

## THE TWO JUSTICES. MORAL LIMITS TO STATE POWER IN LATE ANTIQUITY

Peter VAN NUFFELEN\*  
(Ghent University)

**Keywords:** *violence; power; execution; philanthropy; state.*

**Abstract:** *The paper discusses the practice of saving condemned criminals from execution and argues that it demonstrates a tension between justice according to positive law and justice according to divine or moral law.*

On 27 July 398, the emperors Arcadius and Honorius published a constitution ostensibly aimed at curtailing interference of the Church in state matters. The five extant excerpts deal with things as different as the avoidance of paying debts through church asylum, the *episcopalis audientia* (that is, dispute settlement by bishops), and the payment of the poll tax by clergy. The longest excerpt seeks to control ecclesiastical intervention in criminal cases:<sup>1</sup> ‘No clerics or monks nor even those called *synoditae*<sup>2</sup> shall be permitted to set free and hold by force or by any usurpation persons who have been sentenced to punishment and condemned for the enormity of their crimes.’ The emperors clearly disliked that monks and clergymen sometimes intervened in favour of condemned criminals. The usual moment to do so apparently was when the convict was led out to the execution grounds. The law admonishes bishops to restrain the monks, but real threats weigh on the judge (usually the provincial governor or a higher official): he should make sure that due procedure is respected, and if he fails to punish anyone who illegally intervenes, he will be financially

---

\* peter.vannuffelen@ugent.be

<sup>1</sup> *CTh* 9.40.16, 9.45.3, 16.2.32-33, and *CI* 1.4.7, addressed to Eutychianus, the praetorian prefect of the East. *Codex Theodosianus* 16.2.32 is addressed to Caesarius, which must be an error. The mastermind behind these laws is taken to be the chief eunuch of Arcadius, Eutropius (Gaudemet 1989, 257-259; Ducloux 1991, 142), but this is irrelevant for my purposes. Translations are those of Pharr 1952.

<sup>2</sup> Who these are is unclear.

punished, whilst his subalterns risk even their lives. Six years earlier, a constitution had been issued by Theodosius I addressing the same problem and offering some of the same remedies.<sup>3</sup> It reveals why judges and their staff are menaced with such severe punishments: apparently officials had acquiesced in the fact that the convict had been snatched, without pursuing the matter further, whilst on other occasions they had connived under the pretence that an appeal had been lodged.

The constitution of 398 has tended to be interpreted as regulating a conflict between Church and state, whereby public order was restored and excessive forms of intercession were used as a pretext to limit the increasing societal power of the Church.<sup>4</sup> In fact, more is at stake. I shall first argue that it is misleading to associate the practice of snatching from execution exclusively with monks and even the Church. Secondly, we may tend to see a conflict between, on the one hand, the moral ideal harboured by the Church of not executing human beings and, on the other, the respect for justice according to positive law. Yet, I shall argue that the situation is more complex. The paper will conclude with a reflection on what this particular practice teaches us about violence in Late Antiquity.

### ***Philanthropy and execution***

The constitution of 398 is addressed to the prefect of the East, who often resided in Antioch, and from that same city we have two witnesses for forms of intercession similar to what is in the law. The pagan orator Libanius proclaims in a discourse of praise for the city of Antioch (A.D. 356) that its citizens stand out among all inhabitants of the Empire for their commitment to *philanthropia*, that is, care for other people:

There is, moreover, such an abundance of human kindness (*philanthropia*) that what other towns omit to perform for their own citizens, here is performed for strangers. When politicians from other places are brought here on charges involving the death penalty, as they are led out to execution the commons has fallen to weeping, surrounding the palace with supplication, and their requests have calmed the seething rage of the governor of the day. Thus they would present their

---

<sup>3</sup> *CTh* 9.40.15 (13/3/392).

<sup>4</sup> Gaudemet 1989; Ducloux 1991.

requests because of their inclination to pity, while he would grant them their request since they were fit to receive it. So the cities used to keep their citizens, our city the reputation of having sought and found, and he, fame from overcoming his temper.<sup>5</sup>

The passage displays some of the presuppositions inherent in the practice of intercession, in particular that the role of positive law is not disputed nor that the guilt of the convicted is doubted. The people of Antioch appeal to moral values that justify leniency in the execution of the sentence, without necessarily doubting the justice of the sentence according to positive law. Libanius depicts such actions as revealing the high moral worth of the people of his city. In turn, intercession appealed to values that the judge could make his own: practising clemency was an occasion to show one's own virtue. Libanius sums this up in the idea that the judge overcomes his anger. Whilst anger at injustice was justified, it was also an emotion that risked making a judge incline towards severity, possibly excessively so. Thus, the people of Antioch allow the governor to demonstrate his finer qualities.

The same dynamic is visible in a sermon of John Chrysostom, who, to illustrate how we should supplicate God for our salvation, narrates how a usurper had been saved from execution in Antioch, maybe in the 370s:

Ten years ago, some men were arrested for conspiring to usurp power, as you all know. When someone who held a magistracy was judged guilty, he was bound with a cord in his mouth and was led on the way to his execution. Then the entire city ran to the hippodrome and drew the workmen from their shops. The whole people gathered together and snatched the condemned from imperial anger, even though he was not worthy of forgiveness.<sup>6</sup>

<sup>5</sup> Lib., *Or.* 11.155-156: φιλανθρωπία τοίνυν τοσοῦτον περίεστιν, ὥστε ἂν πρὸς τοὺς οἰκείους ἑτέροις παραλείπεται, ταῦτα τοῦτω περὶ τοὺς ξένους πέπρακται. τῶν γὰρ παρ' ἄλλοις πολιτευομένων δεῦρο ἀνασπασθέντων ἐπ' αἰτίαις ὧν ἡ δίκη θάνατος, ἀγομένων ἐπὶ τὰς σφαγὰς ἔπεσε μὲν ὁ δῆμος εἰς δάκρυα καὶ περιέρρεον τὸ βασιλεῖον σὺν ἱκετηρίᾳ, τὴν δὲ τοῦ τότε κρατοῦντος ζέουσιν ὁρμὴν αἱ τούτων δεήσεις ἐστόρεσαν. (156) οὐκοῦν οἱ μὲν ὑπὸ τοῦ πρὸς ἔλεον ῥέπειν ἱκέτευον, ὁ δ' ὡς ἀξίοις καὶ τὰ τοιαῦτα λαβεῖν ἐχαρίζετο, καὶ εἶχον τοὺς μὲν πολίτας αἱ πόλεις, οἱ δὲ τὴν τοῦ καὶ δεδεῖσθαι καὶ τετυχηκέναι δόξαν, ὁ δὲ τὴν ἀπὸ τοῦ νικῆσαι τὸν θυμὸν εὐκλείαν. Tr. Norman 2000, 37-38.

<sup>6</sup> Ioh. Chrys., *On the incomprehensibility of God* 3.7 l. 427-435: Πρὸ γὰρ δέκα τούτων ἐτῶν ἐάλωσαν ἐπὶ τυραννίδι τινές, καθάπερ καὶ ὑμεῖς ἴστε. Εἶτα τῶν ἐν

As John depicts it, the intervention of the people in favour of someone convicted of high treason (who exactly we do not know<sup>7</sup>) confirms some of the features of intercession we noticed in Libanius. The people do not doubt that guilt of the traitor, who is 'not worthy of forgiveness'. There is further a suggestion of moral concern on the part of the people. It is possible that John alludes to an effective snatching of the convicted from the scaffold (in the hippodrome) by the people, but John may not have intended more than that the people interceded with the governor to halt the execution. Ideally, then, intercession was a social interaction built on disinterested moral virtue on the side of the person or group interceding, which appealed to that same virtue on the side of the judge to exercise clemency.

Besides illustrating the dynamic and presuppositions of this particular form of intercession, these two examples also show that saving someone from execution was not the prerogative of monks and clergy. Indeed, the practice is also well-attested for emperors. A striking example can be found in the praise that the church historian Socrates (380/390-after 439) heaps on the emperor Theodosius II (408-450). He records some instances of Theodosius' *philanthropia*, a typical imperial quality but also one that was claimed by Libanius for the citizens of Antioch:

When some of his most intimate friends once asked him, 'Why do you never inflict capital punishment upon offenders', he answered: 'If it only were possible to restore to life those that have died.' To another making a similar inquiry he replied: 'It is neither a great nor a difficult thing for a mortal to be put to death, but nobody except God can re-suscitate by repentance a person that has once died.' So habitually indeed did he practice mercy, that when somebody committed a crime to

---

δυναστεία τις ὄντων ὑπεύθυνος τοῖς ἐγκλήμασι φανείς, σπαρτίον ἐπὶ τοῦ στόματος λαβὼν, ἐξήγετο τὴν ἐπὶ θάνατον ὁδόν. Τότε δὴ πᾶσα ἡ πόλις ἐπὶ τὸν ἵππόδρομον ἔτρεχε καὶ τοὺς ἐκ τῶν ἐργαστηρίων ἐξήγον καὶ κοινῇ πᾶς ὁ δῆμος ἀνελθὼν ἐξήρπασε τῆς βασιλικῆς ὀργῆς τὸν καταδικασθέντα καὶ οὐδεμιᾶς ἄξιον ὄντα συγγνώμης.

<sup>7</sup> Two possibilities have been suggested: Theodore, who was arrested and executed in 371/2, after he had asked for an oracle foretelling the successor to Valens (*PLRE* I, p. 898 (13)); Hierocles, who had been accused of magic with his father in the same context but was saved when being led to execution (*PLRE* I, p. 431 (1)); cf. Petit 1955, 237-9). Theodore was executed, so he does not fit John's account.

be punished with death, he was never suffered to reach the gates of the city before being recalled by the emperor's humanity (*philanthropia*).<sup>8</sup>

Theodosius, then, refused to execute people. He did sentence men to death, but pardoned them almost immediately. Such practice is attested for many Late Antique rulers, if not always as explicitly as in Socrates.<sup>9</sup> We need, then, hardly be surprised that in the *City of God* Augustine states that to forgive easily and to abstain from capital executions has to be a quality of a ruler.<sup>10</sup> The ideal was not uncontested: Too quick and easy remittance of punishment, in particular for homicide, angered emperor Valentinian III (425-455), who issued a constitution (8/12/445) that allowed it only for cases of homicide out of self-defence or by accident.<sup>11</sup>

### ***Intercession and justice***

One way of interpreting this form of intercession is to understand it as reflecting the tension between a Christian morality and the importance of respect for legal procedure to the state. In that case, the snatching from the gallows performed by Theodosius II and other emperors represents the Christianisation of the imperial role, generating a tension within the figure of the emperor. It is indeed the case that, whilst clemency was an important classical virtue, Christian ethics was more radical as far as killing was concerned. Summarising the Christian tradition about killing up until his own time, Lactantius stated in absolute terms that to kill a man should always be considered abominable (*occidere hominum sit semper nefas*).<sup>12</sup> Clergy hence had

---

<sup>8</sup> Socr., *Hist. Eccl.* 7.22.9-11: Καὶ ποτὲ τινος τῶν γνωρίμων αὐτὸν ἐρομένου· «Διὰ τί μηδένα τῶν ἀδικούντων θανάτῳ ποτὲ ἐζημίωσας;» «Εἶθε, φησὶν, δυνατόν ἦν καὶ τοὺς τελευτήσαντας ἐπαναγαγεῖν εἰς τὴν ζωὴν.» 10. Πρὸς ἄλλον δὲ περὶ τοῦ αὐτοῦ ἐρωτήσαντα· «Οὐ μέγα, ἔφη, οὐδὲ δυσχερὲς ἄνθρωπον ὄντα <θνητὸν> ἀποκτεῖναι, <ἀλλὰ μηδενὶ ἔξεστιν ἢ> Θεῷ μόνῳ τὸν ἅπαξ θανόντα ἐκ μετανοίας ἀνακαλέσασθαι.» 11. Οὕτω δὲ τοῦτο βεβαίως αὐτῷ κατώρθωτο, ὥστε, εἴ ποτέ τις ἄξια κεφαλικῆς ἐπλημμέλησε τιμωρίας, οὐδ' ἄχρι τῆς πόλεως τῶν πυλῶν τὴν ἐπὶ θανάτῳ ἀπήγετο, καὶ ἡ ἐκ τῆς φιλανθρωπίας εὐθὺς ἀνάκλησις εἶπετο. Tr. C. D. Hartrauft.

<sup>9</sup> Van Nuffelen 2004.

<sup>10</sup> Augustine, *City of God* 5.24, Letter 133.

<sup>11</sup> Nov. Valentiniani 19 (8/12/445).

<sup>12</sup> Lact., *Inst.* 6.6.19. This has been well-studied for Augustine: Deane 1963, 142-147; Markus 1970, 96.

to abstain from shedding blood, and church fathers picked up on Proverbs 24.11, a verse that enjoined ‘to deliver them that are drawn unto death, and those that are ready to be slain’.<sup>13</sup> Monks snatching the condemned were, then, following the injunction of the Bible. Christians were aware that their ethics were more radical in this respect than the laws of the state. Gregory of Nazianzus liked to oppose the law of the state, ‘causing bloodshed’, to those of the church, which were mild and ‘refrained from anger’.<sup>14</sup> Christian officials should ideally not participate in executions, exhorts Ambrose. Who did, was to be excluded from communion.<sup>15</sup> The radical aspect of Christian ethics was also recognised by their pagan adversaries and exploited to oust the Christians from public functions. If they did not want to use their disciplinary power and execute criminals, Christians should not become governors, argued Libanius. The church historian Rufinus even attributes a law in this sense to the emperor Julian, although it is certainly spurious.<sup>16</sup> In our evidence, intercession by clergy looms large.<sup>17</sup>

The opposition between ecclesiastical morality and *raison d'état* is undoubtedly an important feature of the violent snatching from the gallows and surely underpins the rhetoric and measures of the constitution of 398.<sup>18</sup> But, as the examples of Libanius and John Chrysostom show, such intercession was not just practiced or claimed by Christians and represented a more general moral ideal. Indeed, there is a deeper tension at play here between law and virtue, or, put differently, between legal justice and moral justice. To grasp better what is at stake here, I turn to a theological treatise, where the tension appears as one between law and grace.

The *Monogenes* is a series of responses to a pagan interlocutor, now ascribed to Macarius of Magnesia and dated to the reign of Valens (364-378).<sup>19</sup> As part of a question about the gratuitous remission of sin by God, Macarius distinguishes the different roles that law and grace play in the divine economy. Sins are transgressions of the law

---

<sup>13</sup> Ps.-Cypr., *On the singleness of clerics* 33; *Const. Apost.* 4.9; Ambr., *Off.* 1.179.

<sup>14</sup> Greg. Naz., *Ep.* 78.6.

<sup>15</sup> Ambr., *Ep.* 25, 50, 68.

<sup>16</sup> Lib., *Or.* 45.27; Ruf., *Eccl. Hist.* 10.33; Socr., *Eccl. Hist.* 3.13.3.

<sup>17</sup> See Ducloux 1991, 152; Rapp 2005, 226-228; Hillner 2015, 77-78

<sup>18</sup> Gaudemet 1989; Ducloux 1991.

<sup>19</sup> Goulet 2003; Volp 2013.

and are hence defined according to the law, whereas grace looks at the whole character of the person. Law is thus described as subservient: it should not usurp the rights of grace, which is the master of the law. As such, grace does not look at the details of one's sins nor does it exercise a justice that is only defined by the law. To explain how both roles can be exercised by God – after all he is the source of law and grace – Macarius presents his readers with an illustration:

One can learn this from a true picture and a good example. Yesterday, indeed, not long ago, in our own time and not in the past, some men, guilty of forbidden actions and about to be punished with a fitting penalty, grovelled in front of an imperial cortège and started to praise his power without end. They were freed of all crimes and have left the legal decision behind them. Others, by contrast, free of all reproach and stain, having not participated in any public crime or theft, did not sincerely praise the emperor, and received on the spot the most horrible punishment of execution, as unfaithful and highly ungrateful. They did not draw any benefit from having lived without having committed a crime or profit from being free of crimes. On the contrary, because they considered that they had been raised by their good deeds, they were lost as if by their own fault.<sup>20</sup>

The contrast is a stark one, between the guilty who are saved and the innocent who are punished. One might think that it hardly inspires confidence in God, who appears to be unconcerned with justice. Yet, Macarius' argument is more subtle than that. The convicted are guilty of crimes defined by the law, as much as the second group is innocent by that criterion. The former have been sentenced: legal process has had its due course. Yet, when it comes to character and loyalty to the emperor, the contrast is reversed: the convicted truly repent and praise the emperor sincerely. The ones who never com-

<sup>20</sup> Mac. Magn., *Apocr.* 4.25.13-14: Ἔστι γοῦν τοῦτο μαθεῖν ἐξ εἰκόνης ἀληθοῦς καὶ πολλοῦ παραδείγματος· χθὲς γάρ, οὐ πρὸ πολλοῦ, καὶ πρώην, οὐ πρὸ χρόνου, τινὲς ἀπηγορευμένοις ἐνεχόμενοι πράγμασιν καὶ μέλλοντες ἱκανῇ τιμωρίᾳ κολάζεσθαι, βασιλικὴν πρόοδον ὑποκύψαντες καὶ τὴν ἀρχὴν διαιωνίζειν λιπαρῶς ἐναρξάμενοι πάσης ἀφέθησαν ἐγκλημάτων ὑποβολῆς καὶ τὴν δικαστικὴν κατόπιν ἀπόφασιν ἔρριψαν. 14. Ἄλλοι δέ, μώμου παντὸς καὶ κηλίδος ἐλεύθεροι, ἀδικήματος κοινοῦ καὶ κλοπῆς ἀμέτοχοι, μηδὲ μέχρι σχήματος τὸν βασιλέα στέψαντες, ὡς ἀκαθοσίωτοι καὶ λίαν ἀχάριστοι, φρικωδεστάτην παραντὰ τῆς ἀπωλείας τὴν κόλασιν ἔλαβον, οὐδὲν ἐκ τοῦ ζῆν ἀνεγκλήτως ὀνήσαντες οὐδ' ἐκ τοῦ καθαρεῦν ἐγκλημάτων κερδήσαντες· τοῦναντίον δ' ἐξ ἔργων, ὡς ἐδοκίμαζον, εὐαγῶν ἐπαρθέντες, ὡς ἐξ ἐπιτριβῆς οἰκείας ἀπώλοντο.

mitted a crime, in turn, feel themselves morally superior, even to the emperor, whom they do not sincerely praise. The emperor in the example, exemplifying God's grace, looks beyond the acts of individuals, which can be laudable or despicable, lawful or unlawful, to the interior of the individual: the public supplication of the criminals reveals a change in disposition towards the good, whereas the arrogant pride of the others shows a moral disposition that endangers their respect for the source of all law. The suggestion, crucially, is not that the emperor cancels the law by saving the humble guilty and executing the innocent proud: the evil-doers have been convicted first, and are saved on showing repentance. Law looks at the actions: it judges, in Macarius' words, the details of the act in the past, whereas grace takes a wider view that looks at the individual's disposition, his repentance and thus also looks towards the future. There is hence a role to play for law, but it cannot take the position of grace: in the end, we are judged by God on our acts *and* on how we respond to them. It is this second element that is lacking in law. The point Macarius makes is thus not that the emperor (and thus God) is whimsical and does not care for justice. Rather, he subjects the convicted to a moral judgment after the legal one: if they show repentance, they are saved. The parallel condemnation of those without any crimes to account for is a strong reminder of the crucial importance, not to say superiority, of the moral dimension: one can be just according to the law but still immoral, a fact that will not escape God.

For sake of his argument, Macarius assumes that the emperor has the same omniscience as God, who indeed can know our inner disposition, and that he is equally good as God. Indeed, the passage supposes tacitly that the emperor, as the apex of the social hierarchy, is morally superior to all, and that it hence reveals arrogance to think that one is better than he. In real life, the emperor is not equal to God and there is hence always a degree of uncertainty as to whether his appeal to virtue or that of the person interceding is justified. Even so, Macarius implies that one cannot organise a society by law alone. It is important to have rules and transgressions need to be identified. Yet law only regards actions and does not consider personality. Wider moral considerations, then, allow one to deviate from the law, without undermining its validity, as happens in intercession. Law alone does not suffice: what matters, is how one's life is oriented towards the good.



In further work I will provide evidence that the Macarius' formulation of the tension between grace and law (and the moral superiority of the former over the latter) is a Christian take on the general tension between morality and positive law, or, put differently, between divine and human law, or even still differently, true justice and legal justice. In this context, it suffices to see that the practice of intercession is not merely the result of the Christianisation of public life but reflects a fundamental tension at the heart of the Later Roman Empire about the role of positive law and its relation to true justice.

In the case of monks saving criminals from execution we see this tension appear as a conflict between two social groups (monks vs. imperial officials), each appealing to a different framework (Christian ethics vs. legal rules). Yet, as the actions of Theodosius II show, the emperor was inhabited by this tension, a fact that is illustrated by the paradox of his following the law and then granting clemency. In an episode from the 560s, found in the sixth-century chronicle of John Malalas, Justinian acts in a similar paradoxical way.

In the reign of Justinian there was paraded a member of the Green faction, who was due to be beheaded for raping a girl. The girl was the daughter of Acacius, the imperial curator. While he was being paraded, just as he was being taken in parade through the quarter of Pittakia, members of the Blue faction attacked and seized him and took him into the Great Church. There was much disturbance over him and turmoil in the church. The emperor exercised clemency, announcing his instructions to the people through a *silentarius*. He paraded members of the Blue faction for two days.<sup>21</sup>

In the sixth century, the circus factions had acquired prominence in the social and political life of Constantinople, being, on the one hand, an ever unruly presence, and, on the other, somewhat recog-

---

<sup>21</sup> Ioh. Mal., *Chron.* 18.150: Ὅτι ἐπὶ τοῦ βασιλέως Ἰουστινιανοῦ ἐκ τοῦ μέρους τοῦ πρασίνου ἐπόμπευσέ τις ὀφείλων ἀποτμηθῆναι ὡς φθείρας κόρη. ἡ δὲ κόρη ἦν θυγάτηρ Ἀκακίου τοῦ βασιλικοῦ κουράτορος. καὶ ἐν τῷ πομπεύειν αὐτὸν οἱ ἀπὸ τοῦ βενέτου μέρους ἐν τῷ διέρχεσθαι αὐτὸν πομπεύοντα ἐν τῇ τοποθεσίᾳ τῶν λεγομένων Πιττακίων ἐπιρρίψαντες ἤρπασαν αὐτὸν καὶ εἰσήγαγον ἐν τῇ μεγάλῃ ἐκκλησίᾳ. καὶ ἐγένετο στάσις μεγάλη περὶ τούτου καὶ ἀκαταστασία ἐν τῇ αὐτῇ ἐκκλησίᾳ. ὁ δὲ βασιλεὺς ἐφίλανθρωπεύσατο δηλώσας τῷ δήμῳ διὰ σελεντιαρίου μανδάτατους δὲ ἐκ τοῦ βενέτου μέρους ἐπόμπευσεν ἐπὶ ἡμέρας δύο. Tr. Jeffreys, Jeffreys and Scott 1986, 305, adapted.

nised as representatives of the people.<sup>22</sup> Here the Blue faction saves a condemned member of the Greens, seeking to have the rapist protected by church asylum, which in the fifth century had become a legally recognised right.<sup>23</sup> Why they do this, remains unclear. Blues and Greens were often hostile to one another, and why the one side would in this case support a criminal from the other, remains unsaid. The silence is significant in that it signals that John Malalas is mainly interested in reporting an occurrence of turmoil and imperial response to it. Justinian's response is hardly in line with the constitution of 398. On the one hand, he pardons the rapist, thus apparently accepting that the Blues had acted with an eye for the general good. On the other, he punishes these same Blues by 'parading' them, that is, having them march through the city in humiliating postures on an ass or a camel. Thus, in a paradoxical gesture, he accepts the outcome of the snatching and thus attributes some legitimacy to it, whilst at the same time punishing the snatchers for interrupting due procedure. Justinian exercises clemency and upholds the law at the same time.

### *An ineffective state?*

To conclude this paper, I wish to issue a double warning for the distorting effect that modern presuppositions can have on our interpretation of Late Antiquity.

For modern states, respect for legal procedure and the execution of sentences are essential for maintaining the rule of law. Although many states still know the right to pardon criminals and often grant it to heads of state, these tend to be well circumscribed and are not supposed to be exercised in such an instantaneous manner as in our Late Antique examples, precisely because this would be seen as undermining the rule of law. If the people literally snatched the condemned from the gallows, against the wish of the emperor, this would, from a modern perspective, reveal profound deficiencies of the Late Antique state. Such an interpretation projects modern notions of state power back onto Antiquity. We know that the ancient states (a highly problematic term at that) did not possess a monopoly of violence, a central concept for the modern state. For example, armed re-

<sup>22</sup> On the factions, see most recently Bell 2013, 142-159.

<sup>23</sup> *CTh* 1.12.2 (1/4/409); *Constitutio Sirmondiensis* 13 (21/11/419); *CTh* 9.45.4 (23/3/431), 9.45.5 (28/3/432). See Ducloux 1994.

tainers of private individuals are a conspicuous feature of the later Roman Empire.<sup>24</sup> We are hence bound to see violence exercised by other actors in society. Further, such judgments assume that one has to look towards the state as the institution to limit violence, apparently forgetting that social practices also regulate and limit violence, besides producing them. Intercession is an interesting case of a social practice seeking to limit forms of state violence, in particular the death penalty, and in doing so, sometimes resorting to violence in the form of violent snatching. Lastly, the assumption seems to be that the modern state is always a force for the good. The discourses surrounding intercession reveal both an appreciation for the role of positive law as essential for maintaining order and a deep awareness that the state often fails to produce real justice.

I doubt that popular modern frameworks are sufficiently fine-grained to grasp this dynamic. Studies of 'popular politics' tend to set people and elite against each other. E. P. Thompson, for example, understands the people as having a different understanding of morality from that of the elite and sees conflicts arising from that difference. For C. Tilly the people are the engine of democratisation and reduction of injustice, facing an elite trying to maintain unjust privileges.<sup>25</sup> There was, undoubtedly, much injustice in Late Antiquity and we know of numerous bread riots that burned down houses of the elite. Yet, it must be clear that those snatching the condemned from the gallows appealed to the same values that a ruler should exhibit. This implies that we are touching here upon common meanings about what constituted a just society and that an analysis of the role of the people that follows the lines of Tilly and Thompson risks going astray. As we have seen, the two justices are not that of the people and that of the elite. Rather, it was a constant challenge to articulate legal justice on true, divine justice, a challenge to people and elite alike.

### Bibliography

Bell 2013: Peter N. Bell, *Social Conflict in the Age of Justinian: Its Nature, Management, and Mediation*, First Edition, Oxford, United Kingdom, Oxford University Press.

---

<sup>24</sup> Cf. Nippel 1995; Krause 2014.

<sup>25</sup> Thompson 1971; Tilly and Tarrow 2007.

- Deane 1963: Herbert A. Deane, *The Political and Social Ideas of St. Augustine*. New York: Columbia University Press.
- Ducloux 1991: Anne Ducloux, *L'Eglise, l'asile et l'aide aux condamnés d'après la constitution du 27 juillet 398*, *RHDFE*, 69, 141-76.
- Ducloux 1994: Anne Ducloux, *Ad ecclesiam confugere. Naissance du droit d'asile dans les églises (IV<sup>e</sup>-milieu du V<sup>e</sup> s.)*, Paris, De Boccard.
- Gaudemet 1989: Jean Gaudemet, *Ordre public et charité chrétienne: la loi du 27 juillet 398*, in *Hestiasis. Studi di tarda antichità offerti a Salvatore Calderone*, Messina, Sicania, 245-264.
- Goulet 2003: Richard Goulet, *Macarios de Magnésie. Le monogénès. Textes et traditions*, Paris, Libr. philosophique J. Vrin.
- Hillner 2015: Julia Hillner, *Prison, Punishment and Penance in Late Antiquity*, New York, Cambridge University Press.
- Jeffreys, Jeffreys and Scott 1986: Elizabeth Jeffreys, Michael Jeffreys and Roger Scott, *The Chronicle of John Malalas. A Translation*, Melbourne, Australian Association for Byzantine Studies (*Byzantina Australiensia* 4).
- Krause 2014: Jens-Uwe Krause, *Gewalt und Kriminalität in der Spätantike*, München, Verlag C. H. Beck (*Münchener Beiträge zur Papyrusforschung und antiken Rechtsgeschichte* 108).
- Markus 1970: Robert Markus, *Saeculum. History and Society in the Theology of St Augustine*, Cambridge, Cambridge University Press.
- Nippel 1995: Wilfried Nippel, *Public Order in Ancient Rome*, Cambridge-New York, Cambridge University Press (*Key Themes in Ancient History*).
- Norman 2000: A. F. Norman, *Antioch as a Centre of Hellenic Culture as Observed by Libanius*, Liverpool, Liverpool University Press (*Translated Texts for Historians* 34).
- Petit 1955: Paul Petit, *Libanius et la vie municipale à Antioche au IV<sup>e</sup> siècle après J.-C.*, Paris, P. Geuthner.
- Pharr 1952: Clyde Pharr, *The Theodosian Code and Novels and the Sirmondian Constitutions*, Princeton, Princeton University Press.
- Rapp 2005: Claudia Rapp, *Holy Bishops in Late Antiquity: The Nature of Christian Leadership in an Age of Transition*, Berkeley, Calif, University of California Press (*The Transformation of the Classical Heritage* 37).

- Thompson 1971: E. P. Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, *P&P*, 50, 76-136.
- Tilly and Tarrow 2007: Charles Tilly and Sidney G. Tarrow, *Contentious Politics*, Boulder, Colo, Paradigm Publishers.
- Van Nuffelen 2004: Peter Van Nuffelen, *The Unstained Rule of Theodosius II: A Late Antique Panegyric Topos and Moral Concern*, in *Virtutis Imago: Studies on the Conceptualisation and Transformation of an Ancient Ideal*, edited by Gert Partoens, Geert Roskam and Toon Van Houdt, Peeters, 229-256.
- Volp 2013: Ulrich Volp, *Macarius Magnes, Apokritikos*, Kritische Ausgabe mit deutscher Übersetzung, Berlin, De Gruyter (*Texte und Untersuchungen zur Geschichte der altchristlichen Literatur* 169).