

Justice Applied by the Episcopal Arbitrator: Augustine and the Implementation of Divine Justice

EVA-MARIA KUHN

Institut für Rechtsgeschichte
Albert-Ludwigs-Universität, Freiburg im Breisgau
eva-maria.kuhn@jura.uni-freiburg.de

ABSTRACT

The paper is concerned with Augustine's palpable exercise of justice. While considering his stoic-inspired hierarchy of the laws, the focus here is on Augustine less as the philosopher and theologian, but rather as the decisionmaker and influential figure of his time. The question is of whether and how Augustine applies his comprehension of the divine agenda to the day-to-day legal conflicts in his bishop's court. The paper looks at Augustine's interpretation, perception and promotion of justice as judge and representative of his congregation.

Augustine returned to Africa in 388 a changed man. He and his circle of friends had ceased pursuing a public career in imperial service. In Carthage they were received as distinguished "Servants of God" and in time would become *the* influential group within the African church. Augustine arrived in Hippo during the spring of 391 in order to find like-minded people with whom to study the Scriptures and to be "humble in the house of God". However he did not take into account Valerius, the old bishop of the Hipponian flock. Valerius, courageously and without regard for church procedure, understood the need of his church to recruit talents. He allowed Augustine to set up a monastery and soon after gave the meanwhile freshly ordained priest permission to give sermons. In 395 Augustine was elected as the new bishop and thrown completely into active and public life for good. As bishop he was head of the Christian "family" of Hippo and had to earn himself a position of strength and authority.¹ The office came with multiple tasks and he became a busy man. Soon he was famous for his knowledgeable preaching and expected to hold sermons all over the place. He was to approach officials and to intercede on behalf of debtors or accused; prisons had to be visited and people needed protection from being ill-treated. Powerful landlords had to read his letters of reproof or advice, when he inter-

¹ I refer to and recommend the description by P. BROWN, *Augustine of Hippo. A Biography. New Edition with an Epilogue*, Faber & Faber, London (1967) 2002, here: chapters 13-17 (125-197) and the Epilogue, 441-513. Well in contrast and stimulating J. O'DONNELL's *Augustine, Sinner and Saint. A New Biography*, Ecco, New York 2005.

vened on behalf of their subordinates. Augustine's position included guidance of his clergy and monastery as well as administrative responsibility for the church's finances. In the provincial councils of Numidia, as well as in the yearly councils of the whole African church, he took part in the forming of canons, regulations and prohibitions; sanctions and directives for practice, both useful and essential for the growing body of the Catholic church. There church policy and jurisdiction were shaped and frequently delegates were sent to the imperial court to make suggestions for reform. Back in Hippo, Augustine's *secretarium* was daily crowded with neighbours who fought over their properties or families who bitterly battled over their father's will. They all expected Augustine to listen and settle their grievances.²

This is only a rough sketch of Augustine's versatile *curriculum*, the philosopher and church father we know of today. His philosophy of law and justice built on ancient philosophy; he stimulated theological questions for the time and for more thinkers to come. Correspondingly, Augustine's thoughts developed from communicating with imperial ministers, provincial governors, local elites, city councillors, farmers, land-owners or other clerics relating to issues of his time. His theoretical agenda built on and was mirrored in practice. Hence the question arises how his theories complemented his actions. What value and recognition did Augustine give his theories on justice in the legal discourse he confronted as bishop of a coastal town in Late Roman Africa?

Of Ambrose, the statesman turned bishop, we know that he decided against a certain Marcellus, who was in a financial dispute with his sisters, although the laws were on his side. Ambrose cited the Scriptures in his verdict and maintained that Marcellus should be a generous Christian and forego money.³ Did Augustine fancy such bold originality? A close look therefore is to be cast on Augustine's interpretation, perception and promotion of justice in some of his day-to-day legal conflicts. With his focus on God and his Christian community, how did he confront the ancient legal tradition and the prevailing law? What value did he give it in his actions? The question is how Augustine applied his theory of justice when addressing judges, officers and colleagues. What did he perceive to be their and his own role and duty in bridging the gap between the almost inaccessible divine order and the often inadequate laws of the time?

An outline of the philosophical background (1) will provide the tools to develop Augustine's perception of an ordinary judge's tasks in this regard (2).

² Cf. BROWN, *Augustine*, 222.

³ Cf. AMBR. *Ep.* 82, 6 (*PL* 16, 1277): *Itaque vide, quid dicat apostolus: quare non magis fraudem patimini? Ut propre videatur qui non patitur, fecisse; tolerare enim debet qui fortior est.* See E. PIELER, *Gerichtbarkeit*, in *Reallexikon für Antike und Christentum*, vol. X (1978), 391-487, 472f.; F. MARTROYE, *Une sentence arbitrale de Saint Ambroise*, «Revue historique de Droit français et étranger», 8 (1929), 300-311; N.B. MCLYNN, *Ambrose of Milan*, University of California Press, Berkeley 1994, 270; on Ambrose, critical of Roman Law also J. GAUDEMET, *Droit Romain et Patristique Latine*, in *Miscellanea Historiae Ecclesiasticae VI, Congrès de Varsovie*, Nauwelaerts, Bruxelles 1983, 165-181, here 175f.

How should a judge adopt norms and tackle disputes? What is the judge's part in this enterprise of looking for laws and decisions that complement divine will and justice? The role and duty of judges can be well depicted in Augustine's intercession with two imperial magistrate-judges, Apringius and Marcellinus on behalf of some Donatist perpetrators. Thirdly the focus will be on the bishop as judge in particular (3): in what respect is the clerical office a useful vehicle to transport and substantiate divine justice? How and with what legitimation did Augustine apply his comprehension of the divine agenda to a specific conflict? Augustine wrote many treaties in which he reflects on matters at a general level, as in the *City of God* or his pamphlets against heresies. They were well reflected assessments written for larger audiences.⁴ Some letters though were above all notes for people on a matter of temporary concern, swiftly dictated letters to be sent through a messenger waiting. They draw us closer to the Augustine who actively took a stand on matters. In these moments, philosophical or theological impact was a secondary preoccupation for the bishop. In less self-conscious routine, Augustine's primary thought was to find arguments and means of persuasion for a distinct behaviour that complimented his 'just cause'; firsthand evidence of his intentions for the society he was surrounded by. Letters 8* and 9* of the Divjak collection provide material for both the question of a bishop's role and Augustine's relation to contemporary law and justice.⁵

⁴ On how and for whom Augustine invented and staged himself with his *oeuvres* see e.g. BROWN, *Augustine*, 297ff.; N.B. MCLYNN, *Augustine's Roman Empire*, «Augustinian Studies», 30/2 (1999), 29-44; O'DONNELL, *Augustine*, 35-86 ("Augustine confesses").

⁵ Freshly printed and on its way to libraries and curious readers is K. UHALDE's book with the promising title: *Expectations of Justice in the Age of Augustine*, University of Pennsylvania Press, Philadelphia 2007. For a comprehensive bibliography on the abundant research on Augustine's concepts of justice see P. CURBELIÉ's recently published book *La justice dans la Cité de Dieu*, Institut d'Etudes Augustiniennes, Paris 2004. It contains 489 narrowly printed pages and a 41-page bibliography of more than 1300 titles, — "a major contribution to the understanding of an important theme in *The City of God*." (cf. G. BONNER's review in «The Journal of theological Studies», 57 [2006], 744-746). R. DODARO, *Christ and the Just Society in the Thought of Augustine*, Cambridge University Press, Cambridge 2004 is instructive on Augustine's Christology; G. CATAPANO (ed.), *Sant'Agostino. La giustizia*, Nuova Biblioteca Agostiniana - Città Nuova, Roma 2004 provides a useful anthology of how the term justice is used in Augustine's oeuvre. On Augustine's involvement in solicitation and implementation of legislation on imperial and local levels see E.T. HERMANOWICZ's intriguing discussion of the Calama riots: *Catholic Bishops and Appeals to the Imperial Court: A Legal Study of the Calama Riots in 408*, «Journal of Early Christian Studies», 12/4 (2004), 481-521. D. DOYLE's book *The Bishop as Disciplinarian in the letters of St. Augustine*, Lang, New York 2002 has a chapter on Augustine's use of Roman law; compare also S. ELM, *Der Asket als "vir publicus": Die Bedeutung von Augustin's Konzept des "Christus iustus et iustificans" für den spätantiken Asketen als Bischof*, in J. MEHLHAUSEN (ed.), *Recht, Macht, Gerechtigkeit, Kaiser*, Gütersloh 1998, 192-201; C. MAYER, *Legitimation des Rechts bei Augustinus*, in G. KÖBLER (ed.), *Geschichtliche Rechtswissenschaft: ars tradendo innovandoque aequitatem sectandi. Freundesgabe für Alfred Söllner zum 60. Geburtstag am 5.2.1990*, Brühlscher Verlag, Gießen 1990, 383-401.

1. Augustine's Philosophy on the Laws

Roman Stoic tradition defined justice as correlation of earthly regulation with eternal cosmic law. Law was “right reason applied to command and prohibition”, stated Cicero.⁶ The law of justice was not handed down from gods to men, but all human beings were born with the seed of virtue that they could develop.⁷ Man's reason could teach the virtues of goodness, justice and wisdom. So through the reason within him, man had access to natural law and the precepts of moral behaviour.⁸ This view implied a strong denial of any positivism concerning law: if justice were made only by decisions of a people, constitutions and verdicts of judges, it could be legitimate to commit adultery, to rob and forge.⁹

1.1. Augustine's Layout of the Laws

Like Cicero, Augustine distinguished the *lex aeterna* from the *lex naturalis* and the *lex temporalis*. But to him, the *lex aeterna* was the will and wisdom of a personal Creator, the eternal reason and will of God. He commanded the observance of the natural order of things and forbade the disturbance of it.¹⁰ The content of the *lex aeterna* was to preserve the order of creation; this was the object of their *incommutabiles regulae*. In God's creation, in this *ordo naturalis*, everything had its due order and as a reflection of the divine, the *lex naturalis* or *lex intima* was the imprint of the *lex aeterna* on the human soul: “therefore, to ex-

⁶ CIC. *Leg.* I, 6, 18f: *lex est ratio summa insita in natura, quae iubet ea, quae facienda sunt, prohibetque contraria. Eadem ratio cum est in hominis mente confirmata et confecta, lex es[referring to the doctissimis viris proficisc].... [and in his own words ...](19)...a lege ducendum est iuris exordium. Ea est enim naturae vis, ea mens ratioque prudentis, ea iuris atque iniuriae regula ...* (I quote the Tusculum edition by R. Nickel: M.T. CICERO, *De legibus. Paradoxa stoicorum. Über die Gesetze. Stoische Paradoxien*. Lateinisch und deutsch, München 1994, 22ff.).

⁷ See especially CIC. *Leg.* I, 8, 24f, where according to Cicero the seed of the human race was sown over the earth and granted the divine gift of the soul (*quandem maturitatem serendi generis humani, quod sparsum in terras atque satum divino auctum sit animorum munere, ...*) and where he proclaims men's similarity with the gods: *Iam vero virtus eadem in homine ac deo est* (Nickel's edition, 28ff.).

⁸ See M.C. HOROWITZ, *Stoic Synthesis of Natural Law*, «Journal of the History of Ideas», 35 (1974), 3-16.

⁹ See CIC. *Leg.* I, 16, 43: *Quodsi populorum iussis, si in principium decretis, si sententiis iudicium iura constituerentur, ius esset latrocinari, ius adulterare, ius testamenta falsa supponere, si haec suffragiis aut scitis multitudinis probarentur* (Nickel's ed., 48); E.-W. BÖCKENFÖRDE, *Geschichte der Rechts- und Staatsphilosophie. Antike und Mittelalter*, Mohr Siebeck, Tübingen 2002, 158f; A. DIEHLE, *Gerechtigkeit*, in *Reallexikon für Antike und Christentum*, vol. X (1978), 233-360 (on the Stoa especially 266ff.).

¹⁰ See AUG. *C. Faust.* XXII, 27 (CSEL 25/1, 621): *Lex aeterna est ratio divina vel voluntas Dei, ordinem naturalem conservari iubens, perturbari vetans*, and A.-H. CHROUST, *The Philosophy of Law of St. Augustine*, «The Philosophical Review», 53 (1944), 196.

plain briefly how I value the notion which is impressed on us by eternal law, it is the law by which it is just that everything should have its due order".¹¹

Yet, the perception of the divine law had become faint. According to Augustine, since Adam's fall man was free only to do evil, but not good: contrary to Pelagius's opinion, man could not autonomously arise again, nor understand and be good. In order to understand the *lex aeterna* and to grasp truly what was just and what was not, all human beings depended on God's grace.¹² The bewildering discontinuity of human action and circumstance was the result of weakness and ignorance (*infirmitas et ignorantia*); time and time again they were getting in the way and stood in contrast to the invincible purpose of an omnipotent God.¹³ For Augustine this resulted in the paradox of the need for God's privilege of grace on the one hand and free will on the other.

But a reconciling view could be found already in the New Testament. In the Gospel of John, Christ was identified with the *logos*, a term that conveyed multiple traditions and encouraged diverse images and could be understood as "word" of the Jewish God become fact, but also echoed the cosmic law (to say it in German, the *Weltgesetz*) of classical philosophy.¹⁴ For Augustine in like fashion, men's weakness and ignorance could be overcome by Christ, who was the incarnate solution to men's need for God's direct mediation.¹⁵ Christ (through Paul) could help decipher the truth inscribed in men's soul, a revelation that Augustine experienced himself reading the Holy Scripture in a garden one day.

Sero te amavi, pulchritudo tam antiqua et tam nova, sero te amavi! Et ecce intus eras et ego foris et ibi te quærebam et in ista formosa, quae fecisti,

¹¹ AUG. *Div. qu.* 53, 2 (CCL 44A, 88): *transcripta est naturalis lex in animam rationalem; Lib. arb.* I, 6, 15 (CSEL 74, 15f.): *...ut igitur breviter aeternae legis notionem, quae impressa nobis est, quantum valeo, verbis explicem, ea est, qua iustum est, ut omnia sint ordinatissima.* I have taken the translation of *quae impressa nobis est* from ST. AUGUSTINE, *The Problem of Free Choice*, transl. by M. Pontifex (Ancient Christian Writers, 22), Newman Press, London 1955, 49. See also Pontifex' extensive note on "the truth within you that is the source of all instruction", 245ff.

¹² See e.g. AUG. *Nat. et gr.* 19 (CSEL 60, 245): *aliud intellegere velle nec posse et facere contra legem non intelligendo quid fieri velit*; H. WELZEL, *Naturrecht und materiale Gerechtigkeit. Prolegomena zu einer Rechtsphilosophie*, Vandenhoeck & Ruprecht, Göttingen 1951, 53f.

¹³ See P. BROWN, *St. Augustine's Attitude to Religious Coercion*, «Journal of Roman Studies», 54 (1964), 111.

¹⁴ Joh. 1,1-18 (prologue): "In the beginning was the Word and the Word was with God and the Word was fully God ... and the Word became flesh ...". The Creator of the book Genesis is evoked here, of course, but also the Divine Wisdom of e.g. Proverbs 8, 22-31, already a similar conception to the universal principle of Greek thought. Justin's interpretation for instance was influenced by Stoicism, when he presented Christ as the *logos spermatikos* who 'inhabits everybody' (cf. *Apol. App.* 10, 8). On the adaptability of the word *logos* and the understanding of the Johannine Gospel there is much and also much biased controversy. I found E.L. MILLER, *The Johannine Origins of the Johannine Logos*, «Journal of biblical Literature», 112 (1993), 445-457 quite useful, or: H.P. THYSSEN, *Philosophical Christology in the New Testament*, «Numen», 53 (2006), 133-176. In patristic thought also Rom 2,14ff. and Mt 7,12 would often be quoted: the divine order is there all along, but Jesus Christ brings new perception of it; see BÖCKENFÖRDE, *Geschichte*, 195.

¹⁵ See DODARO, *Christ and the Just Society*, 70f. Augustine's model for Christ as the instructor is again Cicero's *vir optimus*: see ELM, *Der Asket*, 199.

deformis iruebam. mecum eras, et tecum non eram. ea me tenebant longe a te, quae si in te non essent, non essent. vocasti et clamasti et rupisti surditatem meam, coruscasti, splenduisti et fugasti caecitatem meam, fragasti, et duxi spiritum et anhelo tibi, gustavi et esurio et sitio, tetigisti me, et exarsi in pacem tuam. (Conf. X, 27, 38, CSEL 33, 255)

I have learnt to love you late, Beauty at once so ancient and so new! I have learnt to love you late! You were within me, and I was in the world outside myself. I searched for you outside myself and, disfigured as I was, I fell upon the lovely things of your creation. You were with me, but I was not with you. The beautiful things of this world kept me far from you and yet, if they had not been in you, they would have had no being at all. You called me; you cried aloud to me; you broke my barrier of deafness. You shone upon me; your radiance enveloped me; you put my blindness to flight. You shed your fragrance about me; I drew breath and now I gasp for your sweet odour. I tasted you, and now I hunger and thirst for you. You touched me, and I am inflamed with the love of your peace. (trans. by R.S. Pine-Coffin)¹⁶

As here, Augustine often alluded to the five senses. Yet as he described the moment of his conversion, he changed the usual order. He mentions hearing first, since he first listened to the Word.¹⁷ Christ and the Scriptures had become the source of resurrection for the fallen man.

1.2. *The Conditional Validity of Man-made Law and Justice*

The correlation of divine law and justice with the *lex naturalis* again meant the theoretical rejection of any value in themselves of the rules of the *lex humana*, the *leges temporales*. Laws and rules of the world were only binding if they were in accordance with divine law. The *lex temporalis* was forever changeable. It was positive law that had to be adjusted to time and place. It was only binding and just, were it drawn from the eternal law of God, which never changed: “I think you can also see that in the temporal law nothing is just and lawful that men do not derive from eternal law”¹⁸, Augustine explained, and he would go

¹⁶ Augustine describes the moment of his conversion in *Conf. VIII*, 12, 29-30 (reading Paul, Rom. 13,13-14: “...put on the lord Jesus Christ...”). Here, in *Conf. X*, 27, 38, his theory of illumination on the inscribed law is beautifully reflected. The *ordo naturalis* relates to the divine order.

¹⁷ See M. BOULDING’s note to her translation of the passage (*Conf. X*, 27, 38) in *The works of Saint Augustine I/1*, 262.

¹⁸ *AUG. Lib. arb. I*, 6, 15 (*CSEL 74*, 15f.): *Simul etiam te videre arbitror in illa temporalis nihil esse iustum atque legitimum quod non ex hac aeterna sibi homines derivaverint*. The translations throughout the article strongly bear on the translations given in *The works of Saint Augustine. A Translation for the 21st Century*, New City Press, New York.

further and hold that *non est autem ius ubi nulla est iustitia*¹⁹ – “but there is no law, where there is no justice”. A temporal law that was not just was not a law and did not cause obligation, “for, if the emperors were in error – God forbid! – they would issue laws in favour of their error against the truth, and by those laws the good would be tested and receive crowns as their reward for not doing what the emperors commanded, because God forbade it”.²⁰ – If to envision this was such an atrocity, what were the *leges temporales* useful for?

1.3. *The Value of the “leges temporales”*

Though Augustine revived Cicero’s view that temporal laws depended for their value on the eternal law, he was aware of the need for implementation of temporal rules and regulations. The dynamic of change required Augustine’s law-maker to know when a just law had to be modified to bring about a sound reflection of the eternal, unchangeable principles. Augustine derived the need for rule and order from the necessity of a restoring order and peace. Since Adam’s fall men could live peacefully together only under the authority of rules accompanied by sanctions.²¹ Man achieved justice in a peaceful society when there were laws made by men for their fellow men²², where justice was “the virtue that assigns to every man his due”.²³

¹⁹ AUG. *Civ.* XIX, 21 (CSEL 40/2, 408). With his opposition to the Pelagian model of ‘self-perfection’ (*emancipatus a deo*, *C. Iul. imp.* I, 78, Augustine also replaced Cicero’s concept of *ius* with the concept of *vera iustitia*: see ELM, *Der Asket*, 197; P. HAWKINS, *Polemical Counterpoint in De civitate Dei*, «Augustinian Studies», 6 (1975), 97-106.

²⁰ AUG. *Ep.* 105, 2, 7, written after the year 406 (CSEL 34/1, 599): *Imperatores enim si in errore essent, quod absit, pro errore suo contra veritatem leges darent, per quas iusti et probarentur et coronarentur non faciendo, quod illi iuberent, quia deus prohiberet*, *Cresc.* III, 51, 56 (CSEL 52, 462): *Reges cum in errore sunt, pro ipso errore leges contra veritatem ferunt; cum in veritate sunt, similiter contra errorem pro ipsa veritate decernerunt: ita legibus malis probantur boni et legibus bonis emendantur mali*. In *Lib. arb.* I, 5, 11, (CSEL 74, 12) he was explicit: *Nam mihi lex esse non videtur, quae iusta non fuerit* (“so an unjust law does not seem to me to be a law”) And in *Civ.* IV, 4 Augustine would reference Cicero’s *De legibus* I, 16, 43: *remota iustitia, quid sunt regna nisi magna latrocinia?*

²¹ Cf. BÖCKENFÖRDE, *Geschichte*, 200, 209.

²² See AUG. *Civ.* XIX, 6 (CSEL 40/2, 381): *Quid ipsa iudicia hominum de hominibus, quae civitatibus in quantalibet pace manentibus deesse non possunt, qualia putamus esse, quam misera, quam dolenda? Quando quidem hi iudicant qui conscientias eorum, de quibus iudicant, cernere nequeunt* (“What of those judgements pronounced by men on their fellow men, which are indispensable in cities however deep the peace that reigns in them? How sad, how lamentable we find them, since those who pronounce them cannot look into the consciences of those whom they judge.” Transl. by W.C. GREENE, *The Loeb Classical Library*, vol. VI, 143).

²³ AUG. *Civ.* XIX, 21 (CSEL 40/2, 408f.): *Iustitia porro ea virtus est quae sua cuique distribuit*. This definition of justice is also to be found in *Dig.* 1, 1, 10 pr. (Pseudo-Ulpian) and *Inst.* 1, 1 pr.; cf. D. LIEBS, *Römisches Recht*, 6th completely rev. ed., Vandenhoeck & Ruprecht, Göttingen 2004, 62: *Iustitia est constans et perpetua voluntas ius suum cuique tribuendi*. For the shift in Augustine’s thought away from the ancient model, cf. R. DODARO, *Justice*, in A.D. FITZGERALD (ed.), *Augustine through the Ages. An Encyclopedia*, Eerdmans, Grand Rapids (Michigan) - Cambridge 1999, 482.

Worldly rule then had to consort with divine order. Their function was to guard peace.²⁴ Yet the implications of this concept remained unclear.²⁵ What then did temporal laws mean for the individuals and their interactions in Augustine's view? It seems that the *leges temporales* were not truly necessary for the people gifted with grace. Since they could derive their idea of just behaviour from their soul and reason, where – God given – they could understand and follow the *lex aeterna*. For those remaining, secular prohibitions and rules of the *lex temporalis* were helpful criteria. They told them what ought and what ought not to be done. The worldly rules and sanctions helped the weak – deaf to traces of the divine in their souls – to behave correctly.²⁶ Despite his verdict that man-made laws were dependent on their relation to divine principles, Augustine was pragmatic on the issue. He thought it safer to have a body of rules on which a society could lean.²⁷ Therefore he is often met promoting obedience to the authorities and the law. He complied with legal custom, the imperial rescripts and constitutions.²⁸

In the organization of the Roman Empire Augustine found some common sense of right. He was mostly happy with what was intended and that there was order, despite imperfection. “Often”, he said, “the laws that govern the civitates allow something or leave something unpunished, what divine justice would condemn. Yet, the notion that not all is provided for, must not lead to the conclusion that the existing regulations should be disapproved”.²⁹ All problems

²⁴ Cf. S. COTTA, *Droit et justice dans le De libero arbitrio de St. Augustin*, «Archiv für Rechts- und Staatsphilosophie», 47 (1961), 159f, 164. He sees Augustine's understanding of a social utility of temporal law as independent of morality. Avarice, greed and selfishness cause the need in a social union for prohibitions and sanctions and for rule (cf. *ibid.* 167). On *cupiditas gloriae humanae* and *amor sui*, see also J. CHRISTES, *Christliche und heidnisch-römische Gerechtigkeit in Augustins De civitate Dei*, «Rheinisches Museum», 123 (1980), 167.

²⁵ Since Augustine was often more concerned with the relation to God: see BÖCKENFÖRDE, *Geschichte*, 209.

²⁶ Cf. AUG. *Cresc.* III, 51, 56 (CSEL 52, 462): *ita legibus malis probantur boni et legibus bonis emendantur mali*.

²⁷ Cf. COTTA, *Droit et justice*, 169: “le droit n'a pas le but d'assurer la béatitude, mais seulement la sécurité”; R.W. DYSON, *Normative Theories of Society and Government in Five Medieval Thinkers*, Edwin Mellen Press, Lewiston 2003, 33ff.

²⁸ In Augustine's struggle against the Donatists and the Pelagians the emperor supported his Catholic party and he was forever arguing that law enforcement served the common good and that disobedience to imperial rules did not automatically create martyrs. Cf. e.g. the letters that he wrote to the governors of Africa (see endnote 61 below). Cf. E.-L. GRASMÜCK, *Coercitio. Staat und Kirche im Donatistenstreit*, Roehrscheid, Bonn 1964, 207. Augustine failed to see the implications and inherent dangers of such acceptance. Cf. O'DONNELL, *Augustine*, 201: “Augustine never theorizes a world in which Christians would dominate the secular realm indefinitely and with confidence...”.

²⁹ AUG. *Lib. arb.* I, 5, 13 (CSEL 74, 13f): *Videtur enim tibi lex ista, quae regendis civitatibus fertur, multa concedere atque impunita relinquere, quae per divinam tamen providentiam vindicantur, et recte. Neque enim quia non omnia facit, ideo quae facit improbanda sunt*.

could be settled somehow. Thus the individual was guarded against overestimating oneself, thinking that she or he could know better.³⁰

From this reassuring position, Augustine taught his congregation another form of justice. Accepting the laws of property, the Christian mind superseded obedience toward the laws of the world by a Christian concept of justice: *caritas* meant that one used one's property to do good. As for the rich man of Luke 16,10, who was rich with what belonged to him, Augustine moralized: "if you want to hear what that rich man's crime was, look no further than what you hear from the Truth: he was rich. He used to wear purple and fine linen, and feast sumptuously every day. So what was his offence? The man lying at his gate covered with sores, and given no help".³¹

2. *The Duty and Qualities of a Judge*

Ideally the individual had to decide what was to be done and how to behave at any given moment. In the realm of God's grace this was possible for each and every person.³² The contradiction of the privilege of God's grace and free will was in Augustine's eyes solved by mysterious incorporation. The individual's self-determination was part of the natural order, Augustine did not altogether deny it.³³ *Esto iudex in te*, be judge of yourself, he demanded of his listeners in a sermon and referred to the inner conscience as the judge who could know right from wrong: "if you have conducted this hearing well, if you have conducted it honestly, if you have been just in conducting it, if you have climbed onto the judicial tribunal of your mind, if you have suspended yourself on the torture rack of your heart before your own eyes, if you have applied to yourself the tortures of fear, then you have heard the case well".³⁴ Yet - free will allowed the conscience dispute and decision for the bad ...

³⁰ Cf. P. BROWN, *Sozialpolitische Anschauungen Augustins*, in C. ANDRESEN (ed.), *Zum Augustin-Gespräch der Gegenwart*, vol. II, Wissenschaftliche Buchgesellschaft, Darmstadt 1981, 183ff. Also DIEHLE, *Gerechtigkeit*, 352-358, gives a good summary of Augustine's take on justice.

³¹ AUG. S. 178, 3 (*PL* 38, 962): *quod ergo ejus crimen? Jacens ante januam ulcerosus, et non adjutus*. See also e.g. *Ep.* 153, 26 or *Vera rel.* 14, 21. Cf. J. GAUDEMET, *La formation du droit séculier et du droit de l'église aux IV et V siècles*, Sirey, Paris 1979², 178; F.-J. THONNARD, *Justice de Dieu et justice humaine selon saint Augustin*, «Augustinus», 12 (1967), 387-402. COTTA, *Droit et justice*, 169, maybe a little too readily, breaks it down to the separation of law and morality.

³² In *Ep.* 120, 6 (*CSEL* 34, 708-710), Augustine encouraged Consentius's faith by giving an example of how through redeeming confusion the wise man could through Christ become "the wise and strong among the weak whom God had chosen". Cf. *Vera rel.* 31, 58.

³³ BROWN, *St. Augustine's Attitude*, 111 calls it Augustine's tendency to think in terms of processes rather than of isolated acts. Augustine was mainly critical of the self-righteousness in Pelagian thought: see BROWN, *Augustine*, 340-353.

³⁴ AUG. S. 13, 7 (*CCL* 41, 182): *Si bene audisti, si recte ausdisti, si in audiendo te iustus fuisti, si tuae mentis tribunal ascendisti, sit e ipsum ante te ipsum in eculeum cordis suspendisti, si graves tortures adhibuisti timoris,*

In case of injury or conflict between two parties, a judge found the correct answers for them; decide in legal matters and punish violations of the law.³⁵ Augustine took a static view and gave the judge little flexibility to act. The judge in contrast to the law-maker was bound closely to the *leges*:

Conditor tamen legum temporalium, si vir bonus est et sapiens, ille ipsam consulit aeternam de qua nulli animae iudicare datum est, ut secundum eius incommutabiles regulas quid sit pro tempore iubendum vetandumque discernat. Aeternam igitur legem mundis animis fas est cognoscere, iudicare non fas est. (Vera rel. 31, 58, CSEL 77, 42)

It's the same with these temporal laws: although human beings make judgments about them when enacting them, nonetheless, once they have been enacted and confirmed, none will have the right to make judgements about them, but only to judge in accordance with them. Still, the maker of temporal laws, if he is a good and wise man, will consult that eternal law itself, which no soul has been given the right to judge, so that in accordance with its immutable regulations he may discern what at this juncture in time is to be commanded and forbidden. Acquiring knowledge of the eternal law therefore is the sacred right of the unspotted minds, while for passing judgments on it, there is no such right. (transl. by E. Hill)

On the level of the laws, Augustine perceived it to be the law-maker's privilege to decide, but he insinuated that this law-maker was in fact a wise man. Emperor may (he) be, only the unspotted mind had the right to make evaluation of the divine laws. So it remained an ambiguous explanation that left room for interpretation.³⁶ Augustine obtained his law-makers' privilege from observing his own times, where law-making was more and more restricted to the emperor and his representatives.³⁷ A *iudex pedaneus* was put in charge by the magistrate and delegated to follow procedure according to precisely ordered steps; he had only the *facultas iudicandi*,³⁸ whereas imperial magistrates also had the *iurisdic-*

bene audisti. S. 13 was held in Carthage on May 27th, 418. The translation is taken from B.D. SHAW, *Judicial Nightmares and Christian Memory*, «Journal of early Christian Studies», 11/4 (2003), 550.

³⁵ Cf. CURBELIÉ's chapters on the qualities of a judge, "Augustin juge", "Augustin intercessor" etc., 389-404; using different letters and sermons. See also A. PUGLISE, *Sant'Agostino giudice*, in *Studi dedicati alla memoria di Paolo Ubaldi* (Pubblicazioni della Università cattolica del Sacro Cuore, 5th s., 16), Vita e Pensiero, Milano 1937-1946, 272ff.

³⁶ On the developing distinction between eternal law and natural order in Augustine see R.A. MARKUS, *Saeculum: History and Society in the Theology of St. Augustine*, Cambridge University Press, Cambridge 1970, 88ff.

³⁷ See LIEBS, *Römisches Recht*, 47, 69, 82f. on the decline of the possibility of the magistrate to develop new law.

³⁸ This reflects the old tradition whereby a *iudex* is instructed by the *praetor* to decide according to a strict formula: see LIEBS, *Römisches Recht*, 37f.

tio. This gave the latter more freedom in regard to choice of punishment.³⁹ Administration and jurisdiction were not separated. The magistrate had the right both to execution and to ‘speak the law’. His duty to regard the laws and also to respect the parties’ interests limited his *cognitio*.⁴⁰ A verdict could theoretically be appealed. The emperors thus had their body of jurisdiction well under control and monopolized both law-making and law-giving.⁴¹ The fines with which magistrates were threatened with for not applying the laws show how much the emperor mistrusted his own officials. Imperial legislation proves that often attempts were made to secure the moral integrity of their judges.⁴²

2.1. *The Exemplary Conduct of the “assessor” Alypius*

Similar to such imperial attempts and thus not revolutionary, Augustine demanded of judges specific qualities. Alypius, the later bishop and then only *assessor* at the court of the *comes largitionum* in Rome, was craftily drawn out in Augustine’s *Confessions* as example of how a judge in the imperial administration should act. A powerful senator wanted something of Alypius that was not permitted by the law (*per leges illicitum*), but Alypius could neither be asked, nor bribed nor threatened. His boss, the judge, followed his example and so the rules were not broken.⁴³ A small detail was meant to exemplify the character of

³⁹ Cf. PLIN. *Ep.* 4, 9, 17; ULPIANUS in *Dig.* 48, 19, 13; 48, 13, 7(6); 48, 19, 9, § 11. According to Ulpian the legal penalty may be either alleviated or aggravated at the discretion of the judge, in case of ordinary crimes (for murder: Marcianus in *Dig.* 48, 8, 3, § 5). Cf. B. SANTALUCIA, *Diritto e processo penale nell’antica Roma*, Giuffrè, Milano 1998, p. 241ff., esp. 247; W. REIN, *Das Criminalrecht der Römer von Romulus bis auf Justinianus. Ein Hilfsbuch zur Erklärung der Classiker und der Rechtsquellen für Philologen und Juristen nach den Quellen bearbeitet*, Leipzig 1844, 69; J. STRACHAN-DAVIDSON, *Problems of the Roman Criminal Law*, Vol II, 170, Clarendon Press, Oxford 1912 (reprint Ed. Rodopi, Amsterdam 1969), 160f.

⁴⁰ See PIELER, *Gerichtsbarkeit*, 394f. This *administrator-iudex* was much less restricted than has been held in former legal history, e.g. by E. Levy or L. Wenger (“Richter am Gängelband”). See also J. PLESCIA, *Judicial Accountability and Immunity in Roman Law*, «The American Journal of Legal History», 45 (2001), 51-70.

⁴¹ Cf. LIEBS, *Römisches Recht*, 69f.

⁴² Cf. the whole chapter in the Digest. Ulpian, *Dig.* 21, 10, held that a governor must not receive gifts, judges had to come from other places etc. E. Levy emphasizes the judge’s restriction and gives examples: see his *Gesetz und Richter im Kaiserlichen Strafrecht*, in *Gesammelte Schriften*, vol. II, ed. by W. Kunkel & M. Kaser, Boehlau, Köln 1963, 499ff. In the particular case of the church, it was the result of the bishops’ telltale to Ravenna’s courts. Especially the African bishops lodged complaints, asked for mercy and successfully bid for firmer legislation: see HERMANOWICZ, *Catholic Bishops*, e.g. 496.

⁴³ AUG. *Conf.* VI, 10, 16 (CSEL 33, 130f.): *Romae asidebat comiti largitionum Italicianarum erat eo tempore quidam potentissimus senator, cuius et beneficiis obstricti multi et terrori subditi erant. voluit sibi licere nescio quid ex more potentiae suae, quod esset per leges illicitum; restitit Alypius. promissum est praenium; inrisit animo. praetentae minae; calcavit mirantibus omnibus inusitatum animam, quae hominem tantum et innumerabilibus praestandi nocendique modis ingenti fama celebrantum vel amicum non optaret vel non formidaret inimicum. ipse autem iudex, cui consiliarius erat, quamvis et ipse fieri nollet, non tamen aperte recusabat, sed in istum causam transferens ab eo se non permitti aderebat, quia et re vera, si ipse faceret, iste discederet*

his friend and the behaviour required of a good judge⁴⁴: Alypius at the time had the grand opportunity to be weak on his favourite hobby of collecting literature. He could easily have had *codices* copied out for himself at the expense of the emperor's treasury, but he did not do so. Despite temptation, Alypius' sense for justice prevailed. A judge's personal moral integrity was essential for the office. In the design of his *Confessions*, Augustine told a story of how his by then episcopal colleague and friend had given an example and had encouraged the judge to withstand corruption.

Augustine however moderated Alypius' virtue: he had been infected with *insania* then, because "on his way back from lunch one day he had gotten carried away by a well-nigh incredible hunger for the gladiatorial games" - and had "watched, cheered, burnt" and "drunk in the savagery".⁴⁵ This could have happened, since then he had merely trusted in himself and only later had placed confidence exclusively in God.⁴⁶

2.2. *The Obligation of Christian Judges*

Augustine explicitly took on the rhetoric of what in particular was required from a Christian judge. There is a fitting passage on the difference Augustine drew between a Christian and a non-Christian judge:⁴⁷ The Christian proconsul Apringius was in charge of trials against some Donatist people who had murdered and beaten Catholic priests. This was at the end of the year 411, shortly after the conference of Carthage. Again the issue of religious peace had been settled in favour of Augustine's Catholic party. The imperial commissioner, who had presided over the conference, was Marcellinus, brother of Apringius and Augustine's new friend.⁴⁸ Marcellinus was actively engaged with the enactment of the laws against the Donatists. Upon his verdict the emperor had proscribed Donatism. The clergy was to be separated and exiled, fines had to be

⁴⁴ And he quotes Lk 16, 10ff., "he who is faithful in a small matter will be faithful in a great matter, too..."

⁴⁵ AUG. *Conf.* VI, 8, 13 (CSEL 33,128): *...spectavit, clamavit, exarsit, abstulit inde secum insaniam ...et inde tamen manu validissima et misericordissima eruiti eum tu et docuisti eum non sui habere, sed tui fiduciam, sed longe postea.*

⁴⁶ Cf. Th. FUHRER, *Zwischen Glauben und Gewissheit: Auf der Suche nach Gott und dem ‚vitae modus‘*, in N. FISCHER - C. MAYER (ed.), *Die Confessiones des Augustinus von Hippo. Einführung und Interpretation zu den dreizehn Büchern*, Herder, Freiburg 2004², 260f., connecting paragraph 16 to paragraph 13 of book VI.

⁴⁷ AUG. *Ep.* 134 to Apringius (CSEL 44, 84-88). Since 408 everybody in imperial office was Christian, but often in name only (cf. Honorius' law: *Cod. Theod.* 16, 10, 19).

⁴⁸ On Augustine's politically marginal role in African and Roman politics until 412 see MCLYNN, *Augustine's Roman Empire*; the new friendship (*ibid.* 46ff.) "offered Augustine access to the empire at a new level and gave him, at last, a platform from which to address Marcellinus' peers", and thus the dedication of his City of God to his *dearest son* was "not incidental".

paid and Donatist property was to be handed over to the Catholics.⁴⁹ The offences of murder and the injuries were usually under the jurisdiction of the proconsul, but in the person of Marcellinus a special imperial commissioner in charge was still in Africa. Thus Augustine was not sure who would take the chair in the trial and wrote them both.⁵⁰ He was concerned about court procedure and wanted to advise on the verdict.

2.3. *Augustine's Arrogation of Authority*

Of course, other than with the habit of the church whose admonition should show clemency, the governance over a province had to be carried out with severity. Augustine acknowledged this: *sed alia causa est provinciae, alia est ecclesiae, illius terribiliter gerenda est administratio, huius clementer commendanda est mansuetudo*. Were Apringius not a good Christian, Augustine would still defend the interest of the church and argue that the acts against servants of God should remain beneficial in the sense that the victims stand out as examples of patience (*exempla patientiae*) and that the church should not therefore be remembered in connection with vengeance; their blood should not be mixed with the blood of their enemies.⁵¹ If Apringius did not yield, Augustine continues, he would suspect him of hostility. Thus implicitly argued, a hostile judge could not be impartial. Augustine explicitly requests the imperial judges to add his letters to the protocol of the proceedings and so appears to be prepared to take the case to the emperor's own council.⁵² "We act

⁴⁹ Cf. *Cod. Theod.* 16, 5, 52. For more detail see W.H. FRENCH, *The Donatist Church*, Clarendon Press, Oxford 1952, 289ff.

⁵⁰ See AUG. *Ep.* 139 (to Marcellinus, *CSEL* 44, 148-154); 133 (to Marcellinus, *CSEL* 44, 80-84), 134 (to Apringius, *CSEL* 44, 84-88); the proconsul of Africa decided *vice sacra*, in the emperor's place, see PIELER, *Gerichtbarkeit*, 430, 438.

⁵¹ See AUG. *Ep.* 134, 3 (*CSEL* 44, 86). He repeated this in letter 139, 2 (*CSEL* 44, 150) to Marcellinus: *propter conscientiam nostram et propter catholicam mansuetudinem commendandam*; Augustine was afraid that the Donatists would celebrate themselves as martyrs for their religious cause (see endnote 28 above). In case of murder the death penalty was prescribed, see Th. MOMMSEN, *Römisches Strafrecht*, Leipzig, 1899, 632. In the pursuance of the Donatists as heretics, the death penalty was never intended, but the *supplicium justae animadversarionis* of *Cod. Theod.* 16, 5, 41 and 44 bore the interpretation of death in the view of proconsul Donatus in 408. See AUG. *Ep.* 100 to Donatus (*CSEL* 34, 535-538) and FRENCH, *The Donatist Church*, 189, 271; differently: MCLYNN, *Augustine's Roman Empire*, 40, who holds that Augustine is hypothetical and only wants to pump information on further enforcement of heresy laws. Working in the mines was another option, see STRACHAN-DAVIDSON, *Problems*, vol II, 170; A. HOULOU, *Le droit pénal chez St. Augustin*, «Revue historique de Droit français et étranger», 4^e s., 52 (1974), 5-29.

⁵² *Etiam gestis iubete allegari epistulas meas* (AUG. *Ep.* 139, 2, *CSEL* 44, 151). He is explicit in this regard in this letter to Marcellinus: should his brother support the death penalty he should at least leave the convicted in custody until Augustine asked the emperor for clemency, *ut in custodiam recipiantur, atque hoc de clementia imperatorum impetrare curabimus*. On the importance of 'acts' see DOYLE, *Bishop as Disciplinarian*, 91-98, but especially J. SCHEELE, *Buch und Bibliothek*, «Bibliothek und Wissenschaft», 12 (1978), 40, 79f. and A. STEINWENTER, *Beiträge zum öffentlichen Urkundenwesen der Römer*, Moser, Graz 1915, 12, 27ff.

within the limits of our episcopal power when we threaten a person at times with the judgement of men but most of all and always with the judgment of God”, he would write a few years later to Macedonius, then the *vicarius Africae*.⁵³

Augustine demands to have a say in the issue: firstly the church could not be held responsible in case the accused were killed, since she did not indict them for the deeds. He often stressed the obligation not to accuse. Christian moral forbade it. Repeatedly Augustine complained about people taking advantage of this reluctance to hand over offenders.⁵⁴ Instead the accusations here had been made by officials, maybe *defensores civitatis*.⁵⁵ But since the victims were servants of God, Augustine is very clear: “we do not want the sufferings of the servants of God to be avenged by punishments equal to those sufferings”.⁵⁶ The *defensor civitatis* was a new development in criminal law. Originally the initiative of a trial had lain with the victim, the person involved.⁵⁷ Augustine thus uses a promising forensic trick. Although the *iurisdictio* was in the hands of the magistrate, the fact that his action depended on somebody’s accusation, resulted in Augustine’s argument that he should be referring to the victim’s interest, which in this case was the church.

Secondly he reminds Marcellinus of his duty and mission: he had come to Africa for the benefit of the Catholic cause. Augustine subtly commands regional authority to testify and decide about the content of this benefit, since he was the responsible churchman in Hippo, where the crimes had transpired.⁵⁸ If this reminder did not show enough power of persuasion he lastly orders it as

⁵³ AUG. *Ep.* 153, 21 (CSEL 44, 420f): *Agimus quantum episcopalis facultas datur, et humanum quidem nonnunquam, sed maxime ac semper divinum iudicium comminantes.*

⁵⁴ See below, § 3.3.2, AUG. *Ep.* 9* and *Ep.* 22*, 3. This was an ongoing theme that even the emperor referred to, e.g. in *Const. Sirmond.* 14 of 409 (in *Theodosiani Libri XVI cum Constitutionibus Sirmondianis*, ed. Th. MOMMSEN, Weidmann, Berlin 1962, 1st ed. 1904, 919): *ut hac saltem ratione, quod agi adversum se per episcopum non posse confidit, at aliorum accusationibus malorum audacia pertimescat.* For the context see J.F. MATTHEWS, *Laying down the Law: A Study of the Theodosian Code*, Yale University Press, New Haven 2000, 121ff., 151-155; also HERMANOWICZ, *Catholic Bishops*, 505ff. (though I disagree on how she links the constitutions’ expressed wish not to torture innocents (*sine innocentium laesione, ibid.*, 918) to the “emperor’s violent judgement” (497) and the light she casts on Augustine’s letter exchange with Nectarius (*Ep.* 90; 91; 104; 105).

⁵⁵ *Quia non accusantibus nostris sed illorum notoria ad quos tuendae publicae pacis vigilantia pertinebat* (AUG. *Ep.* 133, 1, CSEL 44, 81). In AUG. *Ep.* 134, 2, they are the preservers of public security, *cura eorum, qui disciplinae publicae inserviunt* (CSEL 44, 85). Cf. E. BERNEKER’s article *Defensor civitatis*, in *Reallexikon für Antike und Christentum*, vol. III (1957), 649-656 and S. LANCEL’s one in *Augustinus-Lexikon*, vol. II (1996-2002), 261-262.

⁵⁶ *Nolumus tamen passiones servorum dei quasi vice talionibus paribus suppliciis vindicari* (AUG. *Ep.* 133, 1, CSEL 44, 81).

⁵⁷ On the usual *subscriptio in crimen* see A. NOGRADY, *Römisches Strafrecht nach Ulpian. Buch 7-9 De officio proconsulis*, Duncker & Humblot, Berlin 2006, 76ff.

⁵⁸ *Ut modum dispensationis meae non supergredi videar* (AUG. *Ep.* 133, 3, CSEL 44, 83).

bishop to his Christian son.⁵⁹ With a Christian judge, he concludes the matter more diplomatically with Apringius, he dealt otherwise; they pursued the same interest. A fellow-Christian with Augustine, Apringius had the judicial authority that Augustine lacked, so there should be no question but that he would extend his hand to help of the church.⁶⁰

2.4. *The Manner in Which to Conduct the “cognitio”*

Concerning the procedure of investigation, the Christian judge should use his authority restrictedly: only clubbing, not torturing during the investigation and not using his power to full in his judgement, but yielding to the gentler sentence.⁶¹ Marcellinus had already been mild in his inquisition. He had succeeded by using ‘only’ rods for beatings to get confessions. Augustine approves since he says that this was done frequently even in episcopal courts.⁶² Augustine asks the judge to be strict in his inquisition in order then to have the opportunity to display gentleness and pardon. It sufficed to display power in the inquisition.⁶³ Only the observance of the correct procedure allowed mild punishment: “do not imagine either that, while you have a duty to exercise mercy, judgement is

⁵⁹ “...if listening to a friend begging or a bishop giving advice would not suffice” (AUG. *Ep.* 133, 3, *CSEL* 44, 83f); see *Ep.* 134, 1 (*CSEL* 44, 84f).

⁶⁰ See AUG. *Ep.* 134, 3 (*CSEL* 44, 86): *Subdatur sublimitas tua, subdatur fides tua; causam tecum tracto communem, sed tu in ea potes, quod ergo non possum; confer nobiscum consilium et porrige auxilium*, and *Ep.* 134, 2: *Christianus iudicem rogo, et christianum episcopus moneo*. Cf. *Civ.* V, 24: the Christian rulers are to “make their power the handmaid of his majesty by using it to spread his worship to the greatest possible extent” (P. WEITHMAN, *Augustine’s political philosophy*, in E. STUMP, ed., *The Cambridge Companion to Augustine*, Cambridge University Press, Cambridge 2001, 246).

⁶¹ See AUG. *Ep.* 133, 1 (*noli perdere paternam diligentiam*) to Marcellinus, but also *Ep.* 134; 153; 139,2; similarly in *Ep.* 100 to Donatus, the Christian and African proconsul of 408 (see endnotes 50 and 51 above).

⁶² See AUG. *Ep.* 133, 2 (*CSEL* 44,82), where he enumerated the customs. Marcellinus had succeeded “not by limbs stretched upon the rack, not by iron claws furrowing the flesh, not by burning with the flames, but” — and Augustine approved — “by a beating from rods — a form of restraint that is customarily practised by teachers of the liberal arts, by parents themselves, and often even by bishops in their courts.” (*non extendente eculeo, non sulcantibus unguis, non urentibus flammis, sed virgarum verberibus eruisti. qui modus coercionis et a magistris artium liberalium, et ab ipsis parentibus, et saepe etiam in iudiciis solet ab episcopis hiberi*). On the daily use of torture and the “powerful mental impact” of it, revealed in dreams see SHAW, *Judicial Nightmares*, 539 ff., who refers *e.g.* to SEN. *Ep.* 14, 2; CYPR. *Ad Donatum* 10 and AUG. *S.* 161, 6 (*PL* 38, 880); 308, 5 (*PL* 39, 1408-1410).

⁶³ In his *City of God* (XIX, 6) Augustine had a much darker view: there the judges could not look into the heart of the truth; therefore they had to load guilt upon themselves and torture the accused and witnesses. In legal practice however Augustine was more of an optimist and believed in the prudent judge who powerfully examined using “only” the rod and thereby succeeded in matters of procedural justice. He was constantly repeating this in his defence of the verdict against the Donatists, a case where everything had been pursued with such diligence and brought to light with such diligence, *post causam tam diligenter actam et tam diligenter manifestatam* (AUG. *Ep.* 141, 13, *CSEL* 44, 246).

no affair of yours”⁶⁴ and as important as display of power was: “do not, now that the crime has been discovered, look for an executioner, since in its discovery you were unwilling to use a torturer.”⁶⁵

2.5. *The Verdict in a Criminal Case*

Augustine argues cautiously; he would not have the judges expand their authority unlawfully. He did not demand a privilege for the church, he says, since he believed that judges were generally permitted to alleviate the penalty.⁶⁶ Augustine is unaware of the source of this custom (he just often heard): in his opinion it was in the power of the judge to mitigate the sentence and to punish more leniently than the laws commanded, *soleo enim audire in potestate esse iudicis mollire sententiam et mitius vindicare quam leges*.⁶⁷ Laws against Donatism did not foresee the death penalty, but in cases of *violentia* and murder clearly the death penalty was prescribed. Yet who would register an appeal against a less fatal judgement? The interested party, the church in any case would not.⁶⁸ So Augustine’s assumption seemed practical and carried weight.⁶⁹ The Christian judge in particular was to use his power to punish in a gentle, fatherly way; he should be loving yet strict, always with an eye to the opportunity for the convicted to be healed and to do penance, *paenitendi medicina*.⁷⁰ In-

⁶⁴ AUG. *En. Ps.* 32/2, 12 (CCL 39, 256): *Ne putes quod ad te misericordia pertineat, iudicium autem ad te non pertineat.*

⁶⁵ *Noli facinore invento quaerere percussorem, in quo inveniundo noluisti tortorem* (AUG. *Ep.* 133, 2, CSEL 44, 83).

⁶⁶ *Quod licet iudicibus facere etiam non in causis ecclesiae* (AUG. *Ep.* 134, 4, CSEL 44, 87).

⁶⁷ AUG. *Ep.* 139, 2 (CSEL 44, 151).

⁶⁸ Augustine’s caution resulted from previous defeat, when upon the appeal of the convicted Donatist Cripinus the emperor had fined the judges who had granted mercy upon his request to waive Crispinus’ fine. The fines for the judges were eventually revoked, but it must have left a sour taste in the mouths of African administrators; cf. MCLYNN, *Augustine’s Roman Empire*, 53f.; HERMANOWICZ, *Catholic Bishops*, 496.

⁶⁹ See B. HECHT, *Störungen der Rechtslage in den Relationen des Symmachus. Verwaltung und Rechtsprechung in Rom 384/385 n. Chr.*, Duncker & Humblot, Berlin 2006, 564f. E. Levy is pessimistic on Augustine’s guess: see his *Gesetz und Richter*, 501. Yet the lawyer Hermogenian whose work was absorbed by African jurisprudence had written long ago in his *iuris epitomae* (*Dig.* 48, 19, 42): *Interpretatione legum poenae molliendae sunt potius quam asperandae* (“In the interpretation of the statutes punishments should be mitigated rather than made harsher”). Cf. D. LIEBS, *Hermogenians Iuris Epitomae. Zum Stand der römischen Jurisprudenz im Zeitalter Diokletians*, Vandenhoeck & Ruprecht, Göttingen 1964, 73f; *Römische Jurisprudenz in Africa mit Studien zu den pseudopaulinischen Sentenzen*, 2. Auflage, Duncker & Humblot, Berlin 2005, 106; E. DOVERE, *De iure. L’esordio delle epitomi di Ermogeniano*, Jovene, Napoli 2005², 141-86. On the liberty of the judge cf. also endnote 40 above.

⁷⁰ Augustine compares the death penalty with the — in his view — outdated law of retaliation of the Old Testament, requiring an eye for an eye. See AUG. *Ep.* 134, 2 to Apringius (CSEL 44, 85): *ut eis paria non retribuuntur, quamquam lapidis ictibus digitum praecidere oculumque convellere leges puniendo non possint.*

stead of being killed, convicted persons should be put to some useful work.⁷¹ This mildness was an obligation, because the Christian judge would have to give account of his doings before God's tribunal.⁷²

2.6. *The Formula for Civil Affairs*

In civil matters Augustine equally asks for a judge's impartiality: "Be just even when the rich has a sound case: you sometimes have to decide against the poor. Then would-be kindness was not asked for. You were not to play down the poor person's wrongdoing and make his case better than it was and, upon being disapproved of, excuse yourself with merciful motivation".⁷³ Augustine sticks close to worldly rules and arrives at the divine solution in a second step: "hold tight to both mercy and judgment". It would do no good to be an accomplice to someone's dishonesty, because then "he left your presence unjustly assisted, and remained in God's presence justly condemned."⁷⁴ Other than Ambrose, Augustine proposes a strategy to which modern mediation management would eagerly subscribe; treat them justly and then give them the opportunity to grant mercy, thus wheedle them into being charitable out of their own choice; in this fashion *vera iustitia* and *caritas* could be generated:

Iudicares primo secundum causam, argueres pauperem, flecteres divitem. Alius est iudicandi, alius petendi locus. Quando te ille dives videret tenuisse iustitiam, non exercisse iniqui pauperis cervicem, sed pro merito peccati sui obiurgasse te iuste, nonne flecteretur ill ad misericordiam petente te, qui laetus redditus erat iudicante te? (En. Ps. 32/2, 12, CCL 39, 257)

You should have given judgment on the merits of the case, and convicted the poor person, and then sought to mollify the rich man. There is a right place for judging, and a different place for making an appeal for clemency. If the rich litigant had watched you holding fast to justice, and giving no preference to a dishonest poor man, but justly finding him guilty as his crime deserved, would not that rich claimant have been inclined to mercy at your peti-

⁷¹ Cf. MOMMSEN, *Römisches Strafrecht*, 949ff. Working in the mines was the heaviest punishment after the death penalty, there were other harsh sentences, for instance one could be made into a state slave: for life (cf. endnote 51 above).

⁷² *Non dubito in hac potestate, quam tibi deus homini in homines dedit, cogitare te divinum iudicium, ubi et iudice stabunt rationem de suo iudicio reddituri*, he writes to Marcellinus' brother, the proconsul and judge in the trials against the Donatists, also at the end of 411 (AUG. Ep. 134, CSEL 44, 85).

⁷³ AUG. En. Ps. 32/2, 12 (CCL 39, 256).

⁷⁴ AUG. En. Ps. 32/2, 12 (CCL 39, 257): *A te recessit iniuste adiutus, Deo remansit iuste damnandus*.

tion, as he had been rendered happy at your judgement? (transl. by M. Boulding)

The outcome of this cursory investigation is intriguing: Augustine was ready to take a judge's verdict to a court of appeal. Using the tools at hand he insisted on correct judgment according to procedure.⁷⁵ Augustine argued how capital punishment damaged the image of the church and since the victims were clerics his opinion had to be taken into consideration. However, his emphasis lay mostly on the highest court of appeal: that of God himself. To him the judges were responsible. Nevertheless, Augustine stressed the importance of accurate application of the *constitutiones principum* and the observation of the correct procedure.⁷⁶ Not only did judgement have to follow investigation; but the statements lodged on behalf of the church needed to be collected with protocol. The bishop insisted on the judge's impartiality and his modest application of punishment. He claimed a judge's moral integrity and called attention to his high responsibility in using the laws that had granted him the earthly power to judge. Augustine's way of thinking amounted to the equating of "law-abiding" and "Christian". A famous imperial officer and lawyer of the early third century proudly construed his legal activity thus:

Iuri operam prius nosse oportet, unde nomen iuris descendat. Est autem a iustitia appellatum. Nam, ut eleganter Celsus definit, ius est ars boni et aequi. Cuius merito quis nos sacerdotes appellet. Iustitiam namque colimus et boni et aequi notitiam profitemur, aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum, verum etiam praemiorum exhortatione efficere cupientes, veram nisi fallor philosophiam, non simulatam affectantes. (Ulpianus, *Dig.* 1, 1, 10)

The person who engages himself in legal matters, has to know first, where the name of law is derived from. Namely it's called after justice. For, as Celsus elegantly defined it: law is the art of the good and the fair. In this regard one should call us priests. For we supply the service of justice and declare the

⁷⁵ HERMANOWICZ, *Catholic Bishops*, e.g. 482 and 494, perceives appeals to the emperor to be the often used yet double-edged instrument of the African bishops concerning local politics.

⁷⁶ When Augustine interceded on behalf of the farmer Faventius, he was preoccupied lest the money of the wealthy opponent might prevail in court. Faventius, a tenant farmer, had been taken in custody in inappropriate manner. Further he had not been granted the legally provided postponement to prepare his case. Instead he had been lead by force to Generosus, then governor of Numidia. Augustine emphasized the fact that laws had been violated and asked the governor to be not only an upright, but also a Christian judge and therefore to grant a delay. See AUG. *Ep.* 113-116, especially 115 to the bishop colleague and 116 to Generosus, where he demanded: *Et profecto facies quod non solum integrum, verum etiam christianum iudicem decet* (AUG. *Ep.* 116, CSEL 34/1, 663). Concerning the decision about punishment: in *Ep.* 104, 17 Augustine distinguishes the different levels of guilt and holds that mercy should follow only after a neat verdict. On "reserved mildness" see also *Ep.* 91, 10 or *Ep.* 95, 4.

knowledge of the good and fair, separating equity from iniquity, discerning the permitted and prohibited and desiring to encourage to do good not only through fear of punishment, but through exhortation with awards, striving for - if I am not mistaken - the true wisdom not for her simulation.⁷⁷

Given Augustine's advice for the judges, he would probably subscribe to this confident description. He would agree on the mixture of fear of punishment and exhortation. Only it would not be an art of the good and fair alone, but god-given wisdom as well as sense for Christian charity. Like the lawyer Ulpian, Augustine requested to be heard and was conscious of his knowledge of the (divine) law. *Vera philosophia* had become *vera iustitia dei* to the African bishop. Augustine was convinced of his own ability to know about law and justice.

3. *The Bishop As Judge and Arbitrator*⁷⁸

3.1. *Augustine As Episcopal Judge*

Late antiquity witnessed the Christian bishop as responsible for the church's discipline. Scripture commanded the Christians to settle their disputes amongst themselves. When following imperial decrees a bishop was put in charge by the consent of litigating parties. Other than were the civil judges, he was more at liberty how to decide, because arbitration before the episcopal judge could not be appealed; there was no need to decide according to worldly regulations. Decisions of the episcopal arbitrator abided because of the mutual agreement of the two parties that had chosen the bishop as their judge.⁷⁹ He had to arbitrate in their place and for them find a just solution and so serve up justice.

Augustine's perception of his office as judge was closely linked to his duty as leader of his congregation: "I nourish you with what nourishes me, I offer you

⁷⁷ Cf. LIEBS, *Römisches Recht*, 61f.

⁷⁸ From the church's point of view the bishop could be called judge. From an outsider's view, e.g. the imperial regime, the bishop was an arbitrator since he had to be put in charge by the consent of the litigating parties. Cf. M. KASER - K. HACKL, *Das römische Zivilprozessrecht*, Beck, München 1996², 641 f. (§ 100 III) on a short period in the fourth century where bishops might have been judges, though W. SELB, «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung», 84 (1967) 162-217, esp. 195 considers *Const. Sirmond.* 1 (from 333) not reliable. Cf. also M.R. CIMMA, *L'Episcopalis audientia nelle costituzioni imperiali da Costantino a Giustiniano*, Giappichelli, Torino 1989, 40ff., 62ff. For newer research that draws together some of the different interpretations you could refer to O. HUCK, *À propos de CTh 1,27,1 et CSirm 1*, «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung», 120 (2003), 78-105; on the distinctions of *arbiter* and *iudex* very useful J. HARRIES, *Creating Legal Space: Settling Disputes in the Roman Empire*, in C. HEZSER (ed.), *Rabbinic Law in its Roman and Near Eastern*, Mohr Siebeck, Tübingen 2003, 63-81.

⁷⁹ Cf. J. GAUDEMET, *L'Église dans l'empire romain*, Sirey, Paris 1958, 235f., concluding: "Ainsi dès l'époque du Code Théodosien, la juridiction épiscopale en matière civile n'existait plus que sous forme d'un arbitrage *inter volentes*."; differently G. VISMARA, *La giurisdizione civile dei vescovi (secoli I-IX)*, Giuffrè, Milano 1995, 109.

what I live on myself ... I feed you on what I am fed on myself set food before you from the pantry which I too live on, from the lord's storerooms", he told his listeners.⁸⁰ He never ceased to tell, how the office was to him a burdensome and dangerous responsibility; the dominance it gave might weaken the demand of modesty, *humilitas*, and service for the task. In Christ's team of good pastors the bishop was to call his flock which would follow his commands.⁸¹ Of course as no less burdensome he perceived his duty to sit in the episcopal court.

From an observer's point of view, his close friend and colleague Possidius portrayed Augustine's judicial activities modelled on the strong ideals of educational authority and wisdom applied to service of the church.⁸² Concerning court procedure, Augustine was aware of being in a tricky position, since whoever decided against a friend was likely to lose one.⁸³ Depicting his late friend with conscious emphasis less as the "holy wise man", but more as "example inviting imitation",⁸⁴ Possidius accentuated Augustine's pastoral, administrative and forensic activities. He remembered him as working quite hard: "Often he remained without food until midday, sometimes the whole day, always examining and arbitrating, focusing on the state of their Christian souls, how much someone advanced in his faith and good manners or retreated from them".⁸⁵ The order of procedure is again essential: Augustine usually examined (*noscebat*) and then arbitrated (*dirimebat*); on the basis of the results he came to his verdicts. Christian attitude and morality of the parties had a major impact, Possidius stated. Through the study of Scriptures the bishop acquired judgments "regarding the Christian soul".⁸⁶ However this was not always the main issue in the process of

⁸⁰ AUG. *S.* 339, 4 = *S. Frangip.* 2 (ed. G. Morin in *Sancti Augustini Sermones post Maurinos reperti*, Typ. Polygl. Vaticanis, Roma 1930, 193): *inde pasco, unde pascor ... inde vobis appono, unde ego vivo, de thesauro dominico.*

⁸¹ Cf. F. BELLENTANI, "Episcopus ... est nomen suspecti officii: Il vocabolario del servizio episcopale in alcuni testi agostiniani, in *Vescovi e pastori in epoca teodosiana. In occasione del XVI centenario della consacrazione episcopale di S. Agostino, 396-1996. XXV Incontro di studiosi dell'antichità cristiana. Roma, 8-11 maggio 1996*, vol. I (Studia Ephemeridis Augustinianum 58), Institutum Patristicum Augustinianum, Roma 1997, 667-682.

⁸² Cf. E. ELM, *Die Macht der Weisheit. Das Bild des Bischofs in der Vita Augustini des Possidius und anderen spätantiken und frühmittelalterlichen Bischofsviten*, Brill, Leiden 2003, esp. 100-159. Possidius was throughout his biography concerned with refuting criticism that Augustine had been arrogant in his early days. See ELM, *Die Macht*, 125, about Augustine's elections to become priest and bishop (cf. POSS. *Vita Aug.* 4, 1-3) At least to his opponents he seemed to have come across as sometimes a little proud. Cf. also L. HAMILTON, *Possidius' Augustine and Post-Augustinian Africa*, *Journal of early Christian Studies*, 12/1 (2004), 87, who emphasizes the factual accuracy of the *Vita*.

⁸³ Cf. POSS. *Vita Aug.* 19, 2 (ed. W. Geerlings in POSSIDIUS, *Vita Augustini*. Zweisprachige Ausgabe, Schöningh, Paderborn etc. 2005, 64): *de amicis vero unum esset, contra quem sententia proferretur, perditurus.*

⁸⁴ ELM, *Die Macht*, 158; cf. also S. ELM, *Der Asket*.

⁸⁵ *Et eas aliquando usque ad horam refectionis, aliquando autem tota die ieiunans, semper tamen noscebat et dirimebat: intendens in eis christianorum momenta animorum, quantum quisque vel in fide bonisque moribus proficeret, vel ab iis deficeret* (POSS. *Vita Aug.* 19, 6, ed. Geerlings).

⁸⁶ This claim turns out to be true, since Augustine extensively quoted the Scriptures in his letters to officials, making it his most prominent source of reference.

arbitration: “And when he saw that circumstance gave the opportunity, then he taught the parties the truth of the divine law, inculcated them, admonished and instructed them, how they could attain eternal life.”⁸⁷

Augustine was settling worldly disputes according to worldly rules and only when opportune did he lecture on the wider, godlier aspects of the laws (*divinae legis veritatem*). As his written questions to the lawyer Eustochius show, he had a team of advisers for legal questions.⁸⁸ And again this duty to judge according to temporal law he had gained from Paul, 1 Cor. 6,1-6:

Quoniam ergo praecepit apostolus, ut saecularia iudicia si inter se habuerint christiani, ea non in foro, sed in ecclesia fiant, unde nos necesse est perpeti tales iurgantium quaestiones, in quibus nobis etiam terrena iura quaerenda sint, praecipue de condicione hominum temporali. (Ep. 24*, 1, CSEL 88, 126)

The apostle has commanded that, if Christians have with one another cases concerning worldly affairs that need adjudication, they should be heard in the church, not in the courts. For this reason we have to endure the sort of petitions on the part of litigants in which we have to learn the laws of this world, especially concerning the *temporal condition of persons*. (transl. by R. Teske; my italics)⁸⁹

The attitude might explain the good reception he attained in his court. His courtroom was forever filling with people who expected a just decision that was free of charge and corruption; that is, they expected decisions unlike those of civil judges. He might have come across as incorruptible, diligently listening and gingerly deciding; it might have been a question of his personal charisma, but certainly his knowledge of the earthly rules could be relied on. Maybe they knew better what to expect, and so they traded in their possibility to appeal at the next instance.

⁸⁷ POSS. *Vita Aug.* 19, 4 (ed. Geerlings): *Atque compertis rerum opportunitatibus, divinae legis veritatem partes docebat, eamque illis inculcabat, et eas quo adipiscerentur vitam aeternam (Mc 10, 17) edocebat et admonebat: nihil aliud quaerens ab iis quibus ad hoc vacabat, nisi tantum obedientiam et devotionem christianam, quae et Deo debetur et hominibus: peccantes coram omnibus arguens, ut ceteri timorem haberent* (1 Tim 5, 20).

⁸⁸ See *Letter 24** (CSEL 88, 126f.), which Augustine wrote to the lawyer Eustochius in the early fifth century. Probably a provincial lawyer, Eustochius, was frequently consulted by Augustine; see LIEBS, *Römische Jurisprudenz*, 34f.

⁸⁹ It is remarkable that he also founds the legitimacy of an individual law on the Scriptures, when he continues in *Ep. 24**: *quod possumus secundum apostolicam disciplinam, ut dominis suis subditi, servis praecipere.*

3.2. *Augustine's Dealing with the Ignorant Bishop Victor, Ep. 8**

Even a Non-Christian might have had higher hopes to get what he wanted and to succeed in his cause, when referring to bishop Augustine instead of to ordinary judges. Augustine's handling of the complaint of the Jew Licinius shows what he expected of his own colleague-bishops. It was not so opportune to teach Licinius the Jew about God's justice. Augustine rather rebuked one of his own colleagues, the seemingly arrogant bishop Victor, who was not such a model bishop after all:

3.2.1. *The Evidence*

The case was all to do with some little pieces of land, *quos agellos*.⁹⁰ It seems they had formerly all belonged to the mother of the Jew Licinius. Apparently the mother was not on good terms with her son. Perhaps she had not been altogether happy with his choice of wife. The son had bought the land from the people to whom his mother had previously sold it. He then had given part of it to his wife upon their marriage. The whole lot had been the object of a sale of the old lady again, as if she were the proprietor. But in truth now her son and his wife were the owners and in possession of it. Regardless, bishop Victor, the purchaser, forcefully took possession. When Licinius protested, Victor replied that he had bought it from his mother. Licinius should argue with her and ask Victor for nothing, because Victor did not owe anything: *Ego enim si male mihi vendidit mater tua, cum ipsa litiga! A me noli aliquid quaerere, quia nihil tibi debeo*. So Licinius turned to Augustine for help.

Licinius's documents had proven the complaint well founded and hence had convinced Augustine. His memorandum to Victor provides evidence for Augustine's high regard and knowledge of property law: he reproaches bishop Victor for severe ignorance of the laws (*ignorantiam iuris*) and sets the issues right.

3.2.2. *The Law of Sale and Augustine's Directive*

It had been wrong of Victor to have driven Licinius away from his possession forcefully. There was no possibility whatsoever of somebody to be rightfully excluded from possession: Licinius had the better right (*optimo iure*) because of his possession. Victor could not buy the land from the mother, if her son had it in his possession. She could not rightfully have sold, what did not belong to her,

⁹⁰ AUG. *Ep.* 8* (CSEL 88, 41-42).

even if by some fault she deserved to have the land (*etiamsi forte ei aliquid competebat*). This meant that she had first to win it back from Licinius in court and only then could she have sold it, after receiving it back. What concerns Licinius, according to Augustine, he would be well advised to go to court with an *actio in rem* to regain his possession. And of course this action would be directed not against his mother, but rather against the one who forcefully took over possession; a legal procedure Augustine in no way wanted his colleague to be seen involved. All this behaviour, concludes Augustine, was altogether revolting and unfitting to Victor's way of life, *valde invidiosum est et a tuis moribus alienum*.

In moral matters a bishop was not to appear weak. He should be an example of honesty and righteousness, unworthy of physical force and ignorant arrogance toward others, especially towards a Jew.⁹¹ He commands Victor to behave according to his advice. It was obligatory for Victor to give back the little estate. His money he could only retrieve from the mother, were it paid, adds Augustine as if he doubted even that. But if it had been paid and she did not give the sum back, again: such behaviour would not cause Licinius to lose his property. He could not lose it, *nec ita iste rem suam perdere non potuit*. And to stress it, he distinguishes between justice and the worldly laws, subtly setting the priorities. The laws on property happened to be in accord with the divine and with justice; Victor had to give back the estates because his action contradicted what justice demanded and the laws cried for, *neesse est enim ut eam recipiat intercedente iustitia clamantibus legibus*. Ultimately he refers to the word of the Apostle and cites 1 Cor 10,32: no offence should be given to the Jews or the Greeks nor to the church - a passage that preaches respect and in a way tolerance.⁹² Better for Victor thus to do what was just, rather than to risk trial before an episcopal court, *Melius est autem, ut a tuo carissimo fratre commonitus facias quod iustum est, quam ut ista causa veniat ad episcopale iudicium*.

Augustine was right about the legal situation. What Victor had done could not be upheld. A sales contract was valid only in written form. For fiscal reasons

⁹¹ "... give, but not give what belongs to someone else" (*Dicit tibi deus: Stulte, jussi dares, sed non de alieno*). See AUG. S. 178, 4 (*PL* 38, 962): *Sed ait mihi raptor rerum alienarum: Ego similis illius divitis non sum. Agapes facio, vincit in carcere victum mitto, nudos vestio, peregrinos suscipio. Dare te putas? Tollere noli, et dedisti. Cui dederis, gaudet, Cui abstuleris, plorat: quem duorum istorum exauditurus est Dominus?* ("But the plunderer of other people's property says to me, "I'm not like that rich man. I provide 'agape meals', I send food to those chained up in prison, I clothe the naked, I welcome strangers." Do you really imagine you are giving? Stop grabbing, and then you have really given. The person you've given something to, rejoices, the one you've snatched something from is crying; which of these two is the Lord going to listen to? ..."; transl. E. Hill).

⁹² On Augustine and the Jews see B. BLUMENKRANZ, *Augustin et le judaïsme*, in *Recherches Augustiniennes*, vol. I (1958), 225-240 (repr. in B. BLUMENKRANZ, *Juifs et Chrétiens. Patristique et Moyen Age*, Variorum Reprints, London 1977, nr. III). In Hippo there was a Jewish community as well as in Carthage, where Augustine often went - the biggest Jewish community in Africa was there (see *ibid.*, 226).

the purchaser had to acknowledge his duty to pay taxes.⁹³ This might be how Licinius confirmed his right of ownership. Property was the real, not negotiable dominion over the land.⁹⁴ Victor could not take the land by force. Not only was Augustine right about Licinius' possibility to be successful with an *actio in rem*, but he was also (and maybe strategically?) silent about something far graver: the forceful invasion of land could be capitally punished in a criminal trial.⁹⁵ Had it not been for the involvement of his mother, Licinius might and could have pursued this possibility.⁹⁶

3.2.3. The “*episcopale iudicium*”

With his reference to the *episcopale iudicium* Augustine meant an episcopal court that might deprive Victor of his office owing to such behaviour.⁹⁷ The bishop of Hippo can be depicted as diplomat, juggling the opportunities, yet harshly reproaching his colleague, with full awareness of the implications *e.g.* that there was danger of a dispute outside a bishop's court and thus a challenge to Victor's career. A verdict outside the church was not wished for, but it could happen. It could result in disciplinary trial against Victor in front of an episcopal court: at best he would be asked to do penance. At worst he would be permanently deprived of his office as bishop.⁹⁸

⁹³ Constantine ordered this in 337, see Vat. 35, 3-5 = *Cod. Theod.* 3, 1, 2; M. KASER, *Das Römische Privatrecht*, 2. Abschnitt, Beck, München 1959, 199 (§ 242 III 1).

⁹⁴ Augustine is referring to *possessio* only. Recently on the distinction between possession and dominion in the Theodosian Code and against the theory of Vulgar law that meddled the terms, cf. S. VANDENDRIESSCHE, *Possessio und dominium im postklassischen römischen Rechts*, Verlag Dr. Kovač, Hamburg 2006.

⁹⁵ HECHT, *Störungen der Rechtslage*, 566f. refers to *Cod. Theod.* 9, 10, 2 of 317: *Si quis per violentiam alienum fundum invaserit, capite puniatur*, but the alleged self-help could protect against such a punishment, *Cod. Theod.* 9, 10, 3 or *Cod. Theod.* 11, 36, 1, 4. *Cod. Theod.* 9, 10, 4 of 390 and *Cod. Theod.* 2, 4, 5 of 389 show, that the problems arose mainly in Africa (see Hecht, *Störungen der Rechtslage*, 567).

⁹⁶ On the *privilegium fori*, see endnote 97 below.

⁹⁷ Licinius probably did have the opportunity to take Victor to a civil court. This Augustine wanted to prevent. The discussion is on a law of 412 addressed to the Praetorian Prefect Melitius, *Cod. Theod.* 16, 2, 41. J. Rougé maintains that Licinius turned to Augustine because Victor was a bishop and the law of 412 contained a *privilegium fori* for bishops, which meant that they could not be called into civil court: see J. ROUGÉ, *Escroquerie et brigandage en Afrique romaine au temps de saint Augustin (ep. 8* et 10*)*, in *Les Lettres de Saint Augustin découvertes par Johannes Divjak. Communications présentées au colloque des 20 et 21 Septembre 1982*, Études Augustiniennes, Paris 1983, 180f. This however is not the case. For the beginning of the fifth century such a *privilegium* did not exist. Similar to the restrictions of the *episcopalis audientia* after Julian the Apostate it was not granted and the Compilers of the Theodosian Code are referring to *apud episcopos, si quidem alibi non oportet* in the sense of 'insofar as something else is not opportune'. Cf. also GAUDEMET, *L'Église*, 242f.; VIS-MARA, *Giurisdizione*, 108ff.

⁹⁸ Cf. the measures taken against bishop Antoninus, a bird of the same feather, who robbed his town to build a villa for himself, Augustine's letter to Fabiola, *Ep.* 20*; see S. LANCEL, *L'affaire d'Antonius de Fussala*, in *Les Lettres*, 267-285; Ch. MUNIER, *La question des appels à Rome d'après la Lettre 20* d'Augustin*, *ibid.*, 187-199.

3.2.4. *Augustine's Mediation*

The sale, which might not have been one, may have been a matter of simple avarice rather than an attempt to lend a strong hand to an elderly lady, as Augustine apologetically assumes. Thereby he prudently pampers the stubborn bishop into a deal already agreed to by Licinius. Augustine had succeeded in convincing Licinius of a settlement which could restore bishop Victor's dignity. In exchange for restitution, bishop Victor should arbitrate the family issue.

Augustine must have been sensitive to it; at the 'heart of darkness' there seemingly lay some fierce female brawl between mother and daughter-in-law. The mother must have been injured in a way, a victim of some offence by the wife or her servant; Licinius had been quite ignorant of and uninterested in the details so far. But Augustine had questioned the motivation his mother could have had for such behaviour. Licinius consequently had agreed to have the matter investigated and settled by bishop Victor. Victor may even himself beat Licinius with a rod, should his compliance in the offence be revealed. Other than that, it seems important only that the mother could be spectator of her son's reproof or witness to the beating of the daughter-in-law or her servant, depending on the outcome of the investigation. Augustine had secured Licinius' consent to a trial before Victor's court and now installed his colleague as judicial arbitrator on the condition of Victor's most ardently advised return of the acres to their rightful owner. Victor has almost no option to behave otherwise. Licinius has his case and does not need to be reminded about divine law. But the bishop was not to be ignorant of the secular laws. It seems a fine solution of the problem for all, since Licinius might have had an interest in not having to stand in a Jewish trial, where the offence against a parent was more severely punished. The Old Testament foresaw the death penalty.⁹⁹ So Licinius would be well served and needed no revenge like Shakespeare's Shylock. His dignity would be preserved and his losses returned. But foremost Victor would be corrected and not be challenged in a trial before an ordinary court. It is crucial for Augustine that a bishop should not be a party to a trial in civil court. Even more importantly, a bishop was not to be seen robbing land for any reason. With a little help and instruction on procedure the damage to ecclesiastical authority might have been contained. Yet sadly the outcome of the affair cannot be tracked.

⁹⁹ Ex. 21, 15 and 17 foresees the death penalty for insulting parents.

3.3. *The Forming of Church Law Inspired by Imperial Ruling, Ep. 9**

In a last example Augustine promotes imperial *jurisprudence* in the clerical sphere: “I do not know what to say if in ecclesiastical tribunals we do not preserve the justice that the civil laws have most wisely established”.¹⁰⁰ Augustine is unhappy about the Roman bishop’s failure to refer to the imperial *leges temporales*. *Ep. 9** is a good example of how Augustine approved of worldly regulations concerning procedure and compliance with the law in a lawsuit. He wants them copied in the ecclesiastical sphere.

3.3.1. *The Evidence*

A *vir honestus*, member of the legal profession most likely, had abducted and taken with him, a nun to make her the “plaything of his debauchery”, *ad ludibrium stupri de patria duxerat*. This phrasing means that he – as they were not married and she had vowed abstinence – had dishonoured her, by taking her with him, be it with or without her consent.¹⁰¹ The clerics, who had traced and found him with her, maybe in a church,¹⁰² had obviously given him a good beating.

In late antiquity social status and legal privilege were divided in society between more respectable and lower people, *honestiores and humiliores*. Members of the provincial *curiae* for example or lawyers (as here) received better treatment especially in criminal procedure, where they were exempt from torture or beatings.¹⁰³ Therefore unhappy about his treatment, the man had appealed to Pope Celestine (422-432) and had been granted a trial against the

¹⁰⁰ AUG. *Ep. 9**, 4 (CSEL 88, 43-45).

¹⁰¹ Though Augustine uses the mild ‘*duxerat*’ instead of ‘*abduxerat*’, he is sure that she was forcefully subdued to the man’s lust: *libidini suae subdere* (AUG. *Ep. 9**, 2, CSEL 88, 44). Cf. though A. PRIMMER’s hypothesis, (‘*de patris abduxerat?*’), *Nachlese zur Textgestaltung*, in *Les Lettres*, 64. Yet Lizzy Bennett’s young and silly sister Lydia had out of her own choice eloped with Mr. Wickham, also a “distressing event of a most alarming and serious nature” (J. AUSTEN, *Pride and Prejudice* (1813), Oxford University Press, London 1964, 261ff.).

¹⁰² This is not obvious; it cannot be deduced from *9**, 2, but could from *9**, 3, where Augustine is shocked about *malefactis nequissimorum hominum, quae in ecclesia nefandis ausibus perpetrant*. See PRIMMER, *Nachlese*, 61-63.

¹⁰³ Cf. LIEBS, *Römisches Recht*, 64f.; in fact, the words *cum honorem vel curiae vel fori habent, quem videtur habere iste de quo agitur* (AUG. *Ep. 9**, 2, CSEL 88, 43-45) are a proof of Jones’ suspicion that the privilege included advocates (JONES, *The Later Roman Empire*, vol. I, 519). In late antiquity, as was the case formerly with all Roman citizens, the privileged were exempt from corporal punishment and could not be tortured in a trial. Later this was repeatedly granted to certain groups. An overview of the history of the privileges is provided by C. LEPALLEY in BA 46 B (*Lettres 1*-29**, Nouvelle édition du texte critique et introduction par Johannes Divjak, Traduction et commentaire par divers auteurs, Études Augustiniennes, Paris 1987), 462-465.

rough clerics before bishop Alypius' court.¹⁰⁴ Alypius was given papal order to investigate and then discipline the clerics for violating the privileged man. These developments did not much please Augustine. It gave him the occasion to advise his friend in charge who had asked his opinion on the *quaestio iuris*.¹⁰⁵ Augustine had already been interviewing a presbyter named Commodianus, allegedly involved in the case somehow, who had complained about the oncoming trial to Augustine. The latter had questioned him about details, but Commodianus claimed to have seen nothing. Only responsible for the subordinate clerics involved, he had not been himself present at the scene of the beating.

3.3.2. *Augustine's Assessment*

Firstly, Augustine did not see how Commodianus could be judged, since he had not taken part in the beating. Predominantly though, Augustine writes to Alypius, he was worried lest the other clerics should be punished and the abductor walk away unharmed. One is tempted to detect some trace of criticism of the worldly laws. For Augustine seems to be quite excited and annoyed that *honesti homines* might think they could have a licence to do whatever they pleased, just because they were legally granted the privilege not to be corporally punished:

Nosti quemadmodum nos soleat quaestio ista conterere vel quomodo haec mala impunita salvo regimine ecclesiae relinquuntur vel quomodo debeant ab ecclesia vindicari, quandoquidem leges publicas nequeant. (Ep. 9, 2, CSEL 88, 43)*

You know how this question tends to wear us down, that is how these evils remain unpunished were it not for their handling by the church or how the church should punish what the civil laws cannot punish. (my transl.)

Looking closely though, one must conclude that Augustine is much more concerned with church procedure and the treatment of cases where somebody appeals with a false or incomplete story and consequently gets granted favours. True, Augustine does say that the civil laws were not useful: *leges publicas nequeant*. Yet civil laws might have covered the offence. Given the facts, a *vir honestus* might well be punished for the crime of *stuprum* (e.g.) and so lose his privileges once and for all in a trial before ordinary judges through the punish-

¹⁰⁴ One might ask why he did not complain to civil authority. Yet it seems the man did not think his chances to be so high there, given his behaviour that had caused the situation.

¹⁰⁵ Alypius had (in 427) just come back from a mission to Italy, where he had met Celestine. This explains why he, thus known, is put in charge; cf. A. GABILLON in *BA* 46 B, 461.

ment of *infamia*.¹⁰⁶ Augustine himself is aware of this possibility, since he holds that he could not believe that clerics in defence of the Lord's house were to be punished for doing something so much less than the civil laws provided for, *incomparabiliter minus quam paretur legibus publicis*, and he explains their alleged motivation in beating and his justification of it: "...in order that there might be something to fear on the part of those who have no fear that the bishop or clerics may bring the civil laws to bear against them."¹⁰⁷

Augustine might think this particular case too weak a case to prove the crime that the *curialis* committed. His privilege guarded him against being tortured to confess his felony. But this upsetting outcome was not mainly due to lack of laws or due to privileges. Augustine criticizes the vicious people themselves, who were not to count on the church's own policy and self-obligation not to accuse somebody before worldly tribunals, so that the death penalty and torture might be avoided and the accused person might have the opportunity to repent.¹⁰⁸ Augustine supported corporal punishment not so much because of the weakness of the civil laws, but rather because of their sometimes too harsh sanctions; because of the fatal condition of men who could not live morally and who therefore sometimes violate the laws; and because of the paradoxical situation that the church who did not hold the means to take away positions and privileges (*nec nobis licet*) had to watch quietly as she herself was offended. He supported the idea of releasing somebody unworthy of his office, as could be seen in Victor's case. Likewise in *Ep.* 14* and 15* Augustine made sure that the landowner whom he had informed about a crime (the brutal rape of a nun) committed by one of his men, would not exceed Augustine's advice and verdict and perchance might be so upset as to beat him badly. Since the man had done penance, removal from office was to be punishment enough. Thus the whole letter 9* can be read more like a critique of the rash and little reflected opinion of the Roman bishop and those who wanted the privileges of the *honesti* to be held high and who by and large opposed physical punishment in ecclesiastical matters. It was not earthly law that denied trial altogether, but the clerics who were reluctant to use the worldly courts.

¹⁰⁶ This need not be a criminal trial for a civil court had provisions for this as well, *actiones famosae*, and could sentence *dolus malus, furtum, rapina* or *iniuria* with the sanction of *infamia*. See KASER - HACKL, *Das römische Zivilprozessrecht*, 208 (§ 28 III 3); and also M. KASER, *Infamia und ignominia in den römischen Rechtsquellen*, «Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung», 73 (1956), 272f.

¹⁰⁷ AUG. *Ep.* 9*, 3 (CSEL 88, 45): *quod donec fiat, quae sententia proferenda sit adversus dei servos qui pro domini sui domo faciunt aliquid sceleratis incomparabiliter minus quam paretur legibus publicis, ut sit utcumque quod timeant qui easdem publicas leges contra se episcopis vel clericis moveri posse non timent, omnino non video*. Cf. endnote 54 above.

¹⁰⁸ See § 2.5 above.

The discussion on corporal punishment in the clerical sphere does not seem new (*soleat*).¹⁰⁹ Augustine is in favour of it, since he was at loss as to what else could be done, since nothing else could have an impact on them. They did not care about ecclesiastical excommunication since they either were not Christians nor Catholics or because they lived as if they were not:

Si autem honores movent quos quisque gerit vel gessit in saeculo, nec ipsos nobis licet in peccatis talibus quicquam minuere vel auferre, ut per huiusmodi poenam malefaciendi licentia comprimatur in eis quos vincire seu verberare non possis. (Ep. 9, 2, CSEL 88, 44)*

But if honours that anyone holds or has held in the world impress them, we are not permitted to lessen them or to take them away in the case of such sins in order that we might hold in check the license for wrongdoing on those persons whom you cannot jail or beat. (transl. by R. Teske)

In this crucial passage, Augustine again refers to the fact that only imperial jurisdiction could take away the privileges, whereas ecclesiastical jurisdiction did not have these means. Apart from the Christian tools of reproof, excommunication and penance, the church could only in accordance with the two litigants pronounce a judgement that then would be enforced by the authorities.¹¹⁰ He regrets this. For people doing penance, removal from office sufficed. All Augustine's interceding with the authorities was only to do with encouraging them to moderate corporeal punishment and to prevent death. Each person should be granted the possibility to do better. Since it was common and approved in an episcopal court to 'moderately' beat people, the restrictions the privileges imposed for the *honesti* bore heavily.¹¹¹

Obviously there were people in charge to prevent persons in the church from dancing. We know of a regulation that forbade dancing at weddings: clerics had to leave immediately when the dancing began.¹¹² Thus it is very likely

¹⁰⁹ Cf. § 3.3.2 above. In the power-play between bishops and local administration during and following the Calama riots, HERMANOWICZ, *Catholic Bishops*, construes Possidius as demanding harsh legislation and as therein opposed to Augustine. Her interpretation of *Ep. 95 (ibid., 511ff.)* is for the most part convincing, but I do not think Augustine played upon Possidius' impulsiveness. Augustine never "categorically excluded corporeal punishment" (*ibid., 514*), also not in *Ep. 104, 5*. Augustine opposes the death penalty and torture of innocent people (*Ep. 104, 17*) but not beating in general (*Ep. 8*; 9**). True though, Augustine might have feared that involving the emperor would make compulsory not only thorough examination but also firm judgement against the murderers of the Calama Christians, including inevitable death penalty in a murder trial (independent of the ruling in *Const. Sirmund. 14*).

¹¹⁰ Cf. KASER - HACKL, *Das römische Zivilprozessrecht*, 642 f. = § 100 III.

¹¹¹ Cf. AUG. *Ep. 8**; 133, 2.

¹¹² See Council of Laodicea, can. 53 and 54 in G.D. MANSI, *Sacrorum conciliorum nova et amplissima collectio*, Akademische Druck- und Verlags Anstalt, Paris-Leipzig 1901-27, vol. II, 572f. or C.H. TURNER, *Ecclesiae Occidentalis Monumenta Iuris Antiquissima. Canonum et Conciliorum Graecorum Interpretationes Latinae*,

that there existed also a prohibition of and sanction for dancing in the church. Arguing *a minore ad maius*, Augustine asks why the guardians of the church's peace were allowed to use their means to prevent somebody from doing something far worse than dancing, *i.e.* subjecting to one's lust someone vowed to holiness.¹¹³

A thorough investigation included the behaviour that brought about the beating and its evaluation, remarks Augustine, who wants to have the subject be taken up by a council that would come up with a coherent policy on beating in such cases; only a council would be able to deliver correct judgement.¹¹⁴ This policy then taken into account, it would remain to investigate whether the beating had exceeded the Christian demand for modesty.¹¹⁵ Were that not the mode of procedure, Augustine surely does not know "what sort of account of our judgements we are going to give to our Lord".¹¹⁶ He obviously holds that there should be some wise canonical law-making on the matter. The responsibility should be in more than one bishop's hand. Should all this effort fail, he reminds Alypius and thereby gives him another hint on how to defeat the (not so) honourable man:

Aestimo autem illum in iudicio sanctitatis vestrae rem tam manifestam, id est factum suum quod in libello suo tacuit, negare non posse. Iam vero in ecclesiastici iudiciis si nec iustitia ista servatur quam providentissime constituerunt leges publicae ne quisquam facile per imperiale rescriptum inique pulseatur, ut beneficio careat nec ei sit impunitum quicumque in precibus quae imperatori dantur aliquid quod ad causam pertinere suppresserit, et iste qui hoc fecit in libello tam sanctae sedi traditio non solum non puniendus episcopis verum etiam vindicandus videtur, quid dicam nescio. (Ep. 9, 4, CSEL 88, 45)*

I think however, that in the tribunal of your Holiness he cannot deny so obvious a matter that is the fact that he remained silent about his behaviour in his complaint to the pope. Now I do not know what to say if in ecclesiastical tribunals we do not preserve the justice that the civil laws have most wisely

vol. 2,3, Clarendon Press, Oxford 1939, 383-385; cf. also C. ANDRESEN, *Altchristliche Kritik am Tanz*, in H. FROHNES (ed.), *Kirchengeschichte als Missionsgeschichte. Die Alte Kirche*, vol. I, Kaiser, München 1974, 344-376.

¹¹³ See AUG. *Ep.* 9*, 2 (see endnote 101 above).

¹¹⁴ See AUG. *Ep.* 9*, 2-3 (CSEL 88, 43f).

¹¹⁵ The context of the whole letter suggests that Augustine's interview with Commodianus had already had to do with the question of whether the clerics might have exercised excessive force and so exceeded the limits of Christian moderation. AUG. *Ep.* 9*, 4 (CSEL 88, 45): *nisi forte qui hoc ei fecit mensuram christianae moderationis excessit*. I follow the very constructive yet little received analysis of PRIMMER, *Nachlese*.

¹¹⁶ AUG. *Ep.* 9*, 3 (CSEL 88, 44): *non sane video qualem rationem iudiciorum nostrorum simus nostro domino reddituri*, referring to Mt 12, 36.

established so as to avoid having anyone brought to trial unjustly by means of an imperial rescript – I mean so that a man loses the favour he asked for and so that a person does not go unpunished if, in the petitions submitted to the emperor, he suppresses something that clearly pertains to his case. And I do not know what to say if the man who did this in the request he submitted to so holy a see is seen not only to escape punishment by the bishops but even to obtain reparation. (transl. by R. Teske)

Augustine refers to the ongoing legislation on the misuse of imperial rescripts. Most recently it had been decided that such deception should result in punishment, even in civil courts. The offender should not get anything:

Etsi legibus consentaneum sacrum oraculum mendax precator attulerit, careat penitus impetratis et, si nimia mentientis invenitur improbitas, etiam severitati subiaceat iudicantis. (Cod. Iust. 1, 22, 5)

If a mendacious petitioner should obtain an imperial rescript in conformity with the laws, he shall not have the benefit of it; and where excessive perversity is found in his falsehoods, he shall also be abandoned to the severity of the judge.¹¹⁷

Thus justice under clerical authority could not always be established by one ‘wise man’ alone, but like the Emperor’s *consilium* of lawyers such as Ulpian, Augustine recommends the *consensus iuris* of a church Council on such delicate questions. Guiding principles would have to be laid down, so that prominent lawyer-bishops like Alypius were not left without direction in their query, let alone bishops of the calibre of a Victor. In his view, what had been *providentissime* established by the civil laws, should be taken as reference. Experience gathered in civil law tradition could improve ecclesiastical struggle for fair procedure.

4. Conclusion

Despite his “pragmatic realism”¹¹⁸ that resulted in the acceptance of the Roman judicial and administrative apparatus and order, Augustine often found fault with the state of affairs. Yet to him, this fault was due mostly to the lack of consequence, the lack of assertion and enforcement of temporal laws, even in the realm of the church. “Given what can be observed with regard to the structures

¹¹⁷ It was decreed in 426 in the West. For similar constitutions cf. C. LEPELLEY in *BA* 46 B, 463f.

¹¹⁸ BÖCKENFÖRDE, *Geschichte*, 201.

of the imperial administrative and legal systems generally, the penchant for a systematic lack of well organized system should come as no surprise”: such is the analysis of a distinguished scholar of our days.¹¹⁹ Augustine, man of his times, perceived it less as lack of organization. From his less distanced point of view he saw it largely as failure of individuals. Much needed was commitment to stand up for and demand justice from an administrative body that permitted individual latitude with the laws, imperial or divine.

But the judges for instance, to whom he had sent his letters on behalf of the Donatist murderers, fell themselves victim to the purge of Count Marinus in 413. Marcellinus and Apringius were accused of being supporters of Heraclian. In vain Augustine hastened to Carthage and now used all his influence on their behalf. But they were beheaded, shortly after a summary trial on September 13th. And it was Marinus’s ‘evil plan’: “Suddenly a messenger burst in upon us from whom we learnt that they were executed before we were able to ask the outcome of the hearing. ... His plan was that they could in that way be snatched from the protection of the Church, if they were not merely executed immediately, but were executed in a quite place nearby.”¹²⁰

His realism had its roots in the observation and experience of a society which was not fully christianised in Augustine’s own sense and where issues were often left to run their course, despite the often “prudent provisions” of the worldly laws; where a bishop like Augustine was left waiting in the hall to be heard by some authority,¹²¹ where officials could easily be bribed, a verdict be

¹¹⁹ M. PEACHIN, *Iudex vice Caesaris. Deputy Emperors and the Administration of Justice during the Principate*, Steiner, Stuttgart 1996, 206 denies the possibility to apply Rawls’ concept of “formal justice” to the Roman society: “Needed would have been a thoroughgoing organization and oversight of the legal system; yet that, I suggest, was quite simply foreign to the imperial Roman way of governing. Indeed, my impression is that in Roman terms, the very set of conditions requisite for the attainment of justice and equity demanded precisely what Rawls’ scheme attempts to banish. Roman notions of *iustitia* and *aequitas*, insofar as we can determine these for the imperial epoch, rested largely upon a permanent systematic flexibility – an inherent *absence* of impartial and consistent administration of laws and institutions”. Slightly different HERMANOWICZ, *Catholic Bishops*, 520. I do not think the “same prerogative that allowed Augustine to appeal to the proconsul also gave latitude to the local magistrates”. This inappropriately mingles the distinct matters of ruling, prosecution of a crime and penalty. Augustine restricted himself to admonishing the judges to adhere to the laws; he was very cautious not to ask them to act opposite their duties (see § 2.5 above).

¹²⁰ AUG. *Ep.* 151, 6 (CSEL 44, 386f.), transl. by R. Teske; FRENZ, *The Donatist Church*, 293; MCLYNN, *Augustine’s Roman Empire*, 42f.

¹²¹ In *S.* 302, 17 Augustine asked the congregation not to bother him with commands to intercede anymore, because he was not listened to, when he did so. C. LEPELLEY, *Les cités de l’Afrique romaine au Bas-Empire*, vol. I, Études Augustiniennes, Paris 1981, 396f. thinks the sermon was preceded by an actual failure to achieve something and is testimony of the often little influence Augustine had. The sermon should probably be dated to around 412 (cf. P. HOMBERT, *Nouvelles recherches de chronologie augustinienne*, Institut d’Études Augustiniennes, Paris 2000, 495-506), when Augustine was at his career’s peak time. It might still have been a matter of influence. To a lot of his less prominent colleagues this was probably the recurring scheme. Yet I think the context of the sermon also allows the conclusion that he frequently went there in vain and was embarrassed, since the people in whose favour he had done something had told a wrong story. It should be left to the judges installed to decide upon a soldier the crowd wanted to revenge upon, Augustine argued; see esp. 302, 21 where he demanded that his listeners respect the authorities and let them do their duty.

bought and farmers exploited by their landlords. Injustices resulted not from the body of administration, not from its regulations and prohibitions, courts and appeal-courts, but from the weak human condition. Advocates earned money to defend their clients whatever their case might be; judges accepted money for their verdicts: one sometimes had to pay money even for a just verdict: “These gains (the earnings of corruption) are as wrongly possessed as those that come through theft”, “and I would demand their restitution, but there is no judge under whom they can be claimed.”¹²² In Augustine’s experience it was beyond his immediate influence and rested in God’s hand: a confession of powerlessness by an otherwise strong-minded and always highly committed bishop in the African province of Numidia. He only could demand (*vellem*), but could not always be the deciding judge in his comparably unimportant bishop’s court.¹²³ Thus until final judgement, the just cause fell often short. For Augustine this shortfall was exemplified by the suffering of *humillimus* Christ.¹²⁴ Other than Ambrose Augustine never challenged any imperial authority. After the judicial murder of Marcellinus he fled Carthage instead of pleading for the release of the remaining political suspects.¹²⁵ He was anxious to emphasize his absence when members of his congregation in an act of rebellious self-help liberated 120 people (kidnapped children mainly), who were about to be shipped into slavery by Galatian merchants from the shore of Hippo. He does however emphasize that “our people” (*nostris*) knew about the “custom to take pity on misery” (*mos eleemosynae*).¹²⁶

Nonetheless Augustine had read his Cicero and had developed his ideas of justice and the hierarchy of the laws from this starting point: from a Roman senator and statesman, struggling in the decline of the Roman *res publica*. So against Pelagius’ ascetic elitism, Augustine in Ciceronian tradition promoted the idea of a statesman and judge who involved himself; who in an active life (*vita activa*) saw to it that the laws of the world reflected divine justice and that they were observed. And then his role as bishop was to broker for a Christian *cari-*

¹²² AUG. *Ep.* 153, 25 (CSEL 44, 426): *Haec atque huiusmodi male utique possidentur, et vellem restituerentur; sed non est quo iudice repetantur.* Augustine’s letter to Count Macedonius well displays his dark view on self-righteous people and on forensic bribery.

¹²³ Cf. C. LEPELLEY, *Les cités*, 398. GAUDEMET, *L’Église*, 351, stresses how the bishop legally to significant extent remained a private person. C. ANDO, *Religion and ius publicum*, in C. ANDO - J. RÜPKE (ed.), *Religion and Law in Classical and Christian Rome*, Steiner, Stuttgart 2006, 126-145 holds that Theodosius did not succeed in establishing the *lex Christiana* and so Augustine remained an outsider.

¹²⁴ DIEHLE, *Gerechtigkeit*, 358 refers to AUG. *En. Ps.* 61, 4 (CCL 39, 774), where Christ is referred to as king Zion who was made *the most humble* man.

¹²⁵ Cf. BROWN, *Augustine*, 337; O’DONNELL, *Augustine*, 225.

¹²⁶ AUG. *Ep.* 10*, 7 (CSEL 88, 50). Augustine uses the legally vague expression from the Scriptures: *non defuit fidelis morem nostrum in elemosynis huiusmodi sciens qui hoc nuntiaret ecclesiae ...a nostris liberati sunt me quidem absente.* See H. BOLKESTEIN - W. SCHWER, *Almosen*, in *Reallexikon für Antike und Christentum*, vol. I (1950), 301f.

tas, that was so much closer to divine justice than any procedural and for this purpose only property-managing or order-restoring regulation. To Augustine, the office and duty of a bishop was to lead in this enterprise. His conversion to Christianity was the turning point: the imitation and following of *Christus iustus et iustificans* became essential to find the *vera iustitia* and crucial to Christian life and leadership.¹²⁷ From there he would draw his main legitimacy to instruct, admonish and teach about truth as bishop and judge. Christ was the source of his call to be followed even by imperial officers of the highest status in matters of justice.

¹²⁷ Again see S. ELM, *Der Asket*, especially 196 and 201.