

BOŻENA CZECH-JEZIERSKA *

UTILITAS REI PUBLICAE CONTRA MISERICORDIAM JUSTINIAN'S CRIMINAL LEGISLATION IN BORYS ŁAPICKI'S VIEW

Borys Łapicki is known in the history of Roman law studies primarily because in his works he strongly emphasised the relationship between ethics and Roman law.¹ His ideas in this respect were recognised as innovative and noteworthy, which assured him a special place in the history of Roman law studies in Poland. According to J. Kodrębski, B. Łapicki's views were unique among Roman law scholars.²

* Ph.D., Assistant Professor, the John Paul II Catholic University of Lublin; e-mail: bczechjez@kul.pl, ORCID ID: <https://orcid.org/0000-0002-0735-8166>.

¹ Borys Łapicki (1889–1974) was also one of the first to make an attempt to consistently employ the Marxist scientific method in Polish Roman law studies. Some aspects of his controversial views have recently received more attention, cf. e.g. T. Banach, *Rzymska tradycja prawna w myśli politycznej Narodowej Demokracji (1918–1939)*, Warszawa 2010 (the part entitled: *Prawo rzymskie i etyka w poglądach Borysa Łapickiego*) and M. Bromboszcz, *Romanista w czasach stalinizmu – Borys Łapicki o powstaniach oraz walce niewolników z panami*, in: *Wojna i pokój. Wybrane zagadnienia historyczno-prawne*, ed. E. Kozerska, P. Sadowski, A. Szymański, Opole 2013, pp. 67–75.

² Cf. J. Kodrębski, *Borys Łapicki (1889–1974)*, in: *Profesorowi Janowi Kodrębskiemu in memoriam*, ed. A. Pikulska-Robaszkiewicz, Łódź 2000, p. 93 [93–115]. The turn of the 21st century brought a revival of interest in the correlations between ethical concepts and Roman law, and a wealth of literature on this subject, cf. e.g. H. Kupiszewski, *Prawo rzymskie a współczesność*, Warszawa 1988; a new edition: *ibidem*, Kraków 2013; M. Kuryłowicz, *Etyka i prawo w sentencjach rzymskich jurystów*, in: *W kręgu problematyki władzy, państwa i prawa. Księga jubileuszowa w 70-lecie urodzin profesora Henryka Groszyka*, ed. J. Malarczyk et al., Lublin 1996; *idem*, *Prawo rzymskie. Historia – tradycja – współczesność*, Lublin 2003, pp. 161–165, 172–173; *idem*, *Wokół pojęcia “aequitas” w prawie rzymskim*, *Studia Iuridica Lublinensia* 2011, vol. 15, pp. 15–27; *idem*, *Aequitas i iustitia w rzymskiej praktyce prawnej*, *Annales Universitatis Mariae Curie-Skłodowska. Sectio G. Ius* 2019, vol. 66, no. 1, pp. 173–188.

Borys Łapicki's work fits into, among others, the research into interpolations made in Roman law under the influence of Christian thought.³ This article tries to draw attention to the importance that B. Łapicki attached to the concept of *miser cordia* and the influence of that concept on Roman legislation, especially in the area of criminal law. According to B. Łapicki, one could expect that the term *miser cordia* due to its message would appear much more frequently in the legislation of Christian emperors. Borys Łapicki focused on the legislation of Emperor Justinian as he was considered to be the great defender of Christian faith in times when old Roman religions were falling into disgrace and oblivion.⁴

In 1936, B. Łapicki devoted a separate article "*Miser cordia*" w prawie rzymskim ("*Miser cordia*" in Roman Law) to this issue.⁵ In the article, he gives an overview of the texts contained in the *Code* of Justinian and attempts to find the concept of *miser cordia* there. He starts with presenting *miser cordia* as one of the most important Christian virtues described in the Gospels and in the writings of the Church Fathers. *Miser cordia* was understood there as compassion for those who suffered physically or morally, and as the readiness to help them. However, the concept of *miser cordia* may also be found in the literature of ancient Rome⁶ and, as B. Łapicki notes, it is similar in its essence to that found in the Church Fathers' writings, though – as he points out later: "the attitude of Roman writers to *miser cordia* was different." On the basis of Seneca's and Cicero's writings, B. Łapicki concludes that in ancient Rome *miser cordia* was justified only

³ Recently, M. Kuryłowicz has reminded of the need to carry out research in this field in his speech entitled *Christianitas, Romanitas i rzymskie prawo karne* delivered on 7 June 2019 in Kazimierz Dolny and opening a conference *Contra legem Christianam. Zbrodnia i kara w chrześcijańskim Rzymie*, which was organized by the Department of Roman Law at KUL.

⁴ For information on the growing Christian dominance over pagan beliefs in ancient Rome see: P. Chuvín, *Ostatni poganie. Zanik wierzeń pogańskich w cesarstwie rzymskim od panowania Konstantyna do Justyniana*, transl. J. Stankiewicz-Prądzyńska, Warszawa 2008.

⁵ B. Łapicki, "*Miser cordia*" w prawie rzymskim, in: *Księga Pamiątkowa ku czci Leona Pińskiego*, vol. 2, Lwów 1936, pp. 117–131. *Miser cordia* is considered in a slightly different aspect by W. Litewski, cf. idem, "*Dolus*" et "*miser cordia*" dans le droit romain classique, *Archivum Iuridicum Cracoviense* 1972, vol. 5, pp. 91–101, where there are a few quotations from B. Łapicki's article.

⁶ Cf. e.g. Cicero, *Epistulae ad Atticum*, 9,7c: *miser cordia et liberalitate*; Cicero, *Tusculanae Disputationes* IV, IV,56: *miser cordia liberales*; Tacitus, *Annales* 2,63,2: *miser cordia Caesaris*; Seneca, *De clementia* 2,6,17–18. Cf. a wider selection of texts B. Łapicki, "*Miser cordia*"..., pp. 117–118.

in relation to those who suffered unjustly from the point of view of legal norms in force.⁷ However, as he asserts, it is harder to find the concept of *misericordia* in the sources of Roman classical law, and even if it appears there, it is used in a similar meaning as in Roman literature; i.e. in the sense of pity for those whose suffering is unjust in the light of law.

So, what was the situation like in later legislation, especially in Justinian's legislation? Borys Łapicki asks the fundamental question: "Did the Codification Commission appointed by Justinian rewrite Roman law using the concept of *misericordia* in the meaning defined by the Church Fathers or did it maintain the existing Roman law in this respect?"⁸

There is no doubt that the protection of the Christian religion was one of the determinants of Justinian's legislative policy.⁹ The integrity of Christianity, which was recognised as the state religion, was to be protected for the good of the state and for the spiritual benefit of its subjects.¹⁰ Justinian justified punishing heresy with the fact that it was against religion and as such was harmful to all citizens. Justinian's legislation contains many references to Divine name, which is invoked in many ways.¹¹ This is noted by B. Łapicki when he examines the *Digests* in search of the term *misericordia*. When analysing fragments from Ulpian (D. 4,3,7,7; D. 16,3,7, pr.),¹²

⁷ Ibidem, pp. 118–119. Since *misericordia* gives rise to suffering (*agritudo*) and leads to *perturbatio*, it should be combated rather than encouraged.

⁸ Ibidem, p. 120.

⁹ This issue was dealt with extensively, e.g. by B. Biondi in his book *Giustiniano Primo. Principe e legislatore cattolico*, Milano 1936.

¹⁰ S.P. Kurska, *Ochrona ortodoksyjnej wiary w ustawodawstwie Justyniana*, Zeszyty Prawnicze UKSW 2012, vol. 12, no. 2, p. 5. Repressive monetary penalties were used for punishing heretics, apostates, pagans and Jews. Heresy was treated by Justinian and by his predecessors as *crimen publicum*., cf. A. Dębiński, *Ustawodawstwo karne rzymskich cesarzy chrześcijańskich w sprawach religijnych*, Lublin 1990; idem, *Herezja jako przestępstwo prawa rzymskiego*, in: "Salus rei publicae suprema lex". *Ochrona interesów państwa w prawie karnym starożytnej Grecji i Rzymu*, ed. A. Dębiński, H. Kowalski, M. Kuryłowicz, Lublin 2007, pp. 45–56.

¹¹ W. Bojarski, "Invocatio Dei" w starożytnych zbiorach prawa, in: *Religia i prawo karne w starożytnym Rzymie*, ed. A. Dębiński, M. Kuryłowicz, Lublin 1998, pp. 16–17.

¹² D. 4,3,7,7: *Idem Labeo quaerit, si compeditum servum meum ut fugeret solveris, an de dolo actio danda sit? Et ait Quintus apud eum notans: si non misericordia ductus fecisti, furti teneris: si misericordia, in factum actionem dari debere*; D. 16,3,7, pr.: *Si hominem apud se depositum ut quaestio de eo haberetur, ac propterea vinctum vel ad malam mansionem extensum sequester solverit misericordia ductus, dolo proximum esse quod factum est arbitror, quia cum sciret, cui rei pararetur, intempestive misericordiam exercuit, cum posset non suscipere talem causam quam decipere*.

he concludes that the action of releasing someone else's slave out of mercy (*misericordia*) "does not meet the requirements of a delict." Other Roman jurists (Q.M. Scaevola, Gaius, Paulus) also refused to bring an action of theft (*actio furti*) in such a case, but rather suggested bringing an action on the fact (*actio in factum*). Thus, B. Łapicki does not see *misericordia* in the Christian sense here. When analysing the passage (Ulpian, D. 16,3,7, pr.), B. Łapicki asks the question whether there is an interpolation in this case since *misericordia* is a Christian virtue, and *actio doli* and *actio furti* are *actiones famosae*. He concludes, however, that the above fragment has not been changed – it is hard to talk about Christian *misericordia* if the act of freeing someone else's slave given for safe-keeping is more like *dolus* and the wronged person is granted *actio depositi*, an action bringing infamy to the defendant. Therefore, it would be hard to say that "this passage was rewritten in the spirit of Christian *misericordia*."¹³ The situation is similar when we consider another passage from Ulpian (D. 47,8,4,6),¹⁴ which deals with criminal liability of those who arousing pity in the crowd incite its members to commit wrongful acts. Their action is classified as a delict despite the mitigating circumstances; i.e. *misericordia*, which motivated them. This, according to B. Łapicki, shows that the above fragment has not been affected by interpolation. Another passage (Ulpian D. 11,3,5, pr.)¹⁵ concerns harbouring a fugitive slave to the detriment of his owner. Borys Łapicki claims that exclusion of liability on the grounds of *misericordia* was caused by the lack of intent to harm the slave owner, rather than the moral value of the act itself. He does not therefore question the authenticity of this passage, but at the same time states that "*misericordia* as a motif for acting against the law, not only does not deprive the act of the nature of

¹³ B. Łapicki, "Misericordia" ..., pp. 121, 125.

¹⁴ D. 47,8,4,6: *Si quis adventu suo turbam concitavit vel contraxit, vel clamore vel facto aliquo vel dum criminatur aliquem vel dum misericordiam provocat: si dolo malo eius damnum datum sit, etiamsi non habuit consilium turbae cogendae, tenetur. Verum est enim dolo malo eius in turba damni quid datum: neque enim exigit praetor, ut ab ipso sit turba convocata, sed hoc, ut dolo alicuius in turba damnum datum sit. Eritque haec differentia inter hoc edictum et superius, quod ibi de eo damno praetor loquitur, quod dolo malo hominibus coactis datum est vel raptum etiam non coactis hominibus: at hic de eo damno, quod dolo malo in turba datum est, etiamsi non ipse turbam coegit, sed ad clamorem eius vel dicta vel misericordiam turba contracta est, vel si alius contraxit vel ipse ex turba fuit.*

¹⁵ Ulpian D. 11,3,5, pr.: *Doli verbum etiam ad eum qui recepit referendum est, ut non alius teneatur, nisi qui dolo malo recepit: ceterum si quis, ut domino custodiret, recepit vel humanitate vel misericordia ductus vel alia probata atque iusta ratione, non tenebitur.*

delict (*delictum*), but it does not even have an influence on determining the type of delict or its consequences.”¹⁶ Another fragment analysed by B. Łapicki concerns Paulus's view on abandoning children (D. 25,3,4).¹⁷ In B. Łapicki's opinion, *misericordia* should also be viewed in this situation only as a pity for those who suffer unjustly.¹⁸ The last fragment of the *Digests* (D. 11,7,14,7), that B. Łapicki examines concerns the award of *actio funeraria* for reimbursement of funeral expenses to a person who being motivated by *misericordia* paid for the funeral of a stranger with his own money.¹⁹ In this case, B. Łapicki does not find *misericordia* in its Christian meaning, either. The duty to bury corpses had been previously mentioned by Papinianus (D. 11,7,43),²⁰ who emphasised that it was the public good that required that no bodies should be left unburied (*propter publicam utilitatem*). Ulpian, on the other hand, reminds of Marcus Aurelius and Lucius Verus' edict ordering to bury the dead so that the bodies would not lie unburied or some stranger should not conduct the funeral (D. 11,7,12,3).²¹ According to B. Łapicki, this action does not demonstrate the willingness to help others and to make sacrifices. He rejects the view of Salvatore

¹⁶ B. Łapicki, “*Misericordia*” ..., p. 126.

¹⁷ D. 25,3,4: *Necare videtur non tantum is qui partum praefocat, sed et is qui abicit et qui alimonia denegat et is qui publicis locis misericordiae causa exponit, quam ipse non habet.*

¹⁸ B. Łapicki, “*Misericordia*” ..., p. 129.

¹⁹ W. Litewski, *Słownik encyklopedyczny prawa rzymskiego*, Kraków 1998, p. 8, s.v. *Actio funeraria*.

²⁰ D. 11,7,43: *Sunt personae, quae, quamquam religiosum locum facere non possunt, interdico tamen de mortuo inferendo utiliter agunt, ut puta dominus proprietatis, si in fundum, cuius fructus alienus est, mortuum inferat aut inferre velit: nam si intulerit, non faciet iustum sepulchrum, sed si prohibeatur, utiliter interdicto, qui de iure dominii quaeritur, aget. Eademque sunt in socio, qui in fundum communem invito socio mortuum inferre vult. Nam propter publicam utilitatem, ne insepulta cadavera iacerent, strictam rationem insuper habemus, quae nonnumquam in ambiguis religionum quaestionibus omitti solent: nam summam esse rationem, quae pro religione facit.*

²¹ D. 11,7,12,3: *Hoc edictum iusta ex causa propositum est, ut qui funeravit persequatur id quod impendit: sic enim fieri, ne insepulta corpora iacerent neve quis de alieno funeretur. Cf. De religiosis et sumptibus funerum et ut funus ducere licea (Digesta 11, 7) = O rzeczach poświęconych (zmarłym) i kosztach pochówku oraz Jak należy zorganizować pogrzeb (Digesta 11, 7). De mortuo inferendo et sepulchro aedificando (Digesta 11, 8) = O grzebaniu zmarłych i budowie grobowca (Digesta 11, 8). De sepulchro violato (Digesta 47, 12) = O zbezczeszczonym grobie (Digesta 47, 12), transl., introduction, ed. J. Pudliszewski, Poznań 2009, pp. 35, 37. Cf. also W. Dajczak, Prywatno-prawna ochrona szacunku dla ludzkich zwłok. Uwagi z perspektywy tradycji prawa rzymskiego, in: “*Vetera novis augere*”. Studia i prace dedykowane Profesorowi Wacławowi Uruszczałowski, vol. 1, ed. S. Grodziski et al., Kraków 2010, pp. 125–133.*

Riccobono, who saw an interpolation in this text and claimed that the duty to bury corpses had been introduced in Justinian's legislature under the influence of Christian ethics.²² In the light of the sources cited above, S. Riccobono's view turns out to be erroneous.

In no fragments mentioned above did B. Łapicki find interpolations made by Justinian's compilers that could prove the influence of Christian *misericordia*. He also tried to find those interpolations in Justinian's *Institutions*, yet still with no much success. *Misericordia* is mentioned there only once in the summary of how classical lawyers viewed the act of releasing a slave out of pity, which did not give rise to a claim under *actio legis Aquiliae* because that act did not correspond to facts of the case provided for by law (Inst. 4,3,16).²³ In this case, the *Institutions*, just as the classical lawyers, granted *actionem in factum* and, as B. Łapicki claims, such an approach "does not make legal decisions depend on *misericordia*."²⁴ In *Justinian Code*, the term *misericordia* does occur, but only as *misericordia Dei*. On the other hand, the term *misericordia* referring to relations between people and not to the Divine mercy, appears only in two of the constitutions of Roman emperors. The first is Justin I's Constitution of 519 (C. 5,27,7,1-3)²⁵

²² B. Łapicki, "Misericordia"..., p. 130; cf. S. Riccobono, *Cristianesimo e diritto privato*, Rivista di Diritto Civile 1911, pp. 43-45.

²³ Inst. 4,3,16: *Ceterum placuit, ita demum ex hac lege actionem esse, si quis praecipue corpore suo damnum dederit. ideoque in eum qui alio modo damnum dederit, utiles actiones dari solent: veluti si quis hominem alienum aut pecus ita incluserit ut fame necaretur, aut iumentum tam vehementer egerit ut rumperetur, aut pecus in tantum exagitaverit ut praecipitaretur, aut si quis alieno servo persuaserit ut in arborem ascenderet vel in puteum descenderet, et is ascendendo vel descendendo aut mortuus fuerit aut aliqua parte corporis laesus erit, utilis in eum actio datur. sed si quis alienum servum de ponte aut ripa in flumen deiecerit et is suffocatus fuerit, eo quod proiecerit corpore suo damnum dedisse non difficiliter intellegi poterit ideoque ipsa lege Aquilia tenetur. Sed si non corpore damnum fuerit datum neque corpus laesum fuerit, sed alio modo damnum alicui contigit, cum non sufficit neque directa neque utilis Aquilia, placuit eum qui obnoxius fuerit in factum actione teneri [underlining – B.Cz.J.]: *veluti si quis, misericordia ductus, alienum servum compeditum solverit, ut fugeret.**

²⁴ B. Łapicki, "Misericordia"..., p. 130.

²⁵ C. 5,27,7,1-3: *Naturalibus insuper filiis seu filiabus ex cuiuslibet mulieris cupidine non incesta non nefaria procreatis et in paterna per adrogationem seu per adoptionem sacra susceptis ex divinis iussionibus, sive antequam eadem lex inreperit seu post eandem legem usque ad praesentem diem, non sine ratione duximus suffragandum, ut adoptio seu adrogatio firma permaneat, nullis prorsus improbanda quaestionibus, quasi quod impetrarunt lege quadam interdictum sit, quoniam, et si qua prius talis emergebat dubitatio, remittenda fuit movente misericordia, qua indigni non sunt qui alieno laborant vitio.*

De naturalibus liberis, which maintains a ban on adopting natural children and conferring legitimacy upon them; whereas such acts committed prior to the promulgation of that constitution remained in force. If any doubt arises on this occasion, it should be removed *movente misericordia*. Hence, according to B. Łapicki, this concept is also used in the secular meaning. The second constitution mentioned in this context is the Constitution of Valentinian I issued in 374 (C. 8,51 (52), 2, 1 *De infantibus expositis*),²⁶ which upholds the principle of classical law stating that a slave owner loses all rights over his slave as a result of *expositio* (i.e. abandoning the slave). In B. Łapicki's opinion, *misericordia* constitutes here only a new and at the same time hidden motif of the long-known principle. He summarises his views in the article stating explicitly and clearly that: "the concept of *misericordia* had no effect on Justinian's codification."²⁷ This opinion is repeated in his textbook *Roman law*, published after World War II, where he declares categorically that Christian ethics was based on principles completely different from the ethics in Justinian's *Digests*: "The most important principles in the *Digests*: freedom and dignity are completely foreign to Christian ethics, whereas love of thy neighbour, humility and mercy (*misericordia*) play no role in the *Digests*." Borys Łapicki goes even further and writes: "What is more, it can be asserted that ancient Christianity did not create any *lex Christiana* but made use of Roman law."²⁸

Borys Łapicki gives his views on the relationship between religion and ethics, and Roman law also in his other publications, such as *Jednostka i państwo w Rzymie starożytnym* [*The Individual and the State in Ancient Rome*], Warszawa 1939; *Poglądy prawne niewolników i proletariuszy rzymskich* [*Legal Views of Roman Slaves and Proletarians*], Łódź 1955; *Etyczna kultura starożytnego Rzymu a wczesne chrześcijaństwo* [*The Ethical Culture of Ancient Rome and Early Christianity*], Łódź 1958;²⁹ *O spadkobiercach ide-*

²⁶ C. 8,51(52),2,1 *De infantibus expositis*: *Sed nec dominis vel patronis repetendi aditum relinquimus, si ab ipsis expositos quodammodo ad mortem voluntas misericordiae amica collegerit: nec enim dicere suum poterit, quem pereuntem contempsit.*

²⁷ B. Łapicki, "Misericordia" ..., pp. 130–131.

²⁸ B. Łapicki, *Prawo rzymskie*, Warszawa 1948, p. 226.

²⁹ Cf. a quite unfavorable review by T. Łoposzko, Borys Łapicki, *Etyczna kultura starożytnego Rzymu a wczesne chrześcijaństwo*, Łódź 1958, p. 322 [review], *Kwartalnik Historyczny* 1959, vol. 66, no. 2, pp. 566–567 and a friendly reception of the book in Czechoslovakia: J. Klima, Borys Łapicki, *Etyczna kultura starożytnego Rzymu a wczesne chrześcijaństwo* [review], *Právnehistorické Studie* 1960, no. 6, pp. 263–265.

ologii rzymskiej. Okres chrystianizacji cesarstwa rzymskiego [On the Successors of Roman Ideology. Christianisation of Roman Empire], Łódź 1962.³⁰ In all his writings, he tries to identify ethical and ideological motivations of decision-makers who were responsible for creating law in the Roman state.

In his book *Etyczna kultura starożytnego Rzymu a wczesne chrześcijaństwo* (*The Ethical Culture of Ancient Rome and Early Christianity*), B. Łapicki deals extensively with relations, or rather differences between Christian ethics and Roman ethics. He comes to the conclusion that the Roman humanism and the early Christian ethics were in fact contradictory, and he challenges the thesis that one was heavily influenced by another.³¹ In fact, his conclusions are more general, and are not limited to the times of early Christianity. He states, among other things, that Justinian, "accepting the omnipotence of God, maintains the Roman law of nature," and "replaces Roman *humanitas* in human relations with *misericordia Dei*."³² In his book *Etyczna kultura...*, B. Łapicki gives a more detailed explanation of the basic principles of Christian ethics, especially the concept of love of a neighbour and mercy. He emphasises that the love of a neighbour is closely connected with mercy (*misericordia*). This is primarily due to the fact that the duty of being merciful arises from the principle of imitating God, who is the "Father of Mercy."³³ "Combining love with mercy, which is compassion for the oppressed, intensifies love for the oppressed and turns it into an act."³⁴ This entails duties of every Christian, no matter what his financial status is, especially the duty of charity as well as equality between the faithful. Christian ethics also proclaims love and mercy towards enemies and criminals. Borys Łapicki sees here a discrepancy between Christian ethics and ancient Roman ethics, which called for loving others but only those who deserved respect and who could be loved without us losing our own

³⁰ A comprehensive review by M. Bartošek in *Rivista Internazionale di Diritto Romano e Antico* 1965, vol. 16, pp. 345–356.

³¹ In this respect, he notes more correlations between early Christian ethics and socialist humanism, cf. B. Łapicki, *Etyczna kultura starożytnego Rzymu a wczesne chrześcijaństwo*, Łódź 1958, pp. 305–306.

³² He gives two contradictory justifications for Justinian's power in the *Auctore* Constitution: one is theocratic and the other one – Roman, as it refers to the tradition of invoking the will of the nation, cf. *ibidem*, p. 305.

³³ He cites above all the Letters of St. Paul to the Ephesians and the Corinthians and the Gospel of St. Matthew and of St. Luke, *ibidem*, pp. 224–225.

³⁴ *Ibidem*, p. 225.

dignity. Accordingly, Roman ethics “cannot accept Christian love of criminals and enemies and sets apart love of a neighbour and mercy” and so, it is closer to *clementia* and *humanitas*, and not to *misericordia*.³⁵

Finally, B. Łapicki examines the issue of Christian influences in ancient Rome in his monograph *O spadkobiercach ideologii rzymskiej* [On the Successors of Roman Ideology. Christianization of the Roman Empire], Łódź 1962, which is a kind of continuation of his *Etyczna kultura...* It should be noted that two out of three chapters in this monograph (and over 190 pages out of a total of 300) are devoted to “screening” Justinian’s legislation in order to identify possible influences of Christian ideology. Emperor Justinian emphasised his devotion to Christianity and repeatedly pointed out that his legislation was based on the Christian religion. His legal acts were often preceded with the invocation “*In nomine Domini Nostri Jhesu Christi*.” He was deeply convinced that his authority came from God and consequently, his position was similar to that of God.³⁶ In the history of the Church-state relations, Justinian’s reign is sometimes considered a model example of Caesaropapism.³⁷ This was also noticed by B. Łapicki, who highlights advantages of having the laws based on the Christian religion, as this “secured not only the salvation of human souls, but also the existence of Justinian’s state,” strengthening the obedience of his subjects.³⁸ It is worth noting that the view that both imperial Rome and the Christian religion benefited from their mutual relationship, is now well-established in the Roman law literature, including textbooks. “The pagan Emperor was in theory a god, but only a minor one in a large pantheon of other deities. The Christian Emperor, though only a man, became the steward of God’s one almighty majesty. This was not a degradation,” as J. Baszkiewicz notes.³⁹ Antoni

³⁵ Ibidem, p. 226.

³⁶ A. Dębiński, J. Misztal-Konecka, M. Wójcik, *Prawo rzymskie publiczne*, Warszawa 2010, p. 153.

³⁷ A. Dębiński, *Kościół i prawo rzymskie*, Lublin 2007, p. 46. Some authors claim that the religious policy of Justinian cannot be considered as fully successful because of his instrumental treatment of the Church and religion, cf. M. Kuryłowicz, *Teresa Wolińska, Justynian Wielki*, Wydawnictwo WAM, Kraków 2003, ss. 95 + 4 nlb. [review], *Zeszyty Prawnicze UKSW* 2004, vol. 4, no. 1, p. 264 (261–266).

³⁸ B. Łapicki, *O spadkobiercach ideologii rzymskiej. Okres chrystianizacji Cesarstwa Rzymskiego*, Łódź 1962, pp. 135–136.

³⁹ J. Baszkiewicz, *Powszechna historia ustrojów państwowych*, Gdańsk 1998, p. 44.

Dębiński, J. Misztal-Konecka and M. Wójcik in their textbook⁴⁰ summarise this issue in the following way: "Emperors found an ally in the Christian religion to strengthen their imperial power, while Christianity received protection, including legal protection, from the state, which guaranteed it the position of the official religion."

As to criminal norms, B. Łapicki states that those too like "the entire state administration" should be based on "rigorously exercising God's will and the fear of God, because the Emperor's orders implement the Divine will."⁴¹ He also notes that Justinian's utilitarian treatment of faith and the Catholic Church ran contrary to the New Testament.⁴² Borys Łapicki concludes that although Justinian claimed that he acted in accordance with the Gospels when administering punishment on his subjects,⁴³ in fact he chose from the New Testament "only the rules that made it easier for him to justify his criminal authority, ignoring those God's commandments that could not serve this purpose because they clearly contradicted the Emperor's criminal authority." The purpose of punishment is visible in Justinian's entire criminal policy, which called for prosecuting criminals with utmost severity (*cum vehementia corriges*) and in such a way that the penalty would act as a deterrent for the guilty. His criminal policy was based on *timor Dei* and *timor Caesaris*, penalties were to be imposed strictly and with no exceptions, and any mitigation of punishment required the Emperor's consent and was possible only if the provision determining the severity of penalty gave rise to some doubts.⁴⁴ When the law was clear, an offender could not count on any grace and mercy, even God turned away from him

⁴⁰ A. Dębiński, J. Misztal-Konecka, M. Wójcik, *Prawo rzymskie...*, p. 153.

⁴¹ B. Łapicki, *O spadkobiercach...*, p. 137.

⁴² Ibidem, p. 143.

⁴³ He also makes sure that the senatorial court organised by him should operate in accordance with the Gospel – "*omnes consedentes quod eis visum fuerit sub sacrosanctorum Evangeliorum praesentia et statuere et ad nostram referre scientiam*" (Nov. 62,1). Borys Łapicki suggests that Justinian could have used the model of theocracy proclaimed by St. Paul in order to justify his views: "for it is a servant of God for your good. But if you do evil, be afraid, for it does not bear the sword without purpose; it is the servant of God to inflict wrath on the evildoer" (Letter to the Romans, 13,4), cf. B. Łapicki, *O spadkobiercach...*, p. 161.

⁴⁴ The criminal policy in Justinian's times lacked the principle of flexible interpretation that allowed for mitigation of punishment and that had been used in *ius vetus*. Ibidem, p. 162.

(it was prohibited to refer to *miserationis vox*; C. 9,42,1).⁴⁵ What is more, granting amnesty on the first day of Easter was not motivated by mercy. According to B. Łapicki, amnesty was given so that "moans of miserable criminals and their cries for mercy would not evoke sadness and suffering in the souls of those who peacefully prayed to the eternal God," thus causing dissonance in the universal joy and solemn services.⁴⁶

Justinian's catalogue of punishments included harsh or even cruel penalties. First of all, the death penalty, penalties causing suffering (such as burning alive, mutilating and castration), and degrading penalties (i.e. flogging, ostracism, hair cutting) were all maintained and these were inflicted on women, as well. Tortures were also used. Borys Łapicki strongly rejects the thesis that crucifixion was removed from the catalogue of punishments for humanitarian reasons. It was replaced with the *in furcam tollere* punishment, i.e. hanging a convict on an instrument that resembled a pitchfork used instead of a cross, which had become for Christians a symbol of faith and the object of worship and adoration. However, according to B. Łapicki, this did not make the punishment itself more humane. Likewise, he claims that stigmatization of the convict's face was abandoned for religious reasons and not for humanitarian ones, as disfiguring something that had been created in the image of heavenly beauty was prohibited. In his opinion, it is hard to consider to be Christian mercy what Justinian solemnly declared to be the alleviation of punishment; i.e. mutilating an offender by cutting only one of his arms, as cutting all limbs or breaking bones was prohibited. He notes ironically: "Indeed, it is difficult to understand the concern for the helpless human race here. [...] the Emperor who held dear the humanitarian message of the Gospel, could not write like this."⁴⁷ Borys Łapicki also states that "humanitarian Christian morality did not have any influence on Justinian's criminal law," and to prove his statement, he cites two criminal provisions which show that Justinian treated religion in a utilitarian way. First, in order to defend the Christian faith, *Justinian's Code* provided for

⁴⁵ Nov. 77,1,1: "*indignos semetipsos faciunt dei misericordia*." The exception here is mitigation of punishment when an offence was committed by a minor, which was accepted in Roman practice. See *ibidem*, p. 162, footnote 9. Cf. also M. Kuryłowicz, *Odpowiedzialność "nieletnich" za czyny bezprawne w prawie rzymskim*, in: *Postępowanie z nieletnimi. Orzekanie i wykonanie środków wychowawczych i poprawczych*, ed. T. Bojarski, Lublin 1988, pp. 9–19.

⁴⁶ B. Łapicki, *O spadkobiercach...*, p. 162.

⁴⁷ *Ibidem*, p. 164.

the death penalty for blasphemy (*blasphemia*), this penalty being against God's commandment: "Thou shalt not kill." The second example of how religion was used for the purpose of criminal policy was life imprisonment of adulterers in a monastery, which thus from a sanctuary of spiritual purity and holy meditation was turned into a prison and a place of humiliation and suffering for an offender. To sum up, B. Łapicki states that Justinian's criminal law incorporated some religious elements, increased criminal liability and excluded the Emperor's mercy (*misericordia Caesaris*), but at the same time, it blatantly contradicted the humanitarian principles of early Christianity by breaking God's commandments: "Thou shalt not kill" and "Thou shalt love thy neighbour and be merciful". He also advances the thesis that it is extremely difficult to prove that the criminal law of Justinian was influenced by Christianity and that even B. Biondi "was forced to openly admit that Justinian's criminal law was not only very strict, but also that the very idea of secular penalties was contrary to the New Testament." Having admitted that, B. Biondi tried to prove that the humanitarian Christian ethics had an influence on changing the purpose of punishment from *praeventio* to *emendatio*. This hypothesis, according to B. Łapicki, raises some doubts, as Justinian wanted to correct criminals by means of cruel punishments.⁴⁸

As B. Łapicki writes, "Every Christian has the duty of *misericordia* towards anyone who suffers, even if this person is a sinner and a criminal."⁴⁹ *Misericordia* understood in this way should, therefore, be a guiding principle for the criminal legislation of Justinian, who felt himself to be the executor of God's will and defender of the true Christian faith. However, B. Łapicki asserts that, "Justinian was not an apostle who selflessly served Christianity, but he was more of a politician who used Christianity for his political purposes."⁵⁰ The strong imperial power that was necessary to overcome political, economic, social and religious turmoil did not need humanitarian principles of the Christian ethics, such as *misericordia*. Not only were these principles useless, but also highly restrictive. It was useful, on the other hand, to separate ethics from religion, with religion

⁴⁸ Biondo Biondi's views are cited by B. Łapicki, cf. *ibidem*, p. 165, footnote 32.

⁴⁹ B. Łapicki, "*Misericordia*"..., p. 117.

⁵⁰ *Idem*, *O spadkobiercach*..., p. 138; cf. also O.F. Robinson, *The Criminal Law of Ancient Rome*, Baltimore 1995, where the author writes in a similar tone about *Justinian Novellae*, which in her opinion, were not rewritten in the Christian spirit.

becoming a convenient tool for Justinian to enforce his policy. The utilitarian treatment of faith and the Church lay at the heart of Justinian's criminal policy. "In Justinian's view, even the Christian God himself, God of love and mercy, who offered his Son to save people, takes two different forms. For the Emperor, He is the God of mercy and protection, while for the Emperor's subjects, He becomes an ominous judge who can exterminate the sinful and unruly."⁵¹ Thus, as B. Łapicki concludes, "it is not Christianity that had an influence on Justinian, but the other way round, he exerted his influence on Christianity for political purposes."⁵² The driving force of Justinian's policy was *utilitas publica vel utilitas rei publicae*, which in B. Łapicki's opinion formed the basis of his policy and was a source of his subjects' duties. It was the principle of *utilitas publica* that made Justinian ignore the humanitarian principles of the New Testament ethics and that made religion of secondary importance.⁵³ Unfamiliar as this principle was to early Christianity, it played an important role in ancient Rome. In fact, as Theodosius II argued, the glory and the position of Rome as a global empire were based on *utilitas publica*, and Justinian who often referred to Theodosius' views, felt comfortable in his role of the successor of Rome.⁵⁴

⁵¹ B. Łapicki, *O spadkobiercach...*, p. 167.

⁵² The influence of Christianity on the ancient Roman law is still the topical issue of many discussions. Depending on whether the talk is about Christian religion, ethics, philosophy or theology, various ways of penetration, interactions, inspirations or even pressures may be considered in this area. This makes it difficult to determine the scope of Christian influence on Roman law. On the influence of *humanitas* on Roman criminal law in the 4th century A.D. in the light of imperial constitutions preserved in the *Theodosian Code*, cf. A. Świętoń, *Humanitaryzm w rzymskim późnoantycznym ustawodawstwie cesarskim na przykładzie konstytucji zamieszczonych w CTh 9.3. "De custodia reorum"*, *Studia Prawnoustrojowe* 2009, vol. 9, pp. 43–54, where the author concludes that it was not the humanitarian approach of Roman emperors, but rather practical reasons, including their attempts to exercise a full control over the prison system, that led to introducing legal regulations aimed at alleviating the situation of prisoners.

⁵³ It might also be noted that according to *Leksykon tradycji rzymskiego prawa prywatnego*, ed. A. Dębiński, M. Jońca, Warszawa 2016, the only relevant concepts in the tradition of Roman private law are also those of *utilitas* and *utilitas publica*, and there is no reference to the concept of *misericordia*.

⁵⁴ Nov. 7.3. praef.: *Nos quidem semper singulis atque universis ea provisionum maiestate consulimus, qua res Romana paulatim ad totius orbis terrarum processit imperium... Quis dubitat suis commodis veteres rei publicae commode praeferentes mundi finibus fines imposuisse Romanos?*; cf. B. Łapicki, *O spadkobiercach...*, p. 168.

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Summary

Borys Łapicki (1889–1974) was a Roman law scholar whose works contained many references to the correlations between Roman law and ethics. The article provides an overview of B. Łapicki's writings and discusses his views on the concept of *miser cordia* and on the influence of that concept on Emperor Justinian's criminal legislation. A definite and clear-cut thesis emerges from this analysis. Borys Łapicki declares that although Justinian was an emperor who considered himself and was considered to be the great defender of the Christian faith, his legislation was influenced by the principle of *utilitas rei publicae*, rather than by Christian *miser cordia* and by the humanitarian principles of the New Testament ethics. This is particularly evident in his criminal legislation. This leads B. Łapicki to conclude that it was "not Christianity that influenced Justinian, but on the contrary, he exercised his influence on Christianity so that it could serve his political purposes."

Key words: Borys Łapicki, Roman criminal law, legislation of Emperor Justinian, *miser cordia*, *utilitas rei publicae*

UTILITAS REI PUBLICAE CONTRA MISERICORDIAM O USTAWODAWSTWIE KARNYM JUSTYNIANA OKIEM BORYSA ŁAPICKIEGO

Streszczenie

Borys Łapicki (1889–1974) był romanistą, którego twórczość zawierała wiele odniesień do związków prawa rzymskiego z etyką. W artykule autorka dokonuje przeglądu twórczości B. Łapickiego i przytacza poglądy Łapickiego w zakresie pojęcia *miser cordia* oraz jego wpływu na rzymskie prawodawstwo karne cesarza Justyniana. Wyłania się z nich skryształizowana i jednoznaczna teza B. Łapickiego – pomimo, że Justynian był cesarzem uważającym się i uważanym za wielkiego obrońcę wiary chrześcijańskiej, jego ustawodawstwu przyświecała raczej *utilitas rei publicae*, aniżeli chrześcijańska *miser cordia* i humanitarne zasady etyki Nowego Testamentu. Widać to szczególnie wyraźnie w jego prawodawstwie karnym. Borys Łapicki doszedł zatem do wniosku, że to „nie chrześcijaństwo wywiera wpływ na Justyniana, lecz przeciwnie, on w celach politycznych wywiera wpływ na chrześcijaństwo”.

Słowa kluczowe: Borys Łapicki, rzymskie prawo karne, ustawodawstwo cesarza Justyniana, *miser cordia*, *utilitas rei publicae*

**UTILITAS REI PUBLICAE CONTRA MISERICORDIAM
ОБ УГОЛОВНОМ ЗАКОНОДАТЕЛЬСТВЕ ЮСТИНИАНА
С ТОЧКИ ЗРЕНИЯ БОРИСА ЛАПИЦКОГО**

Резюме

Борис Лапицкий (1889–1974) был романистом, чьи работы содержали много ссылок на связь между римским правом и этикой. В статье автор рассматривает творчество Лапицкого и цитирует взгляды Лапицкого в области понятия *misericordia* и его влияния на римское уголовное законодательство императора Юстиниана. Из них вытекает четкий и ясный тезис Лапицкого – несмотря на то, что Юстиниан был императором, который считал себя и считался великим защитником христианской веры, его законодательство руководствовалось скорее *utilitas rei publicae*, а не христианской *misericordia* и гуманитарными принципами этики Нового Завета. Это особенно очевидно в его уголовном законодательстве. Поэтому Лапицкий пришел к выводу, что «не христианство влияет на Юстиниана, а, наоборот, он в политических целях влияет на христианство».

Ключевые слова: Борис Лапицкий, римское уголовное право, законодательство императора Юстиниана, *misericordia*, *utilitas rei publicae*

