a subjective element which must act as the assumption for the manumission. The presence of this element would make the freedom itself *merita*. The *dominus* must act *religiosa mente*, i.e. he must be moved by pious intentions[48]. Moreover, the whole content of the provision seems to revolve around a very precise legal issue: that of the legal effect of the manumission performed *in ecclesia* and its consequences concerning citizenship. It is in fact stated that the *dominus* acting

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necessaria sint momenta verborum, quae forte seminecis et balbutiens lingua profudit. 2. Et in postremis ergo iudiciis ordinandis amota erit sollemnium sermonum necessitas, ut, qui facultates roprias cupiunt ordinare, in quacumque instrumenti materia conscribere et quibuscumque verbis uti liberam habeant facultatem. CONST. A. AD POP. <A 339 S. D. K. FEBR. LAODICEAE CONSTANTIO A. II. ET CONSTANTE A. CONSS.> [For the reason that it is unworthy that the last wills and dispositions of estates by persons who are deceased should become void on account of the failure to observe a vain technicality, it has been decided that those formalities shall be abolished whose use is only imaginary, and that, in the appointment of an heir, a particular form of words is not required, whether this be done by imperative and direct expressions, or by terms which are indefinite. For it makes no difference whether the terms 'I make you my heir' or 'I appoint you my heir' or 'I wish' or 'I desire you to be my heir', or 'Be my heir' or 'So-and-So shall be my heir' are employed; but no matter in what words the appointment is made, or in what form of speech it is stated, it shall be valid, provided the intention of the testator is clearly shown by the language used. Nor are the words which a dying and stammering tongue pours forth necessarily of importance. Therefore, in the execution of last wills, the requirement of formal expressions is hereby abolished, and those who desire to dispose of their own property can write their wills upon any kind of material whatsoever, and are freely permitted to use any words which they may desire].

[45] The terminology refers to the Justinian law concerning the alienation of slaves accompanied by an *ut intra tempus manumittatur* agreement; this can be found in numerous passages of title *Dig*. XL. 1, including *Dig*. XL. 1. 6 (Alf. 4 *dig*.).

[46] Biondi 1952, p. 119: 'sacerdoti, vescovi, papi, che, per mandato divino, hanno il compito di guidare l'attività umana'.

[47] Sargenti 1975, p. 288; on the existence of an anti-Christian current in the imperial court, see Ehrhardt 1955, pp. 165-179.

[48] This is a predisposition of the soul which returns in St. Augustine's *Sermones*.

religiosa mente attributes a *libertas eodem iure* […] *quo civitas Romana sollemnitatibus decursis dari consuevit*: the legal effect of the *manumissio in ecclesia* is recognised as equal to that of civil manumissions which, due to the rigorous ceremony, guaranteed the attribution of not only the *status libertatis*, but also the *status civitatis*.

Addressing Bishop Osius, the Emperor seems to be concerned about the profile of citizenship: indeed it is underlined that a similar privilege should be granted only to those who had performed the freedom ceremony before the bishops. Here we can also capture the difference between the informal manumissions also referred to by Sozomen[49], which did not lead to the attribution of Roman citizenship but merely to *latinitas iuniana*[50].

Once again the verb *placuit* can be found in the text and it possibly refers to the contents of the Justinian law *Cod. Iust.* I. 13. 1, the echo of which is also clear in the choice of terminology. The words employed are, in fact, *sub abspectu antistitum*, which is an elliptical expression traceable to *sub adspectu plebis adsistentibus christianorum antistitibus* of the text preserved in the *Codex Justinianus*.

In the second part of the provision, an even more favourable regime (*amplius*) is defined for the clergy, substantially introducing further ways of freeing slaves (*non solum in conspectu ecclesiae et religiosi populi*), which would also attribute citizenship, without the formalities demanded of the *status* of the minister. The *domini* are permitted to free their own slaves, even in their last will and testament, using any preceptive expression, as can be read in the Visigothic *interpretatio*, *etiamsi extra conspectum* […] *sacerdotum vel sine scriptura verbis*. In this second part, the law does not merely act as an acknowledgement or explanation of a matter of fact, but is actually innovative, indeed anticipating the Justinianic principle of freedom in the formalities, through the recognition of this privilege of the clergy.

Once again the accent is placed on the simultaneous granting of both *libertas* and *civitas*: the law indeed states that what is granted is the *plenum fructum libertatis*, meaning, as also read in the *interpretatio*, that same *integra et plena libertas* to which Roman citizens have a right.

6. THE PROBLEM WITH DATING THE TWO LAWS

The problem of dating the two laws has been discussed in much of the literature dealing with Christian manumissions. The doubts arise from some of the data that appear to be irreconcilable. As previously mentioned, the only imperial laws regarding the

[49] See note 51 below.

[50] Only with Justinian, in *Novell*. 78, *praef*. 539, was the *lex Iunia* abrogated. Freedom from slavery is considered a sort of divine command: as God gave the Emperor perfect commands, the freedom from slavery must take place fully and perfectly.

manumission *in ecclesia* are the two constitutions analysed. However, the first constitution is dated, in Krüger's edition, 316, the year of the consulate of Sabinus and Rufinus. It opens with the expression *iam dudum placuit*, which could refer to a previous law or equally to a long-established practice. On the other hand, the temporal adverb does not necessarily have to refer to a historical past[51]. If Krüger's date is accepted, *Cod. Theod.* IV 7. 1 would be dated 18 April 321 and, therefore, the Justinianic law could not refer to it. The situation is complicated by Sozomen's account. In his *Historia Ecclesiastica*, he explains that the Constantinian legislation regarding the manumission *in ecclesia* was divided into three laws[52]. In particular the Church historian's text attributes the content of the first law not to the *manumissio in ecclesia* regime but to the correction of the forms of manumission that preceded it and which were still current at the time of Constantine, both civilian and pretorian[53].

There have been various different attempts to overcome this *impasse*; some have tried to change the date of the two constitutions; others have deemed the information in the *subscriptiones* to be correct and have interpreted in various ways both the opening phrase of *Cod. Iust.* I 13,1 and Sozomen's account. Let us start with the date of the constitution addressed to Protogenes. According to Seeck, the *subscriptio* of *Cod. Iust.* I. 13. 1 contains the indications not of the consuls *Sabinus* and *Rufinus* but of *Severus* and *Rufinus*, consuls in the year 323[54]. Such a chronological shift would interpret the expression *iam dudum placuit* contained in the law as referring to *Cod. Theod.* IV. 7. 1.

Furthermore, it has been stressed that the content of the constitution addressed to Protogenes appears to be broader and more complex than the one addressed to Osius, so much so that it can be considered a logically and temporally later specification than the law with the simpler content[55]. This theory also seems to be confirmed by the dates of the *bellum cibalense*, an expression that refers to the first war between Constantine and Licinius, after which Constantine took possession of the area of Illyria. If in the past the

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[51] As noted by Crifò 2003, *iam dudum* 'può significare "non da molto" oppure "già da tempo".

[52] Soz., *h.e.* I 9,6: ἀκριβείας νόμων, καὶ ἀκόντων τῶν κεκτημένων πολλῆς δυσχερείας οὔσης περί τὴν κτῆσιν τῆς ἀμείνονος ἐλευθερίας [Owing to the strictness of the laws and the unwillingness of masters, there were many difficulties in the way of the acquisition of this better freedom], translation by http://www.newadvent.org/fathers/26021.htm)

[53] De Robertis 1999, pp. 145-146.

[54] From Seeck 1889, p. 230; Seeck 1964[2], p. 168 and 58, writes: 'Von den Stadtpräfekten war Bassus in beiden Jahren im Amte, 319 aber nur bis zum 31. August. Soweit die Daten mit seiner Adresse ein späteres Tagdatum nennen, gehören sie also dem Jahr 318 an […] denn ein Gesetz, das während seiner Amtszeit an ihn gerichtet war, kann auch nach Beendigung derselben zur Ausstellung gelangt sein. Bei dieser Unterschrift und bei denen, die vor dem 31 August liegen, bleibt also das Jahr ungewiß'.

[55] Gaudemet 1947, p. 38.

war was thought to have taken place between 314 and 315, subsequent studies date it later, between the autumn of 316 and the first months of 317. In June 316, Sardica - the city of which Protogenes was the bishop - appears to have still been one of the territories occupied by Licinius. Therefore, Constantine would not have had the authority to legislate[56].

Useful elements emerge, in Seeck's opinion, by comparing the contents of the two constitutions, an angle that until now has received little attention. It was noted that the constitution addressed to Osius introduces profoundly innovative principles, unlike the one addressed to Protogenes, which is, on the other hand, incidental and limited, so that its contents are not likely to assume and refer to *Cod. Theod.* IV. 7. 1[57]. Rather, the nature of the emperor's response might suit the dynamics of managing a territory that had recently become part of Constantine's domain. As we have already written, the discourse addressed to Protogenes seems to be addressed to those who intend to use a new legal instrument for the first time and are being reassured about the principles that regulate it and the possibility of using an institution that hitherto had only been employed in the western provinces[58]. Moreover, even if the later date of the *bellum cibalense* is accepted, the priority of the constitution of Protogenes over the one dated 321 can be maintained. The constitution could be attributed not necessarily to 323, but to June 317, on the basis of the above considerations. On the other hand, Constantine was in Sardica in early 317, after the end of the *bellum cibalense*, according to the most recent dating. It is known that, in Sardica, Constantine came to an arrangement with Licinius so that his children could be given the rank of Caesars: we can, therefore, imagine that, during that visit, Constantine met Bishop Protogenes, prompting a decision of *Cod. Theod*. I. 13. 1.

Yet another fact should be taken into account. We know that in 317 the consuls entered office later than usual, perhaps as a result of the war that had just ended. This would consequently confirm that the date of the *subscriptio* refers to the previous year, with the expression *post consulatum Sabini et Rufini*, which was confused with the date of the consulate itself[59].

The above considerations, however, do not solve the problem of Sozomen's account. It cannot be ruled out that the reference to the law preceding *Cod. Iust.* I 13,1 is precisely the measure which is not conveyed. It would be difficult to investigate the reasons why the law was excluded from the encoding and is, as such, lost: it could have been a less

[56] On the so-called *bellum cibalenses*, Kienast 1988. From an earlier period, see the study by Bruun 1961; Calderone 1962, p. 208, note 2.

[57] Sargenti 1975, p. 291.

[58] This is the interpretation, with which I agree, proposed by Sargenti 1975, p. 291.

[59] Sargenti 1975, pp. 292-293.

thorough or partial regulation than the detailed regime described in the two constitutions[60]. It was assumed, for example, that the gap in the Theodosian Code was more extensive: in addition to lacking the constitution contained in the Justinianic Code addressed to Protogenes, it might be missing another, perhaps earlier, one that would have regulated the subject in a general manner. This hypothesis could be supported by the lack of knowledge about the first four books of the Theodosian Code, which are fragmentary and ensured only by the *Breviarium Alaricianum*. However, why would the compilers have chosen to maintain the newer law, with its more specific content, rather than one that was supposedly more general in its scope and contents[61]?

Indeed, another doctrine has proposed a different reading: it denies that the introduction to *Cod. Iust.* I 13,1 contains a reference to a real measure that was not conveyed. Scholars consider this to be a clumsy solution concerning a reference to a situation that was no longer current in the Justinianic era[62]. This interpretation is apparently confirmed by the expression *in ecclesia catholica*, probably a Justinianic addition, which seems to be unfit and disproportionate for describing the place of worship within which the community of the faithful in the era of Constantine would have met[63].

7. THE PURELY CIVILIAN VALUE OF THE MANUMISSIONS 'IN ECCLESIA'

When reading the two constitutions, one may stress that the strictly religious component appears to be secondary. The deity is not involved in any way, if not to justify with devotion and piety the act of liberating the slave, which is devoid of any relevance to the legal system. It is a form of manumission that can boast a profane nature, in order to combine it with the existing forms of manumission in Roman law. In other words, the *antistites christianorum* had the public function of controlling manumission regulations and, at the same time, of ensuring the required presence of the *ad substantiam* in the act.

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[60] The regulation of the manumissions was enriched by *Cod. Theod*. II. 8.1, law of July 321, addressed to the *vicarius Italiae* Elpidius, which recommends the *dies solis* as the most opportune moment for manumissions and emancipations: *Cod. Theod.* II. 8.1: IMP. CONSTANT(INUS) A. HELPIDIO. *Sicut indignissimum videbatur diem solis veneratione sui celebrem altercantibus iurgiis et noxiis partium contentionibus occupari, ita gratum ac iucundum est eo die quae sunt maxime votiva compleri. Atque ideo emancipandi et super his rebus acta non prohibeantur*. P(RO)P(OSITA) V NON. IUL. CARALIS CRISPO II ET CONSTANTINO II CC. CONSS. [Just as it appears to Us most unseemly that the Day of the Sun (Sunday), which is celebrated on account of its own veneration, should be occupied with legal altercations and with noxious controversies of the litigation of contending parties, so it is pleasant and fitting that those acts which are especially desired shall be accomplished on that day. Therefore all men shall have the right to emancipate and to manumit on this festive day, and the legal formalities thereof are not forbidden].

[61] The provocation was made by Sargenti 1975, p. 289, who highlights how the constitution addressed to Protogenes had 'una portata puramente contingente e confermativa'.

[62] De Robertis 1999, p. 147.

[63] The debate is continued by De Robertis 1999, p. 147.

It would seem that the *manumissio in ecclesia* was perceived as the form of manumission that could ensure against the risk of deflections and ambiguity thanks to the reliability and the continuity of the verifications[64]. It is certainly true that the Catholic Church receives privileges, as is evident in the allocation of the same powers due to state bodies in civil manumissions to *clerici* and *antistites*. On the other hand, the mechanism that regulates the *episcopalis audientia* seems identical: during a civil lawsuit, there is the possibility of appealing to the court of the bishop, whose binding decision is pronounced by the civil courts[65], as regulated by *Cod. Theod.* I 27,1[66], probably from 318. It is impossible not to find an attitude in favour of the Catholic religion in the Constantinian laws. Nevertheless, considering the fact that the emperor was baptised only when at death's door, and even then by an exponent of Arianism, it would seem that we must exclude faith as a motivation behind the laws[67]. Rather, these laws seem motivated by public policy and confined to a general framework of relations between the imperial power and religion[68].

As noted, however, there is no question of Constantine's very close, personal involvement in Christian history, we could say 'his' Christianity[69]. Nonetheless, the considerations of the scholars highlighting how it is not appropriate to identify the premise for the *manumissio in ecclesia* in the *favor libertatis* seem more accurate. The premise, rather than in genuine Christian thought, lies in the social composition of the Christian communities, or more precisely, as has been pointed out, in the state of detachment and

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[64] From De Robertis 1999, p. 146.

[65] On the *episcopalis audientia*, Vismara 1995, p. 37; Cimma 1989, p. 31; Harries 1999, p. 101; Pergami 2004; Banfi 2005; Humfress 2011.

[66] *Cod. Theod.* I. 27.1: IMP. CONSTANTINUS A. *Iudex pro sua sollicitudine observare debebit, ut, si ad episcopale iudicium provocetur, silentium accommodetur et, si quis ad legem Christianam negotium transferre voluerit et illud iudicium observare, audiatur, etiamsi negotium apud iudicem sit inchoatum, et pro sanctis habeatur, quidquid ab his fuerit iudicatum: ita tamen, ne usurpetur in eo, ut unus ex litigantibus pergat ad supra dictum auditorium et arbitrium suum enuntiet. Iudex enim praesentis causae integre habere debet arbitrium ut omnibus accepto latis pronuntiet.* DATA VIIII KAL. IULIAS CONSTANTINOPOLI A. ET CRISPO CAES. CONSS. [Pursuant to his own authority, a judge must observe that if an action should be brought before an episcopal court, he shall maintain silence, and if any person should desire him to transfer his case to the jurisdiction of the Christian law and to observe that kind of court, he shall be heard, even though the action has been instituted before the judge, and whatever may be adjudged by them shall be held as sacred; provided, however, that there shall be no such usurpation of authority in that one of the litigants should proceed to the aforementioned tribunal and should report back his own unrestricted choice of a tribunal. For the judge must have the unimpaired right of jurisdiction of the case that is pending before him, in order that he may pronounce his decision, after full credit is given to all the facts as presented].

[67] Amerise 2005, pp. 13 ff.

[68] On the relationship between State and Church, De Giovanni 1980, pp. 57-58; Crifò 1997; González Salinero, pp. 81-117; Dodds 1998, pp. 101-145; De Giovanni 2003[2]; Bonamente - Cracco - Rosen 2008, pp. 8ss.; Percivaldi 2012; Minale 2013, in particular pp. 131ss.

[69] In this terms Crifò 2003, mentions how the letters and discourses noted in Eusebius of Cesarea's *Vita Constantini* prove the significant importance of Christian thought in the emperor's political vision. The influence of his mother Helena and others, who were close to him, such as Lactantius and Bishop Osius of Cordoba himself, was also significant.

antagonism compared to the pagan society in which they existed during the centuries of hiding and persecution. It is the social and political climate that leads to the establishment of the Christian community as a *corpus separatum*, which is self-sufficient [70] and disinclined to use the typical tools of Roman *ius civile*, such as, in this specific case, the *manumissio vindicta*[71], in which, nonetheless, certain authors have identified the origin of the *manumissio in ecclesia*[72].

As we have already seen, the Constantinian measures are restricted to making long-existing practices legal, alongside widely used forms of civil manumission, such as the informal *inter amicos*. Unfortunately, this informal type of manumission - as we shall discover shortly - contained within itself the risk of degenerating into the *invito domino* form of liberation (in the case of the absence or disagreement of the owners)[73]. Moreover, in Sozomen's account, we can find the reason that induced the emperor to regulate a form of manumission that, in practice, was a remedy to the extreme rigour of standardisation:

> ἀκριβεία νόμων, καὶ ἀκόντων τῶν κεκτημένων πολλῆς δυσχερείας οὔσης περί τὴν κτῆσιν τῆς ἀμείνονος ἐλευθερίας[74].

Owing to the strictness of the laws and the unwillingness of masters, there were many difficulties in the way of the acquisition of this better freedom[75].

We do not want to take sides here on the derivation of the manumission *in ecclesia* from the older form of the *manumissio inter amicos*[76]; nor look at its derivation from oriental forms of slave liberation[77]. It suffices to recall the most accurate standpoint of scholars who have ruled out that the Christian communities had made a conscious and aware use of the Roman *manumissio inter amicos* scheme. Rather, it would seem more plausible that, in the early Christian centuries, new forms of liberation were spontaneously established. In particular, the *manumissio inter amicos*, thanks to its flexibility, was also

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[70] According to Eusebius, Constantine was the first to recognise the Church as a *corpus*: *h.e.* x. 5.

[71] Sargenti 1975, pp. 282-283. The *manumissio vindicta* was a way of liberation of the slave. It consists in a simulated trial: a Roman citizen (the *adsertor libertatis*) made a solemn declaration before the slave's master, stating that the slave was free. The *dominus* was silent and so the *praetor* confirmed the *adsertor*'s statement.

[72] This theory was also previously supported by Calderone 1962, pp. 309-310.

[73] The *manumissio in ecclesia* and the *manumissio inter amicos* are compared by Biscardi 1939, p. 350, and then by Danieli 1947-1948, pp. 265-269.

[74] Soz., *h.e*, I 9,6.

[75] Translation by http://www.newadvent.org/fathers/26021.htm.

[76] The *manumissio inter amicos* was an oral, informal way of liberating the slave before witnesses.

[77] Fabbrini 1965, p. 89.

used under a different form, influenced by Hellenistic practices. Indeed, it has been observed that several slave liberation practices in the Hellenistic provinces shared similar elements with the *manumissio in ecclesia*. There is no apparent proximity to the hierodules or to the consecration to the divinity. Rather, it is closer to the ἐπὶ βωμόν form of manumission, consisting in a statement made by the *dominus*, at the altar, in the presence of the faithful. It is also closer to the forms of *manumissio per mensam*[78], of which there is evidence in the Greek world and from which emerges a possible line of continuity with the *manumissio in ecclesia*. Consider the essential act of the καλεῖν ἐπὶ τὰν ἰδίαν ἰστίαν; the publicity given to it through ἐν ἐννόμῳ ἐκκλησίᾳ; the presence of witnesses[79].

Returning to *manumissio inter amicos*, there is no doubt that the Romans would find analogies between it and the *manumissio in ecclesia*. In fact, the former was the product of the combination of two elements: first, showing the slave the desire to liberate him, second, the communication of this intent to friends. For both elements, no kind of formality was required and yet it seems clear that these forms would be easily confused with that of the *manumissio per mensam*. Indeed, in certain circumstances, it is difficult to draw the line between the *manumissio inter amicos* and the *manumissio per mensam*[80].

In any case, some authors have illustrated the elements that would appear to make the *manumissio in ecclesia* similar to the *manumissio inter amicos*.

Firstly, as stated in *Cod. Iust.* I. 13.1, the presence of leaders and members of the community aims to *signare*, through the role of the witnesses, the *scriptura* within which the act of liberation was contained, giving it merely an evidentiary value. In Martial's description, for example, the *amici*, held a similar function[81].

According to some commentators, the similarities demonstrate how, in implementing a new form of manumission, the imperial chancery had a certain form in mind that was

[78] The *manumissio per mensam* was performed during a banquet in the presence of the guests.

[79] The Greek expressions are related by Biscardi 1939, p. 338.

[80] In particular, in the famous *Cena Trimalchionis*, we can read about the two methods for liberating slaves 'viste con gli occhi di un romano dell'età classica, non presentavano sostanziali diversità', as noted by Sargenti 1975, pp. 286-287.

[81] Mart. IX. 87: *Septem post calices Opimiani denso cum iaceam triente blaesus adfers nescio quas mihi tabellas et dicis: 'modo liberum esse iussi Nastam - servulus est mihi paternus - signa'. Cras melius, Luperce, fiat: nunc signat meus anulus lagonam.* [After I have taken seven cups of Opimian wine, and am stretched at full length, and beginning to stammer from the effects of my heavy potations, you bring me some sort of papers, and say, 'I have just made Nasta free - he is a slave that I inherited from my father; - please to give me your signature'. The business may be better done to-morrow, Lupercus; at present my signet is wanted for the bottle] translation by http://www.tertullian.org/fathers/martial_epigrams_book09.htm.

typical of the Roman tradition. To this the new customs of the Christian communities were added[82].

According to some authors, Constantine made the *manumissio in ecclesia* a privileged liberation tool in the sense that he also added *mortis causa* to it[83]. The interpretation of the law that considers the effect of allowing the acquisition of citizenship a novelty is, therefore, too simplistic[84]. The more detailed and convincing argument is that of those who acknowledge the innovative capacity of the law in the second part of the 321 constitution. This goes well beyond the recognition of the effectiveness of the *manumissio in ecclesia*. It would create a truly privileged manumission regime in favour of the clergy, only occasionally connected to the *manumissio in ecclesia*. It is written, in fact, that the freedom granted by the assembly of the faithful (*libertas donata in ecclesiae gremio*) allowed the slave to obtain Roman citizenship in the same way as with the usual forms of civil manumission (*eodem iure quo sollemnitatibus decursis dari consuevit*). The second part, however, has a truly innovative scope because it grants clergy the power to assign *directa libertas* not only in the presence of the assembly of the faithful, but also through an act in the last will (*dederint seu* [...] *dari praeceperint*).

Legal historians have limitedly investigated the innovative aspects of the law; only a few authors, for example, have highlighted how Constantine's law did not contain any reference to the limits imposed by the *lex Aelia Sentia* for civil manumissions, or the numerical limits imposed by the *lex Fufia Caninia*[85]. Also, both direct and indirect last wills were accepted. The reference seems to be to the freedom granted in a direct way - with the traditional formulation of the *manumissio testamento* - and to the freedom granted *per fideicommissum*, perhaps within a codicil, the manumissions ordered by the *clerici* are accorded full value whatever their form[86].

It seems that there were many different reasons for the individual orders, all of which were inspired by the idea of freedom as the highest good.

In the end, as a confirmation of how, in finding a balance, the public interest prevailed over the religious one, we can cite *Cod. Theod.* IV. 9. 2, which declared that, if the manumission was made *non domino*, in the presence of the prince[87], not only was the

[82] As proposed by Sargenti 1975, p. 288.

[83] This is the theory of Mor 1928, as well as Mor 1932; D'Amia 1931: this theory was dismissed several years ago.

[84] Fabbrini 1965, pp. 57 ff.

[85] The *lex Aelia Sentia* was issued in 4 AD; the *lex Fufia Caninia* in 2 AD.

[86] These are the words and reconstruction of Sargenti 1975, pp. 294-295, who concludes by acknowledging the revolutionary value of the imperial law compared to normal manumission regimes. It was brought about by an evident pressure from the Church.

[87] The *Interpretatio* also adds the possibility of *in ecclesia*.

manumission not valid, but as a penalty the person who authorised the manumission had to give two slaves - of the same sex, the same age and the same trade - to the *dominus*, and three to the tax authorities. The law aimed to punish the offence against the Prince: *fallendo principis conscientiam manumisit*[88]. Thus, we must not forget that the trend set in motion by Constantine was destined to have a greater effect in the following age, when there was an increasing number of legal manumissions: in particular, those who had given themselves to the monastic life[89], or who, after being baptised, took refuge in a church[90], became free, but always with the consent of their master.

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[88] *Cod. Theod.* IV. 9. 1: IMP. CONSTANTIN(US) A. AD BASSUM. *Si non a dominis libertas detur mancipio alieno, si quidem ab his iudicibus impetrabitur, quibus dandi ius est, sine ulla trepidatione poenae facilis dissolutio est. Si vero iubentibus nobis quicquam lege actum esse doceatur et non dominus, ut alienum mancipium manumitteretur, petisse, tunc eodem, qui in conspectu nostro libertatem monstrabitur consecutus, ei protinus ad cuius proprietatem pertinet restituto is, qui mancipium alienum fallendo principis conscientiam manumisit, mancipia duo cogatur domino eius dare, cuiusmodi sexus, aetatis atque artis constiterit esse manumissum, et alia tria fisco eademque ratione similia. Quae multa non semper inponitur, sed potius conquiescit, si forte manumissus inferentem sibi quaestionem status obiecta legitima praescriptione potuerit excludere, cum sibi amissi mancipii damna debeat inputare, qui in perniciem suam gesta taciturnitate firmaverit*. P(RO)P(OSITA) ID. IUL. CONSTANTINO A. V ET LICINIO C. CONSS [If freedom should be given to another man's slave by a non-owner and authority for this should be impetrated from a judge who had the right to grant such authority, annulment is easy and without any fear of punishment. If, however, it should be proved that pursuant to Our order any such legal act has been performed and if it should be shown that a non-owner petitioned Us for permission to manumit another man's slave, then such slave who is proved to have received his freedom in Our presence shall be immediately restored to that person to whose ownership he belongs, the man who manumitted another's slave by deceiving the conscience of the Emperor shall be compelled to convey to the owmer two slaves of the same sex, age, and skill as the one manumitted is proved to have been, and the manumitter shall convey to the fisc three other such slaves who are similar in the aforesaid respects].

[89] *Cod. Iust.* I. 3. 37(38), of 484: IMPERATOR ZENO. *Servis, si dominorum fuerint voluntate muniti, solitariam vitam participandi licentia non denegetur, dum tamen eorum domini non ignorent, quod, si servis suis ad monasteriorum cultum migrandi tribuerint facultatem, eorundem servorum dominio, donec idem servi in eodem monachorum habitu duraverint, spoliandos: alioquin si relicta forte vita solitaria ad aliam se condicionem transtulerint, certum est eos ad servitutis iugum, quam monachicae professionis cultu evaserant, reversuros*. Zeno A. Sebastiano PP. <a. 484 D. Id. April. Theodorico Cons.>. [The permission to embrace a monastic life is not refused to slaves who have obtained the consent of their masters, provided the latter are not ignorant of this fact. Where, however, they have given their slaves the power to enter a monastery, We think that they should be deprived of their ownership of said slaves, so long as they remain in the monachal condition. It is otherwise if they have abandoned a monastic life, and assumed any other condition, as it is certain that, under such circumstances, they must be returned to the yoke of slavery which they escaped by their adoption of the monastic profession].

[90] *Cod. Theod.* XVI. 6. 4. 2, of 405: IMPPP. ARCADIUS, HONORIUS ET THEODOSIUS AAA. HADRIANO PRAEFECTO PRAETORIO. *Ac ne forsitan sit liberum conscientiam piacularis flagitii perpetrati intra domesticos parietes silentio celare, servis, si qui forsitan ad rebaptizandum cogentur, refugiendi ad ecclesiam catholicam sit facultas, ut eius praesidio adversus huius criminis et societatis auctores adtributae libertatis praesidio defendantur liceatque his sub hac condicione fidem tueri, quam extorquere ab invitis domini temptaverint, nec adsertores dogmatis catholici ea, qua ceteros, qui in potestate sunt positi, oportet ad facinus lege constringi, et maxime convenit omnes homines sine ullo discrimine condicionis aut status infusae caelitus sanctitatis esse custodes*. [Moreover, in order that no person may be permitted to conceal with secrecy and silence the guilty knowledge of a sinful shame perpetrated within domestic walls, if perchance any slaves should be forced to rebaptism, they shall have be defended by its protection against the authors of this crime and association, by the protection of a grant of freedom. Under this condition, they shall be permitted to

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defend the faith which the masters have attempted to wrest from them against their will. Defenders of the Catholic dogma must not be constrained to the commission of crime by the law with which all other men are bound who are placed under the power of another, and it is especially fitting that all men, without any distinction of conditions or status, shall be custodians of a celestially imparted sanctity].

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