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# Judicial Procedure in New Testament Times

by Roy A. Stewart

*Our readers have already benefited by Mr. Stewart's expertise in rabbinical scholarship. It is a pleasure to publish this further study from his pen. Mr. Stewart, formerly minister at Muirkirk, Ayrshire, now lives in retirement but is able to serve as honorary lecture in Lebanon Bible College, Berwick-on-Tweed.*

## I. INTRODUCTORY

PHARISAIC legislation reaches its final flower in the Talmud, Roman jurisprudence in the *Digest* of Justinian—these voluminous sources doubtless reflect all the details of Jewish and Roman judicial procedure at the time of the Passion and in the apostolic age, could they be critically disentangled. Unfortunately for the Gospel interpreter, it was the Sadducees, not the familiar Pharisees,<sup>1</sup> who sat in the saddle within Jewry at this critical time; and they in their turn were subject to the Roman overlords. Not only are the documents undeniably late, but the Pharisees and later Rabbis possessed a bewildering aptitude for making enactments with sublime indifference to their circumstantial or political freedom to carry them out. Two extraordinary examples will suffice. The Rabbis continued to regulate and even amplify the Temple cultus centuries after the Temple lay in ruins—similarly they diligently discussed the details of death penalties they had long lost the civic power to inflict. The last generation might call them fools, but contemporary history sheds a new light on their tenacious dreams. All these factors complicate the understanding of certain incidents in the lives of Jesus and Paul. The Palestinian Jews of Gospel days were subject to laws both Jewish and Roman. Both were burdensome and exacting, but the first were welcomed with religious zeal and enthusiasm, the second resented and detested. This chapter is concerned merely with the penal aspects.

There were three main ways in which a Jewish court might deal with an offender, assuming it possessed full civic autonomy—religious excommunication, corporal chastisement and capital punishment. The first, a purely domestic matter, did not affect the Romans.

<sup>1</sup> See bib. to NBD arts. "Pharisees", "Sadducees"; also HJP II, ii, pp. 1-43; SB IV, pp. 334-352. On the Sadducees alone, see TWNT VII, pp. 35-54; RGG, 3rd edn. (Tübingen, 1961), p. 1278, art. "Sadduzäer", with bib.

Corporal chastisement was practised, with methodological differences, by both nations. Jewish courts were generally free to lash Jewish offenders at their discretion—unless they happened to be Roman citizens as well. The right of exercising capital punishment autonomously, even over their own countrymen, was withdrawn from the Jews by the Romans in the first Christian century. The precise date is controversial, but the limits are clear. E. R. Goodenough<sup>2</sup> notes that the Greeks in Cyrene were allowed by Augustus, in a decree of 6 B.C., full judicial rights in everything short of the death penalty—this was reserved to the Roman governor, according to the customary provincial administrative pattern. Many scholars therefore maintain, with widespread Roman precedent, that the Jews lost the right of inflicting capital punishment in A.D. 6, when Palestine became a Roman province. Others believe that Jewish courts were allowed exceptional privilege in this matter until the Jewish revolt was crushed and the Temple destroyed in A.D. 70. These limits will be discussed in a later section.

## II. THE JEWISH JUDICIAL SYSTEM IN GENERAL

Legal cases, in the first century as in the twentieth, naturally divided themselves into two classes, civil and criminal. For the former, a court of three judges was sufficient.<sup>3</sup> Civil cases naturally embrace property and monetary disputes, and all everyday litigation. The Mishnah includes in the civil cases the seducing (Ex. 22: 16 f.) or raping (Dt. 22: 29) of a virgin. These offences are serious, but not criminal. If the woman, however, is betrothed or married, criminal adultery is constituted, and Mosaic law prescribes death for both parties (Lv. 20: 10, etc.). Criminal cases in general required a Lesser Sanhedrin of twenty-three—the Talmud further demands two reporting clerks and two ushers, who also had to administer any necessary scourgings.<sup>4</sup> These courts were free and mobile, whereas the Great Sanhedrin of seventy-one was tied to Jerusalem.

Judges varied in powers and functions from age to age. The Old Testament term is *šōfēṭ*, but this means more than judicial arbitrator—Deborah and Gideon were national leaders and saviours as well. In Gospel times a judge was generally called a *daiyān*<sup>5</sup>—the Hebrew Bible uses this term twice in reference to God,<sup>6</sup> bringing it once,<sup>7</sup> like the Mishnah<sup>8</sup> and later literature, into the affairs of men.

<sup>2</sup> *Jurisprudence of the Jewish Courts in Egypt* (New Haven, 1929), pp. 19 f. Henceforth cited as Goodenough.

<sup>3</sup> Mishnah *Sanhedrin*, i, 1; iii, 1.

<sup>4</sup> TB *Sanhedrin* 17b.

<sup>5</sup> From the verb *din*, to judge.

<sup>6</sup> 1 Sam. 24: 15 E.V., 16 Heb; Ps. 68: 5 E.V., 6 Heb.

<sup>7</sup> In the Aramaic portion of Ezra (7: 25).

<sup>8</sup> Cf. *Ketuboth* xiii, 1.

Also "Rabbi" and its collaterals occur frequently in this connection. A contemporary Jewish scholar seems to conclude therefore that "Rabbi" and "judge" may be regarded as the same rose under different names.<sup>9</sup> Though the office of judge was voluntary, the official requirements in Talmudic times were exacting<sup>10</sup>—whether all accepted candidates actually fulfilled them or not. Not only should the man presenting himself possess a fine physique and a splendid command of many foreign languages—he should know all the tricks of sorcerers, and have a mind acute enough to "prove" that the Bible teaches the cleanness of the reptile—which is about as easy, and as useless, as to "prove" the equality of five and seventeen.

There is much truth in Newman's Rabbi-judge equation, but it is scarcely the whole truth. In earlier Rabbinic days, no judge had the right to impose a penal fine (*qenas*) without *semikhah* or ordination.<sup>11</sup> A robed clergyman sitting in court judging and penalizing speeding motorists would seem strange today—but Judaism integrates what we call the secular into the sacred, and would not consider this in any way foreign to the Rabbi's duties. Whether he received ordination from his teacher, or from the Nasi of the Sanhedrin, or from the whole Sanhedrin,<sup>12</sup> the Rabbi's function was at least partly judicial. In the lifetime of R. Ashi (A.D. 352-427) ordination still conferred the authority to deal with fines<sup>13</sup>—yet in the intervening years, owing to shortage of ordinands, such matters frequently had to be dealt with by a *mumheh*, expert, or else by a panel of three laymen.<sup>14</sup> The problem is further complicated by the expedient of partial ordination—endowing a man with Rabbinic authority in certain directions, but not in others.<sup>15</sup> Full judicial powers remained ideally the prerogative of the Rabbi, but, just as in the contemporary Church, manpower shortages sometimes caused his duties to be delegated to lay brethren.

Within Temple times, the Great Sanhedrin of seventy-one members in Jerusalem possessed greater prestige and authority than any merely local court. When Jesus and Paul were tried, the High Priest was almost certainly still head of this body *ex officio*—this seems to be implied in Matthew 26: 57 and Acts 24: 1.<sup>16</sup> At a slightly earlier stage, the Sanhedrin would be composed almost exclusively of priestly, aristocratic Sadducees—now the Pharisaic doctors

<sup>9</sup> J. Newman, *Semikhah* (Manchester, 1950)—henceforth cited as Newman. Cf. esp. pp. 26, 93, 113.

<sup>10</sup> TB *Sanhedrin* 17<sup>a</sup>. Cf. Newman, pp. 82-93.

<sup>11</sup> Cf. UJE, arts. "Arbitration", "Beth-Din", etc.; also Newman, pp. 24 ff.

<sup>12</sup> Cf. Newman, pp. 13-23.

<sup>13</sup> TB *Sanhedrin* 13<sup>b</sup>.

<sup>14</sup> Newman pp. 25 ff.

<sup>15</sup> TB *Sanhedrin* 5<sup>a</sup>. Cf. Newman pp. 78 ff.

<sup>16</sup> Cf. NBD p. 1143; TWNT III, p. 269, line 27; etc.

enjoyed expanding powers, and occupied certain of the seventy-one seats, for Sadducean authority was on the wane. The evidence of the presidency of the High Priest is however chiefly non-Rabbinic—the Talmud prefers to ignore earlier rivals, although they are no longer dangerous.<sup>17</sup>

### III. EXCOMMUNICATION

Excommunication from the synagogue, a punishment which the Talmud pronounces worse than scourging,<sup>18</sup> has clear Old Testament precedent,<sup>19</sup> but becomes excessively complicated in Rabbinic hands.<sup>20</sup> The first stage, *nezifah* or rebuke, became the regular punishment for some minor disrespect on the part of a pupil towards his teacher.<sup>21</sup> The period of disgrace lasted seven days in Palestine, one in Babylonia.<sup>22</sup> The second stage, *niddui*, remained operative for at least thirty days, and could be extended to sixty. Failure to amend then brought the third and more serious stage of *herem* or anathema.<sup>23</sup> This is declared pictorially to enter into all the 248 joints of the body.<sup>24</sup> Babylonian Jews sometimes used *shammetha* loosely for both *niddui* and *herem*. A person under *niddui* was forbidden to cut his hair or wash his garments. If he died in disgrace, the local court of Rabbis was required to stone his coffin—though this became decently commuted to the imposition of a stone on the coffin.<sup>25</sup> It was possible even under *niddui* to teach and be taught; to enter the Temple, but, owing to deprivation of status, only by the left;<sup>26</sup> to labour oneself and to hire others; but under *herem* these things became forbidden. Frequently the person excommunicated was a distinguished Rabbi too obstinate in a personal opinion.<sup>27</sup> The aim even up to the third stage was normally reformation and reclamation, but many early Christians, like Spinoza in modern times, remained permanently under the ban.<sup>28</sup>

From such passages as 1 Corinthians 16: 22 and Galatians 1: 8, ἀνάθεμα hardened into something like *herem* in later Christian discipline—but the term has Greek roots, not Jewish, and usually

17 UJE art. "Sanhedrin".

18 TB *Kiddushin* 70<sup>a</sup>, b; *Pesahim* 52a.

19 Cf. Num. 12: 14-16; Jdg. 21.

20 Cf. SB IV, pp. 293-333 for exhaustive treatment.

21 See UJE art. "Excommunication"; also SB IV, pp. 293 f.

22 For first ruling, cf. TB *Moed Katan* 16<sup>a</sup>; for the second, *ib.* 16 b. For broad Scriptural parallels cf. Gen. 37: 10; Acts 23: 3.

23 *Moed Katan* 16<sup>a</sup>.

24 *Ib.* 17<sup>a</sup>. Cf. Heb. 4: 12.

25 *Ib.* 15<sup>a</sup>; Mishnah *Eduyyoth* v, 6.

26 Mishnah *Middoth* ii, 2.

27 Cf. TB *Baba Mezia* 59<sup>a</sup>, b; Mishnah *Eduyyoth* v, 6.

28 For Christian parallel to three stages of Jewish excommunication, cf. Mt. 18: 15 ff.

means broadly "accursed" rather than specifically "excommunicated" in the New Testament.<sup>29</sup> The verb ἀφορίζω (to separate) implies excommunication in Luke 6: 22.<sup>30</sup> The term ἀποσυζήγωγος in John 9: 22; 12: 42; 16: 2 suggests *herem* or at least *niddui*—but C. K. Barrett<sup>31</sup> would prefer to find another meaning, or else postulate an anachronism. He finds a synagogue ban against Jesus or His disciples inconceivable before Calvary. Yet note John 11: 54.<sup>32</sup>

#### IV. CORPORAL CHASTISEMENT

In general the corporal punishments of the Greek Testament are unambiguously Roman or Jewish, for there are vocabulary preferences as well as guiding principles. The term for the rod of Roman correction is ῥάβδος. The cognate verb ῥαβδίζω (to beat) has occasional agricultural reference, in Septuagint and Classical literature,<sup>33</sup> but its predominant association is corporal, penal and Roman. ῥαβδοῦχος generally means a Roman lictor<sup>34</sup>—the term should be so translated in Acts 16: 35, 38. Certainly there are Jewish and Christian usages of ῥάβδος, staff (Mark 6: 9, etc.); sceptre (Hebrews 1: 9); the authoritarian "rod of iron" (Revelation 2: 27, etc.); but the penal reference is generally to the birch rod of distinctively Roman punishment. Roman lictors, with their tied bundle of rods and protruding medial axe, were well known in many cities—Pilate and Jerusalem may have lacked this facility.<sup>35</sup> Under a law of the elder Cato, promulgated about 200 B.C., and known as the *lex Porcia de tergo civium*, a Roman citizen possessed the right of appeal, and no lictor was authorized to belabour his back summarily with rods, whatever brutality he might feel safe to expend on one whom he considered a "mere Jew". Paul, a freeborn Roman citizen, suffered shamefully illegal abuse more than once—the verb ἐραβδίσθη

<sup>29</sup> Cf. TWNT I, pp. 356 f.; SB III, pp. 260 f., 446 for valuable exegetical material.

<sup>30</sup> Cf. AG; LSJ; TWNT V, pp. 454 ff.

<sup>31</sup> *St. John* (London, 1955), p. 299 f.

<sup>32</sup> A passage quoted by S. W. Baron, *A Social and Religious History of the Jews* (New York, 1937), Vol. I, p. 329, admirably summarizes the meaning of excommunication in practical terms in the ninth century—it was much the same in the first. The source is Paltai b. Abayi, Gaon of Pumbeditha 842-858 (cf. further JE IX, p. 508): "Announce publicly that his bread is the bread of Cutheans, his wine is the wine of libation of an idolater, his fruits are untithed and his books are the books of sorcerers; and also cut off his show-fringes and impede his livelihood; do not pray with him, do not circumcise his son, and do not teach his children in the synagogue; do not bury his dead; do not associate with him in either obligatory or voluntary association; pour a cup of water after him and treat him with contempt and as an alien".

<sup>33</sup> Twice of threshing grain in LXX (Jdg. 6: 11; Ru. 2: 17); in Theophrastus of beating down olive crops, etc., cited LSJ. See TWNT VI, pp. 966-972.

<sup>34</sup> Cf. TWNT VI, pp. 971 f.

<sup>35</sup> Cf. DCG II, p. 582, art. "Scourge", by J. C. Lambert.

in 2 Corinthians 11: 25 points clearly to the lictor's rods, and reveals unscrupulous Roman infringement of Cato's law. The scourging of Jesus before the Crucifixion (Matthew 27: 26; Mark 15: 15) was inflicted by another instrument, equally Roman, but more hideous, which may possibly have been used in the absence of an official lictor. This was the Φραγέλλιον, Latin *flagellum*, to which Horace significantly applies the adjective *horribile*.<sup>36</sup> It consisted of several leather thongs, attached to a wooden handle, and weighted with lumps of lead or similar objects. If this fiendish prelude to crucifixion was not fatal in itself, it effectively reduced the surface of the body to a bleeding pulp. The horror of this phase of the Agony requires full evaluation. One writer<sup>37</sup> significantly remarked: "St. Peter may have witnessed it all; and what a wealth of meaning then lies in the words 'by whose stripes ye were healed' (1 Peter 2: 24; Isaiah 53: 5)."

Jewish synagogue scourgings were less fiendishly brutal than their Roman equivalents, and their ideal intention was reformatory rather than merely punitive—but they can scarcely be described as humane, and the potential of abuse was ever present. The describing verb usually employed is μαστιγῶ, though this is also used in Roman reference,<sup>38</sup> like μαστίσω, which is found only in Acts 22: 25 in the New Testament. The instrument of scourging, μαστιξ, is mentioned as such only in Acts 22: 24 and Hebrews 11: 36, in Roman and Jewish connections respectively, but Mark and Luke use the same word metaphorically for plague or disease.<sup>39</sup>

Jewish corporal punishment takes its procedure from Deuteronomy 25: 2 f., but becomes greatly elaborated in the Talmud tractates *Sanhedrin* and *Makkoth*.<sup>40</sup> Numerous offences are listed as deserving of flogging.<sup>41</sup> Though the rod was not unknown in Rabbinic procedure, <sup>42</sup> it was customary rather to use the three-tongued leather strap, and to administer the celebrated "forty stripes save one," to the accompanying recital of Deuteronomy 28: 58 f. and Psalm 78: 38. There were thirty-nine separate strokes with the threefold lash—R. Judah demanded a fortieth between the shoulders, to fulfil the letter of the law.<sup>43</sup> The unfortunate prisoner was bent and tied, and these strokes were delivered with the full force of one hand,

<sup>36</sup> *Satires* I, iii, 119. See illustration, NBD, p. 1150.

<sup>37</sup> J. C. Lambert—see note 35.

<sup>38</sup> Cf. the unquestionably Roman flagellation of Jesus (Mt. 20: 19; Mk. 10: 34; Lk. 18: 33; Jn. 19: 1).

<sup>39</sup> On all three words, see further TWNT IV, pp. 521-525.

<sup>40</sup> Cf. SB III, pp. 527-530; also ref. of preceding note.

<sup>41</sup> Mishnah *Makkoth* iii, 1 ff.

<sup>42</sup> TB *Sanhedrin* 7b. etc.

<sup>43</sup> Mishnah *Makkoth* iii. 10.

thirteen on the bared chest, twenty-six on the bared shoulders.<sup>44</sup> It was never intended that this penalty should prove fatal—the flogging was stopped at once on suspicion of danger to life<sup>45</sup>—but of course, accidents did happen, and the scourger was held guiltless unless he had exceeded the sentence.<sup>46</sup> The idea that the triple thong made one downstroke count as three stripes seems unfortunately to be mistaken<sup>47</sup>—though not quite up to Roman standards, the treatment was ferocious enough. No lasting stigma was involved in Jewish eyes—flogging actually restored to brotherhood in the community a man disgraced, besides exempting from the death penalty.<sup>48</sup> Numerous Rabbis were scourged, generally through persistent obstinacy over minute points of ritual law. One's thoughts linger over Paul, scholar and gentleman, perhaps not physically strong, who endured this particular agony in innocence five times, out of loyalty to his Lord.

#### V. JEWISH CAPITAL PUNISHMENT AND CAPITAL EVIDENCE

The official Pentateuchal methods of capital punishment were stoning, burning and decapitation by the sword, these being enumerated in their descending order of severity. The Rabbis added a fourth and milder alternative, strangling. They may well have reasoned that this left the body un mutilated for resurrection. Paul Winter<sup>49</sup> thinks that strangulation was a late device, used surreptitiously and illegally to get rid of Jewish apostates, undesirable or undesired, without Roman interference. The crimes for which each particular penalty was appropriate have been listed exhaustively.<sup>50</sup> There seems no good reason to doubt either the intense dislike which the Rabbis felt towards death sentences under any circumstances, or their sincere desire to minimize the physical sufferings involved. Crucifixion is not normally added to the list of Jewish methods.

A man condemned to stoning was sometimes hurled over a precipice first, to abridge his sufferings. This was obviously the intention of the Nazarenes against Jesus in Luke 4: 29, whereas Stephen was judicially stoned on ground level in Acts 7. This certainly proves that such things happened under Roman rule by direct

<sup>44</sup> *Ib.* iii, 12 ff.

<sup>45</sup> *Ib.* iii, 11.

<sup>46</sup> *Ib.* iii, 14.

<sup>47</sup> Poucher, HDB I, p. 527a, discussing the absolute limit of 40 strokes, adds: "The scourge was composed of three thongs, of which 39 was the largest multiple within the limit." Poucher does not make himself absolutely clear, but seems to interpret one blow as constituting 3 stripes, because of the triple thong—but this is entirely against the Rabbinic evidence.

<sup>48</sup> *Makkoth* iii, 15.

<sup>49</sup> *On the Trial of Jesus* (Berlin 1961), p. 73.

<sup>50</sup> UJE, art. "Capital Punishment", Vol. III, pp. 25-27. Cf. also present writer's *Rabbinic Theology*, pp. 100-103.

Jewish action—it neither proves nor disproves their legality from a Roman viewpoint. John 8: 5 raises a question of principle, not of civic competence—though the enemies of Jesus could possibly have been attempting to entrap Him into a statement which might be interpreted as sedition against Rome.

The stringency of the laws of evidence underlines the extreme reluctance of the Jews to impose death sentences, even when they possessed full civic rights. Circumstantial evidence was entirely discounted, for the Pentateuch insists on two witnesses (Numbers 35: 30; Deuteronomy 17: 16). An assassin might conceal his victim behind a wall, run a sword through his heart, and withdraw the blade—even if a crowd of people saw him five seconds later, while the blood dripped from the sword, he could not be charged with murder, for the actual deed was committed without witnesses—and these should have been at least dual.<sup>51</sup> Persons giving evidence must be of full age and good character, not attached to any of the more profligate professions,<sup>52</sup> not related to the accused, and without personal interest in the matters under litigation. The judge must elicit any contradictions in the evidence by severe cross-examination—the case of Susanna is famous.<sup>53</sup> Any circumstantial contradiction destroyed a capital charge, though not necessarily a civil one. The principles of evidence are the same in all cases—where a human life is involved, the stringencies are tightened.<sup>54</sup>

#### VI. JEWISH CIVIC COMPETENCE AND THE DEATH OF JESUS

What precisely did the Jewish leaders, thirsting for the blood of Christ, mean when they hurled at Pilate the pregnant phrase (John 18: 31) ἡμῖν οὐκ ἔξεστιν ἀποκτείνειν οὐδένα? There are three main lines of possible answer.

1. It would follow historical precedents if the Jews lost the *ius gladii*, the legal privilege of exercising capital punishment, in A.D. 6, when their land became a Roman province. Josephus describes the first Roman procurator Coponius as invested with the power of life and death by Caesar,<sup>55</sup> the self-same powers which Pilate claims in John 19: 10. But Josephus nowhere lays claim to any such Jewish authority in this period—indeed he blames the High Priest Ananus for overstepping his prerogatives by ordering on his own authority the stoning of James the brother of Jesus and other

<sup>51</sup> Cf. Tosefta *Sanhedrin* viii, 3; also refs. in *Rabbinic Theology*, cited in last note.

<sup>52</sup> *Mishnah Sanhedrin* iii, 3.

<sup>53</sup> *Susanna* 54-62.

<sup>54</sup> See arts. 'Evidence', JE and UJE. Here the older work is fuller, and abounds with examples.

<sup>55</sup> μέχρι τοῦ κτείνειν λαβῶν παρὰ Καίσαρος ἐξουσίαν (*Wars*, 2, 8, 1.).

Christians.<sup>56</sup> The Jerusalem Talmud clearly states that Jews lost the power of capital punishment forty years before the destruction of the Herodian Temple, and the Babylonian Talmud echoes this.<sup>57</sup> Forty could be a round number, translatable into sixty-four. Newman<sup>58</sup> believes that the Great Sanhedrin left the Hall of Hewn Stones in the Temple about A.D. 30, for reasons internal to Judaism, and that this fact, not Roman interference, caused the cessation of the death penalty. Roman practice does support the simple, factual understanding of John 18: 31: "We possess no civic power to impose a judicial death sentence at all." This was the interpretation of Schürer,<sup>59</sup> Mommsen,<sup>60</sup> Bernard,<sup>61</sup> Jeremias,<sup>62</sup> Rosenblatt,<sup>63</sup> and a host of other scholars.

2. Others insist that the Romans permitted Jewry to exercise the death penalty, against Jews only and in matters exclusively religious, until A.D. 70. Jean Juster<sup>64</sup> argues this with immense learning, scant respect for Gospel historicity, and a propensity to read into Josephus what suits him—that the High Priest's προστασία includes *ius gladii* is gratuitous assumption.<sup>65</sup> T. A. Burkill<sup>66</sup> reaches the same conclusion from the Temple inscription in Greek, warning Gentiles not to proceed beyond their court on pain of death.<sup>67</sup> Deissmann,<sup>68</sup> however, attributes both inscription and penal procedure to Roman authority, which would invalidate Burkill's argument entirely. E. Stauffer<sup>69</sup> goes so far as to argue that the Jews actually practised

<sup>56</sup> *Ant.* XX, 9, 1.

<sup>57</sup> *TJ Sanhedrin*, Gemara on i, 1, Schwab's French trans. Vol. X, p. 229, standard pagination 18a; *TB Sanhedrin* 41a, *Abodah Zarah* 8b. The last passage is relevant to the next note.

<sup>58</sup> *Op. cit.* pp. 60-73. See last passage in note 57.

<sup>59</sup> *HJP* II, i, p. 188 and footnote 515.

<sup>60</sup> Theodor Mommsen, *Römisches Strafrecht*, photographic reissue of 1899 edn. (Darmstadt, 1955), p. 240 and footnote 2. Henceforth cited as *Mommsen*.

<sup>61</sup> *ICC* on John, p. 607.

<sup>62</sup> *ZNW* 43 (1950-51), p. 148.

<sup>63</sup> *JBL* 75 (1956), pp. 315-321. Ref. does not imply acceptance of all views expressed in art.

<sup>64</sup> *Les Juifs dans l'empire romain* (Paris, 1914), Vol. II, pp. 127-152. *SB* I, pp. 1026 f., and C. K. Barrett, *St. John*, p. 445, follow, with minor variations, in Juster's footsteps.

<sup>65</sup> Juster, p. 132 and footnote 2.

<sup>66</sup> *VC* 10 (1956), pp. 80-96. Cf. same writer, *ib.* 12 (1958), pp. 1-18.

<sup>67</sup> This is Paul's "middle wall of partition" (Eph. 2: 14), and the regulation he is accused of inducing Trophimus to break (Acts 21: 28 f.). [Possibly violation of the sanctity of the Temple, by action or word, was the one offence for which the Sanhedrin had capital jurisdiction reserved to it under the Romans. Ed.]

<sup>68</sup> *Light from the Ancient East* (London, 1927), p. 80. Note photograph of Greek text.

<sup>69</sup> *Jerusalem und Rom* (Bern, 1957), pp. 123-127.

crucifixion. This Paul Winter<sup>70</sup> hotly denies, though he insists on the Jewish exercise of death penalties down to A.D. 70, with illegal and surreptitious stranglings thereafter.<sup>71</sup> He regards John 18: 31 purely as a theological "fulfilment," without historical foundation, of the Dominical prediction of John 12: 32 f.<sup>72</sup> On such theories, the Fourth Gospel either records an erroneous statement, or stands itself in error.

3. Mediating theories attempt to retain Jewish capital competence, but explain John 18: 31 circumstantially. Suppose, *exempli gratia*, that the Jews could stone Jesus for blasphemy—they failed to establish their case, and therefore fabricated a political charge of sedition, which became Pilate's province. Hoskyns<sup>73</sup> states that ἀποκτείνω implies bloodshed, certain in crucifixion, but not in stoning. οὐκ ἔξεστιν then means that Passover bloodshed would render Jews levitically unclean. Note the scrupulosity of John 11: 55; 18: 28.

The fact that many Jews were, like Stephen, judicially killed by their compatriots in many parts of the Roman Empire between A.D. 6 and 70 is not disputed. Goodenough demonstrates considerable laxity in the Alexandria of Philo,<sup>74</sup> provided this lynch law was confined to Jews on religious charges who were not Roman citizens,<sup>75</sup> and Origen reveals a similar situation much later.<sup>76</sup> The issue behind the words to Pilate is purely one of legality. It may be reasonable to ask whether Roman jurisprudence and the wider field of Latin literature offer any further pointers.<sup>77</sup>

Justinian's celebrated *Digest*, sourcebook of Roman law, was, like the Talmud, completed about A.D. 530. Ulpian and Paulus, two leading cited authorities, flourished about A.D. 200, and formulated laws based on long precedents.<sup>78</sup> Latin literature was not composed for Gospel exegesis, but its witness, if cautiously interpreted, need not be discounted.

<sup>70</sup> *On the Trial of Jesus*, pp. 62-66. [Alexander Jannaes, a Hasmonaean priest-king, did indeed crucify captured rebels in 88 B.C., but to the horror of other Jews, for "it was not so done in Israel" (4QpNah. 1: 8). Ed.]

<sup>71</sup> *Ib.* p. 73

<sup>72</sup> *Ib.* p. 88.

<sup>73</sup> Sir Edwyn Hoskyns, *The Fourth Gospel* (ed. F. N. Davey, London, 1942), pp. 616 ff.

<sup>74</sup> Died A.D. 45.

<sup>75</sup> Goodenough, pp. 33 ff., 99 f., 230, 253, etc.

<sup>76</sup> *Ad Africanum* 14.

<sup>77</sup> Cf. Mommsen, pp. 229-250, esp. pp. 232 f., 243 ff.

<sup>78</sup> Krüger-Mommsen, *Digesta Justiniani Augusti* (Berlin, 1962-3), 2 vols., or earlier edn. Cited as KM in following notes.

Ulpian<sup>79</sup> states that the power of Caesar's deputy may be either "pure" or "mixed." The first includes the right of inflicting the death penalty, the second stops short of this. This is further clarified by another passage, which assigns capital jurisdiction to those who rule over entire provinces.<sup>80</sup> Ulpian makes it clear that with such rulers the power of death sentence is entirely personal, and under no circumstances transferable to another—yet responsible officials may not indiscriminately set at liberty accused men whose cases they cannot hear in person.<sup>81</sup> The severity of the death penalty is not to be applied in isolated instances of cattle stealing, but may be enforced when this evil attains high nuisance value.<sup>82</sup> These enactments, by pagan standards, are wise and fair—the last, however, is followed by exceptions and modifications for those of a better birth. This constitutes a recurring note in Roman law, and reveals an unfortunate tendency to regulate the sentence, not by the crime, but by the social status of the offender.

Pontius Pilate was Procurator of Judaea. In larger domains, this office might be purely financial—but Judaea was a tiny province, and Pilate was therefore invested with fuller powers, which included the *ius gladii*. These powers were operative strictly within his own boundaries—the moment he stepped outside them, he became a private citizen. He possessed full control over all men physically within his province, irrespective of their origin. If a Galilean remained in Galilee, Pilate could not touch a hair of his head—but let him enter Judaea, and Pilate gained absolute powers of life and death over him. These principles are clearly stated by Paulus.<sup>83</sup> When Pilate sent Jesus to Herod, this was a patent shuffling of responsibility.

Allowing for abuses, it would seem that in her provinces Rome kept the *ius gladii* jealously within the hands of her appointed officials, regulating even their lawful use of it somewhat carefully. It seems almost inconceivable that the Sanhedrin alone could have executed Jesus legally.

<sup>79</sup> KM Vol. I, p. 40, lines 9-12: *imperium aut merum aut mixtum est. Merum est imperium habere gladii potestatem ad animadvertendum facinorosos homines, quod etiam potestas appellatur. Mixtum est imperium, cui etiam iurisdictio inest, quod in danda bonorum possessione constitit. iurisdictio est enim iudicis dandi licentia.*

<sup>80</sup> KM Vol. I, p. 35, line 24: *qui universas provincias regunt, ius gladii habent.*

<sup>81</sup> KM Vol. I, p. 32, lines 37-39: *nec enim potest quis gladii potestatem sibi datam vel cuius alterius coercionis ad alium transferre, nec liberandi igitur reos ius, cum accusari apud eum non possint. Cf. KM Vol. II, p. 961, lines 9-10.*

<sup>82</sup> KM Vol. II, p. 787, line 35, and p. 788.

<sup>83</sup> KM Vol. I, p. 34, line 38 to p. 35, line 2: *praeses provinciae in suae provinciae homines tantum imperium habet, et hoc dum in provincia inest: nam si excesserit, privatus est. habet interdum imperium et adversus extraneos homines, si quid manu commiserint: nam et in mandatis principum est, ut curet is, qui provinciae praeest, malis hominibus purgare, nec distinguuntur unde sint.*

## VII. CRUCIFIXION

It was owing to Jewish judicial incompetence in capital cases, not primarily to the fact of the Passover season, that Jesus was tried again by Pilate after the Sanhedrin had finished with Him. For the brief remainder of His earthly life, He suffered at Roman hands, nevertheless directly by Jewish initiative. It is necessary to look at this Roman punishment through Roman eyes, at its psychological as well as its historical associations.

Paulus<sup>84</sup> in his *Sententiae* reminds readers in several contexts that crucifixion is a *summum supplicium*, an extreme penalty. Truly man, in the most depraved excesses of his cruelty, never devised a more fiendish capital punishment. The gratuitous preliminary brutality of flagellation has been described already. Livy<sup>85</sup> confirms its regular usage, saying of the ringleaders in a slave conspiracy: "Others he scourged and fastened to crosses."<sup>86</sup> Some fortunate victims died under flagellation. If they survived, and were nailed to the cross, they might live for hours or even days, suffering all the unspeakable tortures of lacerated flesh, displacement of vital organs, hunger, thirst, cramp, heat, flies and worse. The stupefying drink declined by Jesus was a Jewish mercy, based on a special interpretation of Proverbs 31: 6—the Romans certainly had no hand in it.<sup>87</sup>

The very thought of the cross, Seneca's *infelix lignum*,<sup>88</sup> brought a shudder to cultured Romans. This emblem of the quintessence of shame was for recalcitrant slaves and unspeakable criminals—it was not under any circumstances for Roman citizens, however black their misdeeds. That is why Paulus frequently informs us that for numerous listed crimes of a serious nature persons of better birth are banished to an island. Only the scum of the earth—by Roman interpretation, that is—are to be actually crucified, hurled to wild beasts, or impounded to penal labour in metal mines.<sup>89</sup> (This latter penalty belongs strictly only to the middle grade of severity.<sup>90</sup>) It was certainly never legal to crucify a Roman—but the law was unquestionably broken from time to time by provincial governors who hoped to get away with their misdeeds. Verres, governor of Sicily, a somewhat brutal specimen of his class, crucified the Roman Gavius at Messina, within sight of the Italian mainland and freedom.

<sup>84</sup> V. 17. 2 (3); V. 21. 4; V. 23. 17.

<sup>85</sup> Lived 59 B.C.—A.D. 17.

<sup>86</sup> *alios verberatos crucibus affixit* (XXXIII, 36).

<sup>87</sup> DCG, art. "Crucifixion".

<sup>88</sup> Ep. 101.

<sup>89</sup> V. 25. 1: *honestiores quidem in insulam deportantur, humiliores autem aut in metallum dantur aut in crucem tolluntur* (cf. v. 23. 1; *Collatio* 14. 2. 1-2).

<sup>90</sup> V. 17. 2 (3).

Cicero wrote some stirring, perfervid invective against this act—words failed him to describe the heinousness of the deed: “It was not Gavius, some unimportant individual, it was the entire and common cause of liberty and citizenship that thou didst there lead to such torture and to such a cross.”<sup>91</sup> Galba and others were guilty of similar transgressions.<sup>92</sup> But such action was regarded by their more enlightened compatriots with detestation and horror.

The crucifying of a mere provincial, without Roman status, was a very much slighter matter. In Jerusalem, Pilate possessed authority to sentence a Galilean peasant, innocent or guilty, with absolute impunity—though it might enhance his reputation to maintain at least an outward show of impartial justice. Whatever brutalities history may record against him elsewhere, Pontius Pilate seems to have shown a remarkable and conscientious desire to save Jesus from the groundless malice of His compatriots—yet he was quite unwilling to carry this to the lengths of prejudicing his personal advancement, and the words “If thou let this man go, thou art not Caesar’s friend” (John 19: 12) finally unnerved him. It is unlikely that the flagellation was his last subterfuge to save Jesus from the Cross by arousing pity—the procurator had washed his hands of the matter in more ways than one, and thereafter merely let injustice take its course. He was entirely convinced of the political innocence of his Prisoner, yet was prepared to sacrifice Him, lest an exonerating discharge in his name might be misrepresented to Caesar. It is quite likely that Pilate was infected with that Roman fear of a Jewish Messiah to which Suetonius (c. A.D. 69-140) gives emphatic later testimony. The Jewish hopes are interpreted in terms of seizing of power—but the power they merely dreamed of is “really” fulfilled in the Roman Emperor!<sup>93</sup> The fears of Suetonius may be a little distorted—but the Romans were not unwise to beware of the Messiah of unredeemed Jewish expectation.

For the history of the apostolic age, it may be noted that Paulus<sup>94</sup> prescribes crucifixion or hurling to wild beasts for those who practise *sacra impia* by night. This is the kind of charge on which early Christians were cruelly done to death merely for celebrating the Eucharist. There was undoubtedly some senseless brutality on the Roman side—perhaps a still higher proportion of tragic

<sup>91</sup> Oratio II in Verrem, Bk. V, cxvi, 170; *et passim*. The proved guilt of Verres deprived Cicero of the satisfaction of declaiming his elaborate speech.

<sup>92</sup> Cf. Suetonius *de Vita Caesarum* VII, ix; Dio Cassius LXIII, 2.

<sup>93</sup> *De Vita Caesarum* VIII, iv, 5: *percrebruerat Oriente toto vetus et constans opinio esse in fatis ut eo tempore Iudaea projecti rerum potirentur. id de imperatore Romano, quantum postea eventu paruit, praedictum Iudaei ad se trahentes rebellant. . .*

<sup>94</sup> *Sententiae* V. 23. 15.

misunderstanding—but the unflinching heroism of the first martyrs will be remembered to the end of recorded time.

It is probable that Christ died on a *crux immissa* or Latin cross. The *palus* or upright stake sometimes remained permanently in the ground, and experts reckon that its height did not exceed nine feet. The *patibulum* or cross beam, carried by the prisoner, was affixed to the *palus* when the time came, some distance below the top, as in the familiar Christian representation. The inscribed *titulus* or charge accords also with regular Roman procedure.<sup>95</sup> The shame and the curse were as hateful to One who was a Jew after the flesh as the agonizing pain.

#### VIII. THE JUDICIAL ELEMENT IN THE PARACLETE CONCEPT

Christians frequently and automatically equate Paraclete and Comforter—but this is a conditioned response, for the Greek word is really judicial in origin, and therefore relevant for selective study here.

The Classical term παράκλητος means one invited or summoned to the aid of a client or friend in police hands, so to speak; a legal assistant or advocate, like the Latin equivalent *advocatus*. Verbally considered, the voice is always passive in native Greek—the advocate is sent for, he does not obtrude himself unasked. In the 4th century B.C., Demosthenes so uses the noun,<sup>96</sup> Aeschines the participial phrase ὧ παρακεκλημένοι (at whose summons)—he refers to pupils in a law court.<sup>97</sup> Dionysius of Halicarnassus, shortly before Christ, speaks of τῶν τὰ δίκαια λεγόντων παράκλητοι, advocates for those who plead the cause of justice.<sup>98</sup> Parallel evidence comes from Dio Cassius<sup>99</sup> and Diogenes Laertius<sup>100</sup> (2nd-3rd centuries) and others.

For the Greek corpus of Philo Judaeus, the term is lexicographically defined as “intercessor”<sup>101</sup>—textual inspection bears this out. Sometimes an ordinary human being is intended, not necessarily in the lawcourts<sup>102</sup>—Joseph, albeit the party wronged, becomes such on behalf of his brethren.<sup>103</sup> Passing to the realm of metaphor, we find the personified city of Alexandria similarly designated.<sup>104</sup> A man repents of falsehood uttered on oath, and seeks religious

<sup>95</sup> See NBD, HDB, JE etc. for fuller details.

<sup>96</sup> Or. XIX. 1.

<sup>97</sup> In Tim. I, 173.

<sup>98</sup> Ant. Rom. XI. 37. 1.

<sup>99</sup> XLVI, 20.

<sup>100</sup> IV, 50.

<sup>101</sup> LSJ, s.v.

<sup>102</sup> In Flacc. 13, 151, 181.

<sup>103</sup> De Jos. 239.

<sup>104</sup> In Flacc. 23.

remission—inward soul-felt conviction of error then acts as paraclete for him.<sup>105</sup> The Jews possess three intercessors with God—the kindness of God Himself, ancestral merits and supplications, and self-reformation.<sup>106</sup> Persuasion personified (πειθῶ) may act as paraclete to Reason.<sup>107</sup> The High Priest is consecrated to the Father (Creator) of the world—he requires the world (personified as Son) to be his paraclete.<sup>108</sup> All these metaphors harmonize with the basic concept. One passage is puzzling—God at creation had no παράκλητος to help Him.<sup>109</sup> Philo is clearly stating, like some Rabbinic authorities, unlike others,<sup>110</sup> that God created alone and unaided. The “intercessor” meaning is blurred, but there is no radical departure.

This selfsame term is found in Rabbinic literature, transliterated into Hebrew or Aramaic—it must have been exceedingly common in Greek vernacular.<sup>111</sup> It may describe intercessors praying to God on man’s behalf for rain.<sup>112</sup> A man who performs one religious precept is said to acquire one paraclete for himself—that is, before God.<sup>113</sup> A criminal ascending the scaffold is said to need “great advocates” if he is to be saved—repentance and good deeds are then declared to be such.<sup>114</sup> (The literal and the metaphorical understanding are both left open.) Again acts of charity are declared to be “great advocates” on a man’s behalf.<sup>115</sup> These passages are merely representative—the paraclete may be angelic or human, living or ancestral; it may be a good deed, or a ceremonial act, or an offering.<sup>116</sup> The underlying doctrine of works is slightly complacent—this situation is only partially reflected in Philo.<sup>117</sup> The Rabbis retain the forensic implication of Classical Greek—but the bar of justice is frequently divine rather than human. They are closer to Philo—though he becomes philosophical at times. Thus far, the paraclete always defends the accused—in the Targum to Job 33: 23 it is contrasted with the κατηγοῶν or accuser, also transliterated.

In the New Testament, the Paraclete reaches some new dimensions, which can only be mentioned here. Some have arraigned the accuracy

105 De Spec. Leg. I, 237. He approaches ἐπαγόμενος παράκλητον οὐ μεμπτόν τὸν κατὰ ψυχὴν ἔλεγχον.

106 De Praem. et Poen. 166 f.

107 De Op. Mundi 165.

108 De Vita Mos. II, 134.

109 De Op. Mundi 23.

110 See *Rabbinic Theology* p. 65 for refs.

111 Cf. TWNT V, p. 800, note 15.

112 TJ *Taanith* 63<sup>c</sup> (opening of Tractate).

113 Mishnah *Aboth* iv, 11.

114 TB *Sanhedrin* 32<sup>a</sup>.

115 TB *Baba Bathra* 10<sup>a</sup>.

116 See further SB II, pp. 560 ff.

117 See notes 105 and 106 above.

of the rendering "Comforter"—R. Bultmann<sup>118</sup> translates "advocate" or "helper" according to context, N. H. Snaith<sup>119</sup> "Convincer."<sup>120</sup> Whatever word be employed, it should bring out the now active rôle of the Paraclete, which is without parallel in the earlier sources. Another radical departure is the fact that the Paraclete is shown in a double capacity in John 16: 8 ff., Counsel for the Defence and Counsel for the Prosecution in one. The same word denotes the Holy Spirit in John, Christ Himself in 1 John 2: 1—it is rich and meaningful enough to cover both contexts.

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<sup>118</sup> *Theology of N.T.*, Vol. II (E.T., London, 1955), p. 88, footnote.

<sup>119</sup> Exp. T. 57 (1945-6), pp. 47-50; *Distinctive Ideas of O.T.* (London, 1944), pp. 180 f., uses term "convictor".

<sup>120</sup> Amongst other writers may be mentioned Mowinckel, ZNW 32 (1933), pp. 97-130; C. K. Barrett in JTS, N.S. 1 (1950), pp. 7-15 esp.