

CHRISTIANIZATION BY WAY OF LEGISLATION. THE THEODOSIAN CODE AS A SOURCE FOR THE RELIGIOUS POLICIES OF THE FIRST CHRISTIAN EMPERORS*

PÁL SÁRY

Faculty of Law, University of Miskolc, Hungary

Abstract in original language

The imperial legislation played a central part in the Christianization of the pagan Roman Empire. The course of Christianization is mirrored clearly in the material of the Theodosian Code. Reading the texts of the constitutions we can recognize the main religious political aims which were set by the first Christian emperors: (1) destruction of the pagan religion, (2) consolidation of the Christian mentality and scale of values, (3) defence of the Christian religion against the external effects and assaults, (4) protection of the purity of faith and the unity of the church, (5) stabilization of the position of the church, (6) regulation of the position of the Jews.

Key words in original language

Roman law; Imperial legislation; Theodosian Code; Religious policy; Christianization.

The Theodosian Code contains more than 2500 imperial constitutions which were issued between 311 and 437. During this period many changes happened in the life of the Roman Empire. Among others the pagan empire became Christian during this time. The course of Christianization is mirrored clearly in the material of the Code. Reading the texts of the constitutions we can recognize the main religious political aims which were set by the first Christian emperors.

1. The first aim was the progressive destruction of the pagan religion. The Christian emperors prohibited the pagan ceremonies; they ordered to punish the various kinds of prediction, magic and especially the sacrifices.¹ The pagan worship of emperors was abolished: adoration of statues and images of emperors was prohibited.² In most cases the rebellious pagans were to be punished with death. The pagan temples were closed, demolished or transformed; the treasures and endowments of them were confiscated.³ The

* The research for this paper was supported by the János Bolyai Research Scholarship of the Hungarian Academy of Sciences.

¹ CTh 9.16.1-2, 4-12; 16.10.1-2, 4-13, 17, 19, 21, 23.

² CTh 15.4.1.

³ CTh 5.13.3; 10.1.8; 16.10.4, 10-11, 13, 16, 18-19, 20, 25.

pagan festivals and the privileges of the pagan priests were abolished.⁴ The pagans were excluded from the public offices.⁵

The first religious political steps of Constantine were very cautious: the prohibitions decreed by him were always combined with some concessions.⁶ The successors of Constantine dealt with the pagans much more harshly, and this change was expressed clearly by the rough drafting of their edicts.⁷

2. The second aim was the consolidation of the Christian mentality and scale of values. The Christian emperors protected virginity and sexual morality. They abolished the matrimonial pressure,⁸ and exempted those women who lived in perpetual virginity (in *virginitate perpetua viventes*) from the poll-tax (*capitatio*).⁹ The sexual crimes were punished severely.¹⁰ In the prisons men were to be separated from women.¹¹ The emperors made efforts to suppress the obscene pagan debauches,¹² and to prevent the increase of prostitution.¹³

Protecting the marriages and families they impeded divorces,¹⁴ and ordered to punish adultery by death.¹⁵ Separation of members of slave families was forbidden.¹⁶ The poor family men were given state support to feed their children.¹⁷ The widowers who remarried suffered pecuniary disadvantages.¹⁸

The power of the fathers and the masters was restricted. The fatherly right to kill the child (*ius vitae necisque*) was abolished.¹⁹ Reclaim an exposed child

⁴ CTh 2.8.22; 6.3.1; 16.10.14.

⁵ CTh 16.10.21.

⁶ While, e.g., private (domestic) rites were prohibited, public ceremonies were permitted (CTh 9.16.1-2; 16.10.1), or, while malevolent magic was prohibited, benevolent sorcery was permitted by him (CTh 9.16.2).

⁷ See, e.g., CTh 16.10.2: *cesset superstitio, sacrificiorum aboleatur insania*.

⁸ CTh. 8.16.1.

⁹ CTh 13.10.4.

¹⁰ CTh 9.7.3, 6; 9.8.1; 9.9.1; 9.24.1-2; 9.25.1-3.

¹¹ CTh 9.3.3.

¹² CTh 15.6.1-2.

¹³ CTh 15.8.1-2.

¹⁴ CTh 3.16.1-2; 16.2.44.

¹⁵ CTh 11.36.4.

¹⁶ CTh 2.25.1.

¹⁷ CTh 11.27.1-2.

¹⁸ CTh 3.8.1-3; 3.9.1; 8.13.1, 4; 8.18.3, 10.

¹⁹ CTh 9.14.1; 9.15.1.

from person who received him was prohibited.²⁰ Torture of slaves to death was declared a crime (homicidium).²¹

In the field of criminal law many other regulations were issued by the effect of Christianity. To sentence criminals to gladiatorial shows was forbidden.²² On Sundays the governors had to visit the prisons and control the conditions of the prisoners.²³ During Lent to conduct criminal procedures and execute corporal punishments was prohibited.²⁴ At Eastertide amnesty was granted for prisoners.²⁵

3. The third aim was the defence of the Christian religion against the external – pagan or Jewish – effects and assaults. The emperors protected the tranquillity of the Christian feasts. On Sundays, at Easter, Whitsun and Christmas all judicial procedure had to be suspended, and organization of spectacles was forbidden on these days.²⁶ Christians were exempted from the public duties which were connected with the pagan religion.²⁷ The actors who were baptized did not have to act on the stage any more.²⁸

Defending the Christian religion Theodosius the Great forbade Jews and Christians to intermarry.²⁹ Jews could not have any Christian slaves.³⁰ Jews had to perform their religious rites without violation of Christianity.³¹ The Jews who were baptized were given a special legal protection.³²

Protecting the religious piety trading of the relics of martyres was forbidden.³³ The ecclesiastical dresses were given legal defence.³⁴ Oath-breaking had to be punished for religious reasons.³⁵ Defending the Christian

²⁰ CTh 5.9.1-2.

²¹ CTh 9.12.1.

²² CTh 15.12.1.

²³ CTh 9.3.7.

²⁴ CTh 9.35.4-5.

²⁵ CTh 9.38.3-4, 6-8.

²⁶ CTh 2.8.1, 18-21, 23-25; 8.8.1; 15.5.2, 5.

²⁷ CTh 12.1.112; 16.1.1; 16.2.5.

²⁸ CTh 15.7.1-2, 4, 8-9.

²⁹ CTh 3.7.2.

³⁰ CTh 3.1.5; 16.8.19, 22, 26; 16.9.1-5.

³¹ CTh 16.8.18.

³² CTh 16.8.1, 5, 28.

³³ CTh 9.17.7.

³⁴ CTh 15.7.12.

³⁵ CTh 2.9.3.

faith apostasy (from Christianity to paganism or Judaism) was declared a crime.³⁶

4. The fourth aim was the protection of the purity of faith and the unity of the church. The Catholic emperors made efforts to confirm the Catholic religion and suppress the heresies. The imperial intervention in the religious cases was reasonable, because the religious conflicts endangered the unity of the whole empire.

Among the various heresies Arianism was the most dangerous. The struggle between the Catholics and the Arians finally ended with the victory of the Catholics. In 380, by his famous edict (*Cunctos populos*), Theodosius the Great declared the Catholic faith a state religion, and Arianism a heresy.³⁷ After this, obedience to the state included obedience to the Catholic Church, too.

The Catholic emperors forbade the heretics to come together, erect altars, build churches, teach their doctrines, perform religious services, ordain clerics.³⁸ The buildings and estates, in which they held their meetings, were forfeited to the state or the Catholic Church,³⁹ and the books, which contained their religious doctrines, were burned publicly.⁴⁰ The rebellious heretics usually had to pay a fine.⁴¹ The aim of the punishment was emendation; punishability was ceased by conversion to the Catholic faith.⁴² The incorrigible persons were exiled.⁴³

The heretics lost their honesty and ability to hold public offices.⁴⁴ They suffered many disadvantages in the field of the law of succession and obligations.⁴⁵ It is worthy of note that the slave-owners and the patrons could be punished, if their slaves or tenant-farmers became heretics.⁴⁶ It was a special case of secondary (vicarious) liability (*culpa in eligendo*) in Roman law.

³⁶ CTh 16.7.1-7; 16.8.1, 7, 23.

³⁷ CTh 16.1.2.

³⁸ CTh 16.5.6, 8-12, 14-15, 20-22, 24, 26, 30, 34, 36-38, 40, 45, 51, 53-54, 56-58, 65-66; 16.6.4, 7.

³⁹ CTh 16.5.3, 4, 8, 12, 21, 30, 33-34, 36, 40, 43, 45, 52, 54, 57-59, 65; 16.6.2, 4.

⁴⁰ CTh 16.5.34, 66.

⁴¹ The amount of the fine depended on the social position of the delinquents (CTh 16.5.52, 54).

⁴² CTh 16.5.41.

⁴³ CTh 16.5.13, 18, 20, 29-34, 36, 45, 52-54, 57-58, 62, 64-65; 16.6.6; 16.10.24.

⁴⁴ CTh 16.5.3, 7, 9, 25, 29, 42, 48, 54, 58, 61, 65.

⁴⁵ CTh 16.5.7, 9, 17-18, 23, 25, 27, 36, 40, 49, 54, 58, 65; 16.6.4; 16.7.3.

⁴⁶ CTh 16.5.52.

5. The fifth aim was the stabilization of the position of the church. The church was given many privileges. The clerics were exempted from the curial duties, some taxes and a lot of other compulsory obligations.⁴⁷ Collaterally, however, the emperors restricted the circle of those persons who could be enrolled in the clergy: e. g. ordination of curials, provincial officials, tax-collectors, bakers and swine collectors were prohibited.⁴⁸

In 321 bequests to the church were legalised.⁴⁹ In 434 the local churches and the monasteries were authorized the right of intestate succession.⁵⁰

The bishops were given official power. The religious disputes fell within the exclusive competence of the ecclesiastical courts.⁵¹ On basis of a compromise of the parties the bishops could adjudge secular legal disputes, too.⁵² The decision of the bishop was not appealable.⁵³ The secular authorities had to execute the episcopal resolutions.

The church enjoyed many judicial privileges. The clerics were exempted from the jurisdiction of the secular courts.⁵⁴ The bishops could not be compelled to give evidence.⁵⁵ The members of the clergy could not be tortured.⁵⁶ The disputed legal cases in which the church was involved had to be resolved without any delay.⁵⁷

The imperial constitutions granted the right of asylum to the churches.⁵⁸ Breaking of this right was declared a capital crime.⁵⁹ The church asylum provided effective shelter from the abuses of state authorities, local lords, and cruel slave-owners. It was possible, however, to misuse the right of asylum. For this reason the emperors restricted this right in some respects, e. g. they prohibited the clergymen to harbour debtors to the fisc.⁶⁰ At the same time the right of asylum was extended in space to the lounges, gardens

⁴⁷ CTh 8.5.46; 11.1.1, 33; 11.16.15, 18, 21-22; 13.1.1, 5, 11; 16.2.1-2, 7-11, 14-16, 24, 36, 40.

⁴⁸ CTh 8.4.7; 12.1.49, 59, 99, 104, 115, 121, 123, 163, 172; 14.3.11; 14.4.8; 16.2.3, 6, 17, 19, 21.

⁴⁹ CTh 16.2.4.

⁵⁰ CTh 5.3.1.

⁵¹ CTh 16.2.23; 16.11.1.

⁵² CTh 1.27.2.

⁵³ CTh 1.27.1-2.

⁵⁴ CTh 16.2.12, 41, 47.

⁵⁵ CTh 11.39.8.

⁵⁶ CTh 11.39.10.

⁵⁷ CTh 2.4.7.

⁵⁸ CTh 9.45.1-5.

⁵⁹ CTh 9.45.4.

⁶⁰ CTh 9.45.1, 3.

and courts of the churches on condition that the refugees were not allowed to sleep and eat within the sanctuary.⁶¹

The Christian emperors made the manumission of slaves possible in the churches.⁶² In the beginning those who were manumitted in a church, in the presence of clerics, became only Latins, but later such persons obtained the *civitas Romana*. The clerics could manumit their own slaves without any formal restriction.

According to the testimony of the Code, in the fourth and fifth centuries some clerics, monks, and especially the *parabalani* often intervened in public affairs, and stood up against every injustice; e. g. they impeded the execution of unfair judgements.⁶³ It is easy to understand that the emperors could not tolerate acts of this kind: so the clerics were forbidden to disturb the administration of justice in any way,⁶⁴ the over-zealous monks were banished from the cities,⁶⁵ the number of the *parabalani* was restricted, and they were prohibited to enter the meeting place of a municipal council or a courtroom.⁶⁶

The clerics were granted a special criminal protection; their physical insult was not a private delict but a public crime (cf. *privilegium canonis*).⁶⁷ Violation of the privileges of the church was declared also a crime.⁶⁸

6. Finally, the sixth aim was the regulation of the position of the Jews. As stated above some rights of the Jews in defence of Christianity were restricted, e. g. they were not allowed to have Christian slaves. As the pagans and the heretics, the Jews were also excluded from the public offices.⁶⁹ On the other hand, however, the Christian state protected the Jewish religion. The Jews could come together without any restriction, and could exercise their ancient religion.⁷⁰ It is true that they were prohibited to build new synagogues, but their old synagogues were granted legal protection by the state.⁷¹ They had their own judicial authorities.⁷² Jewish

⁶¹ CTh 9.45.4.

⁶² CTh 4.7.1.

⁶³ The *parabalani* belonged to a religious guild, whose members were occupied in attending sick persons.

⁶⁴ CTh 9.40.15-16; 11.36.31.

⁶⁵ CTh 16.3.1.

⁶⁶ CTh 16.2.42-43.

⁶⁷ CTh 16.2.31.

⁶⁸ CTh 16.2.34, 40.

⁶⁹ CTh 16.8.16, 24.

⁷⁰ CTh 2.8.26; 8.8.8; 16.8.9, 20.

⁷¹ CTh 7.8.2; 16.8.12, 21-22, 25-27.

⁷² CTh 2.1.10.

religious leaders enjoyed many privileges,⁷³ and anti-Semitic manifestations were declared crimes.⁷⁴

Since all these main aims could be realized, the pagan Roman Empire became Christian formally within some generations. It can be stated that the imperial legislation played a central part in this colossal change.

Literature:

- Biondi, B., *Il diritto romano cristiano*, I–III, Milano, 1952–1954.
- Boyd, W. K., *The Ecclesiastical Edicts of the Theodosian Code*, New York, 1905.
- Coleman-Norton, P. R., *Roman State & Christian Church. A Collection of Legal Documents to A.D. 535*, I–III, London, 1966.
- De Giovanni, L., *Il libro XVI del Codice Teodosiano. Alle origini della codificazione in tema di rapporti chiesa-stato*, Napoli, 1985.
- Di Mauro Todini, A., *Aspetti della legislazione religiosa del IV secolo*, Roma, 1990.
- Escribano Paño, M. V., *La construction de l’image de l’hérétique dans le Code Théodosien XVI*, in J.-N. Guinot and F. Richard, eds., *Empire chrétien et Église aux IV^e et V^e siècles. Integration ou ‘concordat’? Le témoignage du Code théodosien*, Paris, 2008, pp. 389–412.
- Evans Grubbs, J., *Law and Family in Late Antiquity. The Emperor Constantine’s Marriage Legislation*, Oxford, 1995.
- Evans Grubbs, J., *Virgins and Widows, Show-Girls and Whores: Late Roman Legislation on Women and Christianity*, in R. W. Mathisen, ed., *Law, Society, and Authority in Late Antiquity*, Oxford, 1999, pp. 220–241.
- Ferrari Dalle Spade, G., *Immunità ecclesiastiche nel diritto romano imperiale*, *Atti del Reale Istituto Veneto di Scienze. Lettere ed Arti* 99 (1939–1940), pp. 107–248.

⁷³ CTh 16.8.2-4, 10, 13, 15, 17.

⁷⁴ CTh 16.8.11-12, 21, 25-26; 16.10.24.

- Gaudemet, J., *L'Église dans l'empire romain (IVe-Ve siècles)*, Paris, 1958.
- Gemmiti, D., *La chiesa privilegiata nel Codice Teodosiano. Vescovo, clero e monaci: aspetti emblematici*, Napoli, Roma, 1991.
- Härtel, G., *Die Religionspolitik der römischen Kaiser von Diocletian bis Justinian I. anhand ausgewählter Beispiele aus dem Codex Theodosianus, dem Codex Justinianus und den Novellen Justinians I*, *Acta Classica Universitatis Scientiarum Debreceniensis* 22 (1986), pp. 69–86.
- Herrmann, E., *Ecclesia in Re Publica. Die Entwicklung der Kirche von pseudostaatlicher zu staatlich inkorporierter Existenz*, Frankfurt am Main, Bern, Cirencester, 1980.
- Herrmann, J., *Cod. Theod. 9,45: De his, qui ad ecclesias confugiunt*, in G. Kleinheyer and P. Mikat, eds., *Beiträge zur Rechtsgeschichte. Gedächtnisschrift für Hermann Conrad*, Paderborn, 1979, pp. 271–282.
- Hunt, D., *Christianising the Roman Empire: the evidence of the Code*. in J. Harries and I. Wood, eds., *The Theodosian Code. Studies in the Imperial Law of Late Antiquity*, London, 1993, pp. 143–158.
- Huttman, M. A., *The Establishment of Christianity and the Proscription of Paganism*, New York, 1914.
- Joannou, P. P., *La législation impériale et la christianisation de l'Empire Romain (311–476)*, Roma, 1972.
- Kuefler, M. S., *The Marriage Revolution in Late Antiquity: The Theodosian Code and Later Roman Marriage Law*, *Journal of Family History* 32 (2007), pp. 343–370.
- Langenfeld, H., *Christianisierungspolitik und Sklavengesetzgebung der römischen Kaiser von Konstantin bis Theodosius II*, Bonn, 1977.
- Noethlichs, K. L., *Die gesetzgeberischen Maßnahmen der christlichen Kaiser des vierten Jahrhunderts gegen Häretiker, Heiden und Juden*, Köln, 1971.

- Noethlichs, K. L., Zur Einflussnahme des Staates auf die Entwicklung eines christlichen Klerikerstandes. Schicht- und berufsspezifische Bestimmungen für den Klerus im 4. und 5. Jahrhundert in den spätantiken Rechtsquellen, *Jahrbuch für Antike und Christentum* 15 (1972), pp. 28–59.
- Noethlichs, K. L., Materialien zum Bischofsbild aus den spätantiken Rechtsquellen, *Jahrbuch für Antike und Christentum* 16 (1973), pp. 28–59.
- Noethlichs, K. L., *Die Juden im christlichen Imperium Romanum*, Berlin, 2001.
- Rouge, J., La législation de Théodose contre les hérétiques. Traduction de C.Th. XVI,5,6–24, in *Epaktasis. Mélanges patristiques offerts au Cardinal Jean Daniélou*, Paris, 1972, pp. 635–649.
- Salzman, M. R., The Evidence for the Conversion of the Roman Empire to Christianity in Book 16 of the Theodosian Code, *Historia* 42 (1993), pp. 362–378.
- Sandwell, I., Outlawing 'Magic' or Outlawing 'Religion'? Libanius and the Theodosian Code as Evidence for Legislation against 'Pagan' Practices, in W. V. Harris, ed., *The Spread of Christianity in the First Four Centuries. Essays in Explanation*, Leiden, Boston, 2005, pp. 87–124.
- Sály, P., *Pogány birodalomból keresztény birodalom. A Római Birodalom kereszténnyé válása a Codex Theodosianus tükrében*, Budapest, 2009.
- Tilden, P., *Religious intolerance in the later Roman empire: the evidence of the Theodosian code*, Exeter, 2006.
- Vogler, C., Les Juifs dans le Code Théodosien, in J. Le Brun, ed., *Les chrétiens devant le fait Juif*, Paris, 1979, pp. 35–74.

*Dny práva – 2009 – Days of Law: the Conference Proceedings, 1. edition.
Brno : Masaryk University, 2009, ISBN 978-80-210-4990-1*

- Zuccotti, F., 'Furor hereticorum'. Studi sul trattamento giuridico della follia e sulla persecuzione della eterodossia religiosa nella legislazione del Tardo Impero Romano, Milano, 1992.

Contact – email
sarypal@hotmail.com