

This material may be protected by
copyright law (Title 17, U.S. Code).

MAGIC IN ROMAN CIVIL DISCOURSE: WHY RITUALS COULD BE ILLEGAL

HANS G. KIPPENBERG

Dealing with magic in Roman law, I risk being criticised for falling back on second-rate sources. Since the discovery and publication of magical papyri, curse tablets, amulets and inscriptions, literary sources have lost their function as main sources for the history of magic. Today we are in a much better situation than students of previous generations who had to rely on reports by ancient historians, politicians, theologians, philosophers and lawyers. Their biased descriptions have meanwhile been replaced by genuine voices. So it might appear odd to base research again on clearly dispensable evidence for a proper understanding of the phenomenon.

Yet the issue of understanding magic has not been settled, even though genuine sources are available now. We never can understand the word *magic* without referring to an interpretative model of our own. The people of the Trobriand Islands regularly used spells when starting dangerous enterprises as e.g. hunting sharks. Bronislaw Malinowski who discovered this custom used it to define magical action. Magical action provides psychological confidence in situations undermining human control of nature. It serves the function of preserving identity in a threatening situation. The so-called 'hermeneutic circle' requires a preliminary, even prejudiced view of magic—provided it remains revisable.

There is yet a second model available in our own cultural storage for a proper understanding of magic. It is based on J.L. Austin's famous and fruitful study *How to do things with words* (1962). We know that words can be effective in ceremonies: the 'yes' in the context of a marriage e.g. or the 'hoc est corpus meum' in the Catholic Mass. These words perform a function, distinct from referential meanings. Austin called it 'performative'. According to anthropologists there are good reasons for assuming that the efficacy of spells in popular and tribal culture can be seen in analogy to the performative role of words in official culture (S.J. Tambiah).¹

¹ S.J. Tambiah, 'Form and Meaning of Magical Acts: A Point of View'. In:

Long ago Friedrich Schleiermacher maintained that not understanding but misunderstanding are normal in human relations.² The category *magic* is a striking example. It appears to tell us more about our own cultural biases than about the practices referred to, as R.K. Ritner recently remarked.³ It implies a strong rejection, resistant to easy correction or revision. Scholars defining magic in opposition to religion tacitly paid tribute to this view, often without recognising its origin in ancient culture. The notion of *magic* in Western tradition is a loaded term. Some time ago Jonathan Z. Smith addressed the strong disapproval of *magic* in Western culture and traced its roots to ancient law. According to him every society appears to have a term designating illegal ritual activities. But in contrast to most other societies the Romans made the category part of their legal tradition. Ancient Roman law presented certain religious activities as deviant/illegal/dangerous.⁴ This understanding of *magic* has launched a tradition that is part of the Western cultural storage and had an impact on scholarly definitions too. Our notion of *magic* in some respects resembles a *tradition* as A. MacIntyre has described it:

A tradition is an argument extended through time in which certain fundamental agreements are defined and redefined in terms of two kinds of conflict: those with critics and enemies external to the tradition who reject all or at least key parts of those fundamental agreements, and those internal, interpretative debates through which the meaning and rationale of the fundamental agreements come to be expressed and by whose progress a tradition is constituted.⁵

R. Horton/R. Finnegan (eds.), *Modes of Thought. Essays in Western and Non-Western Societies*. London 1973 pp. 199–229; cf. S.J. Tambiah, *Magic, Science, Religion and the Scope of Rationality*. Cambridge 1990 pp. 73–74.

² F.D.E. Schleiermacher, *Hermeneutik*. Nach den Handschriften neu herausgegeben und eingeleitet von H. Kimmerle. 2nd ed. Heidelberg 1974: 'Die laxere Praxis in der Kunst (des Verstehens, HGK) geht davon aus, daß sich das Verstehen von selbst ergibt: und drückt das Ziel negativ aus "Mißverständnis soll vermieden werden". ... Die strengere Praxis geht davon aus, daß sich das Mißverstehen von selbst ergibt und daß Verstehen auf jedem Punkt muß gewollt und gesucht werden' (p. 82).

³ R.K. Ritner 'The Religious, Social, and Legal Parameters of Traditional Egyptian Magic'. In: M. Meyer/P. Mirecki (eds.), *Ancient Magic and Ritual Power*. Leiden 1995 pp. 43–60, esp. p. 59.

⁴ J.Z. Smith, 'Good News is No News: Aretalogy and Gospel'. In: *Map is not Territory. Studies in the History of Religions*. Leiden 1978 p. 190–207, esp. p. 192; 'Tradition Places'. In: M. Meyer/P. Mirecki op. cit. pp. 13–27, esp. pp. 17–18.

⁵ *Whose Justice? Which Rationality?* London 1988 p. 12.

The legal origin and structure of the Western tradition of *magic* is at the core of this paper.⁶

Arenas of discourses about religions in Roman society

In the past three decennia students of religion have become increasingly aware that religious beliefs are seldom as pure as they would like to have them. Generally these beliefs are mixed with meanings attributed to them in the process of communication and social interaction. So students have begun to pay heed to pragmatic meanings, relying on contemporary philosophical theories of representation and their application by cultural anthropologists. A similar approach to ancient religions is also promising. Ancient sources contain valuable evidence about meanings attributed to religions in public communication. We even hear about institutions generating different kinds of pragmatic meanings.⁷

According to Varro there existed three kinds of theology (*tria genera theologiae*) in ancient culture: the genus *mythicon* of the poets, the genus *physicon* of the philosophers and the genus *civile* of the citizens and priests (ed. B. Cardauns Fragment 7).⁸ Only rarely has it been noticed, that Varro connected these genera with three different cultural institutions: the theatre, the school, and the forum. According to him each of these arenas had its own discourse on religion. The poets presented the gods as if they were truly human beings and attributed to them actions that contradicted their dignity and nature (Fragment 7). Philosophers advanced opinions so diverse that they should preferably be discussed inside of a school, than in the marketplace (Fragment 8). Finally there existed among citizens a civil or political discourse on religion. The citizens, in particular the priests among them, had not only to know the religious practices. They had to decide which of the gods had to be venerated in public (*publice*)

⁶ After presenting my paper at the *Magic seminar* in Princeton I received comments and suggestions from Professors Bowersock, Habicht and Hornblower. I gratefully acknowledge their use in this final version.

⁷ Cf. my paper 'Pragmatic Meanings as a Particular Source for the History of Religions'. In: S. Biderman/B. Scharfstein (eds.), *Interpretation in Religion*. Leiden 1992, pp. 53–67.

⁸ B. Cardauns, *M. Terentius Varro, Antiquitates Rerum Divinarum. Teil I: Die Fragmente*. Mainz 1976.

and to determine the appropriate rites and sacrifices (Fragment 9). While religion in our assumption is an internal mental phenomenon, Varro appears to understand it as an external cultural phenomenon shaped by different forms of representation.

In this article I would like to apply Varro's statement to the notion of *magic*. In Roman law, according to Eliane Massonneau, magic was a crime. 'Le crime de Magie et le Droit Romain' was the title of her 1933 Ph.D. thesis in Paris.⁹ Roman law indeed proscribed certain kinds of ritual actions and permitted official charges against the practitioners. But the history of this proscription is much more complex than the title of her thesis allows. In fact the understanding of *magic* as crime rose out of a civil discourse by degrees. The steps of this discourse can be recovered from ancient legal history. In particular valuable are sources supplying informations about lawsuits based on the accusation of *magic*. Two historical periods showed a considerable increase in this kind of charge: the first century CE under Tiberius and the second half of the fourth century under Constantius II, Valentinian I and Valens. The historical accounts about the trials under Tiberius stem mainly from the historian Tacitus. His reports disclose behind the allegations a violent struggle for power among the Roman elite. Not by chance do the charges of illegal religious activities and of high treason (*maiestas*) repeatedly occur in one and the same trial (e.g. Tacitus, *Annals* II 27–32; 69–72; III 10–19; VI 29; XII 59; XVI 8.30–33).¹⁰ The cases in the fourth century, reported mainly by Ammianus Marcellinus, show a similar fusion of the two types of accusations: of *superstitio* and *maiestas* (XVI 8; XIX 12; XXIX 2). But the fear of the Christian emperors of the fourth century was different from that of their pagan predecessors. They were terrified by the power of magicians and persecuted them, even if they were not rivals in a power struggle and of low social status.¹¹

If we want to know more about the civil discourse we should turn to well-known cases of lawsuits. Of special interest for an understanding of the discourse on *magic* are those trials that were remote from the

⁹ *Le crime de Magie et le Droit Romain*. Paris 1933.

¹⁰ A close study of these trials by R.S. Rogers, *Criminal Trials and Criminal Legislation under Tiberius*. Middletown, Conn. 1935.

¹¹ J. Maurice, 'Le terreur de la Magie au IV^e siècle'. In: *Revue Historique de Droit Français et Étranger* 4 Serie 6 (1927) pp. 108–120; H. Funke, 'Majestäts- und Magieprozesse bei Ammianus Marcellinus'. In: *Jahrbuch für Antike und Christentum* 10 (1967) pp. 145–175.

power struggle among elites, such as the cases of the philosopher Apuleius of Madaura, Libanius and Boethius. Among these, the trial against Apuleius in the middle of the second century CE is particularly rich in information, since the famous philosopher defended himself against the charge of *crimen magiae* and later published his speech: *Apologia pro se. De Magia*.¹²

The lawsuit against the philosopher Apuleius (155/158 CE)

The speech of Apuleius allows us to identify the structure of the public discourse on magic: the event that aroused the suspicion, the legal basis for the accusation, the evidence for conviction. Apuleius, born about CE 123 in Madaura in Africa, was educated first at Carthage (flor. 18), then at Athens (apol. 72), where he studied rhetoric, poetry, geometry, music and philosophy (Apuleius, flor. 20). He regarded himself as a Platonist. Leaving Athens, Apuleius set forth on lengthy travels, also in the East. In the course of these he spent a large part of the considerable fortune his father had left him, 2,000,000 sesterces. 'I have often assisted my friends and have shown substantial gratitude to many of my instructors, on more than one occasion going so far as to provide dowries for their daughters' (apol. 23, 2). In Corinth Apuleius was initiated into the mysteries of Isis, in Rome into the mysteries of Osiris. When he found himself in serious financial difficulties he practised as a lawyer in Rome. At last Apuleius returned home to Madaura. On a journey between Madaura and Alexandria he fell sick at Oea, modern Tripoli. Here by chance he met Pontianus, an old friend from Athens, whose mother, a wealthy woman with two sons, was then looking for a new husband. Pudentilla had been a widow for thirteen years. Her father-in-law had wanted her to marry her brother-in-law, but she had declined. Now she felt free to take a husband of her own choice. Pontianus was most anxious to get his mother married to an honest man. So he invited his former fellow student to stay as a philosopher with them. Apuleius entered their household in a manner Lucian had described in his essay *On Salaried Posts in Great Houses*. Greek philosophers often studied foreign magic. Some of them even practised sorcery (Eusebius,

¹² Ed. with a German transl. by R. Helm Berlin 1977. English translation by H.E. Butler 1909 (reprinted in Westport, Conn. 1970).

Praep. Ev 4, 2, 10; Origenes, *Contra Celsum* 6, 42) and tried to earn their living from it. They entered households professing to supply predictions, drugs, love-charms and incantations against enemies. Due to this career Greek philosophers were sometimes regarded by other people as 'easy-going . . . and prone to all sorts of wrong-doing'. The dismissal of one of them 'makes people think' that he is 'an adulterer or poisoner' (Lucian, *On Salaried Posts in Great Houses* 40). The case of Apuleius fits this image well and he may well have practised sorcery, as Augustine guessed a few centuries later.

Pontianus had to find a suitable occasion to disclose his intentions. This happened when Apuleius successfully delivered a public lecture at Oea. His audience broke into frenzied applause and begged Apuleius to become a citizen of their town. Pontianus took Apuleius aside, telling him that the popular enthusiasm was a sign from heaven, and asked him to marry his mother Pudentilla. Since Apuleius and Pudentilla liked each other, they married. But the couple encountered serious hostility. Pudentilla's late husband's brothers (among them Sicinius Aemilianus) as well as Pontianus's father-in-law (Herennius Rufinus) strongly opposed the marriage. Besides the obvious financial reasons they found it strange that a man of about 30 should have married a woman ten years older. In their words she was even thirty years older and already sixty! (apol. 67, 3). Apparently the marriage was a break with established norms and created social tensions.

In a Greek letter to her son, Pudentilla had tried to explain her inclination for Apuleius. But Pontianus fell ill and died. Apuleius' opponents spread the rumour that he had killed him by sorcery and provided as proof a letter, Pudentilla had written to her son: 'Apuleius is a sorcerer (*magos*) and has bewitched me to love him. Come to me, then, while I am still in my senses' (apol. 82, 1). With her letter in hand the opponents opened it in the midst of the marketplace shouting: "'Apuleius is a sorcerer (*magos*). She herself describes her feelings and her sufferings. What more do you demand?"' (apol. 82, 4). Apuleius' opponents regarded *mageia* as a crime. The entire case supports Peter Brown's argument that not only in tribal, but also in ancient society accusations of witchcraft expressed discomfort with actions contradicting acknowledged norms.¹³

¹³ P. Brown, 'Sorcery, Demons and the Rise of Christianity: From Late Antiquity into the Middle Ages' (1970). In: idem, *Religion and Society in the Age of Saint Augustine*. New York 1972 pp. 119–146.

The charge against Apuleius

In the name of Pudens, a brother of Pontianus, and instigated by Rufinus, Aemilianus brought an official charge against Apuleius (apol. 28, 4; 67, 1; 74, 5). The case was tried by the Proconsul himself, Claudius Maximus, probably about CE 155. It took place in Sabratha, modern Zuwarah (on the coast of Libya, near the border of Tunisia). The plaintiff presented the charge on behalf of Pudens, the other son of Pudentilla (apol. 2). Apuleius knew why. 'He attacks me through the agency of a third person, whose tender age he employs to shield his unworthy self against a charge of false accusation' (apol. 2, 3). It was risky to accuse somebody of magic. In case the charge proved unfounded, the plaintiff himself could be accused of calumny and forced to undergo the same punishment as the defendant would have undergone: loss of honour, property, citizenship even of life.

Aemilianus accused Apuleius of *magica maleficia* (1, 3) or *crimen magiae* (25, 4). The charge opened with the words: 'This is the man, most excellent Maximus, whom I have resolved to indict before you. He is guilty of the most numerous and palpable sorceries (*maleficia*)' (apol. 102, 6–103, 1). The plaintiff presented four proofs in support of the charge (Apol. 27): Apuleius had sought out particular kinds of fish; he had bewitched a free woman, to marry him; he worships a mysterious object he keeps at home; in his presence a boy unexpectedly fell down. As magical devices he allegedly had used incantations (*carmina*) (9, 2; 67, 2) and love philtres (*venena*) (69, 4; 90, 1). An accusation of the murder of Pontianus has quietly been dropped.

What kind of punishment did the plaintiff had in mind? The Roman XII Tables demanded punishments for injuries caused by spells: for ill reputation, destruction of crops and theft of crops.¹⁴ The culprit was punished by interdiction of water and fire: he was banned and exiled. This sanction was part and parcel of ancient civic religion. Crimes in ancient law codes were defined as offences against the divine order. Even if merely one single individual in a city violated that order, the whole community was held responsible. The citizens jointly had to purify their city of that offence. Expulsion or execution of the wrongdoer helped to preserve the civic community from divine wrath.¹⁵ Even in the later periods of the Roman Empire the

¹⁴ Probably not the use of spells, but the violation of property and repute of a citizen was punished.

¹⁵ J. Scheid deals with expulsion as a rite of expiation in his essay: 'Le Délit

penalty remained an issue of the local community. But it differed depending on the legal status of the offender. Slaves and *humiliores* were generally executed, *honestiores* allowed to flee, losing their citizenship and property.¹⁶

The legal foundation of the charge: crimen magiae

Apuleius knew about the legal foundation of the charge. In his time not the damage caused but the magical devices were the target of the legal action. 'Now this magic of which you accuse me is, I am told, a crime in the eyes of the law, and was forbidden in remote antiquity by the Twelve Tables because in some incredible manner crops had been charmed away from one field to another'¹⁷ (apol. 47, 3). The Twelve Tables, referred to by Apuleius, were the earliest Roman law code, drawn up by a special commission in 451/0 BCE and published in the Forum on tablets of bronze (or wood).¹⁸ The original tablets perished when Rome was burnt by the Gauls c. 390 BCE. Though written copies of the tablets did exist, the code today is known only through quotations and references by authorities from the entire Roman history, from Cicero, Pliny and Seneca to Augustine. The surviving text is mostly preserved in modernised Latin. Though this fact makes a reconstruction of the original text extremely doubtful,¹⁹ it underlines that even in the later Roman Empire the XII Tables were regarded as the fountainhead of all public and private law, as Livy observed earlier (*fons omnis publici privatae iuris*, Livy 3, 34, 6).

The Twelve Tables: violation of property and reputation by the power of incantations

The Lex XII Tabularum (5th century BCE) contained three regulations which were labelled as *magical* after the first century CE.²⁰

Religieux dans la Rome tardo-républicaine'. In: idem, *Le Délit Religieux dans la Cité Antique*. Rom 1981 pp. 117–171 esp. pp. 152–154.

¹⁶ Th. Mommsen, *Römisches Strafrecht* (1899). Graz 1955 pp. 964–980.

¹⁷ *magia ista, quantum ego audio, res est legibus delegata, iam inde antiquitus XII tabulis propter incredulas frugum incelebras interdicta.*

¹⁸ A brief information about the entire issue by H.F. Jolowicz/B. Nicholas, *Historical Introduction to the Study of Roman Law*. 3rd ed. Cambridge 1972 pp. 108–113.

¹⁹ The reconstructed text of the Twelve Tables is edited by S. Riccobono, *Fontes Iuris Romani Antejustiniani*. Pars Prima *Leges*. Florence 1941 pp. 23–75.

²⁰ Cp. Pliny NH 30, 10–12; Apuleius Apol. 47, 3.

– VIII, 1: *qui malum carmen incantassit* ('Whoever shall have cast an evil spell') (Pliny NH 28, 18). We owe Cicero an interpretation of these words: 'Though our Twelve Tables had prescribed the death penalty for very few crimes, among those so punished was the crime of anyone who brought ill repute (*infamia*) or disgrace (*flagitium*) on another by chanting or composing verses aimed at him' (quoted by Augustine, de civit. Dei 2, 9). If this interpretation is correct, the statute prohibited ruining the good reputation of a citizen. For Cicero the weapon was poetry, while Pliny a century later had imprecations in mind.²¹

– VIII 8a: *qui fruges excantassit* ('Whoever shall have bewitched the crops') (Pliny NH 28, 18; cf. Seneca, natural. quaest. 4, 7: 'And among ourselves, in the Twelve Tables there is the warning: "No one may make incantations against another's crop"').

– VIII 8b: *neve alienam segetem pellexeris* ('Nor shall one lure away another's grain') (Augustine, de civit. Dei 8, 19: 'By means of the <magical> arts . . . one man's harvest could be transferred to another's land. Does not Cicero record the fact that in the Twelve Tables, the practice was noted and a penalty prescribed for anyone who did so?') Pliny, like Apuleius, was doubtful about a marvellous transfer of crops from one field to another. He had a nice story illustrating how foolish it would be to explain economic success by this type of magic. 'Gaius Furius Chresimus, a liberated slave, was extremely unpopular because he got much larger returns from a rather small farm than the neighbourhood obtained from very large estates, and he was supposed to be using spells (*veneficia*) to entice away other people's crops. He was consequently indicted by the curule aedile Spurius Albinus; and as he was afraid he would be found guilty, when the time came for the tribes to vote their verdict, he brought all his agricultural implements into court and produced his farm servants, sturdy people . . . well looked after and well clad, his iron tools of excellent make, heavy mattocks, ponderous plough-shares, and well-fed oxen. Then he said: "These are my magic spells (*veneficia*), citizens, and I am not able to exhibit to you or to produce in court my midnight labours and early risings and my sweat and toil". This procured his acquittal by an unanimous verdict'. And Pliny draw the conclusion: 'The fact is that husbandry depends on expenditure of

²¹ A.-M. Tupet, 'Rites magiques dans l'Antiquité romaine'. In: *Aufstieg und Niedergang der Römischen Welt* 16, 3. Berlin/New York 1986 pp. 2591–2675 esp. pp. 2592–2595.

labour, and this is the reason for the saying of our forefathers that on a farm the best fertiliser is the master's eye' (Pliny NH 18, 41–43). This old story reveals that not the incantations but the violation of somebody else's property was punishable. The Twelve Table Laws aimed at preserving the integrity of Roman citizens: their reputation and property.

Compared with its beginning, the later legal tradition reveals a certain shift in perspective. By the time Pliny dealt with these statutes, the focus had changed: the vexed question of efficacious formulas had become crucial. In his *Natural History* he dealt with man-made remedies for illnesses. The very beginning of the exposition is worth quoting, since it also places the legal matter in a broader framework. 'Of the remedies derived by man, the first raises a most important question (*maxima quaestio*) and one never settled (*semper incerta*): have words and formulated incantations any effect (*polleantne aliquid verba et incantamenta carminum*)? If they have, it would be right and proper to give the credit to mankind.²² As individuals, however, all our wisest men reject belief in them, although as a body the public at all times believes in them unconsciously.²³ In fact a sacrifice of victims without prayer is supposed to be of no effect; without it too the gods are not properly consulted' (28, 10). And he concludes: 'There is power in ritual incantations (*carmina*)' (28, 12). Although Pliny knew philosophers who did not believe in this power, he did. For this reason he did not dare to insert the words of a spell verbatim into his book though Cato had long ago published the very same charm for sprained limbs (NH 17, 267; Cato, Agr. 160).²⁴ For Pliny the written letters of the spell contain its power. For that reason he wanted to protect them from being publicised.²⁵

Reading Pliny one feels strongly reminded of Austin's 'How to do things with words'. The official cult was regarded as a paradigm or even source for the efficacy of particular words. Though Pliny appears

²² This assumption would have pleased Malinowski, who described and explained magic as a purely anthropological (psychological) phenomenon, not a cosmological one.

²³ This idea would please anthropologists like M.E. Spiro, who discriminate a personal from a cultural belief.

²⁴ A. Bäumer, 'Die Macht des Wortes in Religion und Magie (Plinius, *Naturalis Historia* 28, 4–29)'. In: *Hermes* 112 (1984) pp. 84–99.

²⁵ The issue of writing 'magic' was recently subject of a learned article by D. Frankfurter, 'The Magic of Writing and the Writing of Magic: The Power of the Word in Egyptian and Greek Traditions'. *Helios* 21 (1994) pp. 189–221.

not to be completely certain about the soundness of this assumption, he recognised that there is nobody 'who does not fear to be spell-bound by imprecations (*deprecationes*)' (28, 19). Witness the powerful curse tablets recently collected and aptly analysed by John Gager.²⁶ The idea that incantations have terrible power was apparently widespread in ancient culture and was probably one of the lowest common denominators in ancient worldviews. Official cults and private rituals alike took it for granted.

Lex Cornelia: poisoning and its interpretation (1st century BCE)

Apuleius was charged of having used *carmina* (incantations) (9, 2; 67, 2) and *venena* (poison, love philtres) (69, 4; 90, 1). The latter charge was obviously based on the *Lex Cornelia de sicariis et veneficis* (82/81 BCE). The *Lex Cornelia*, proclaimed in 82/81 BCE, had a considerable impact on the conception of a *crimen magiae*. This is surprising since its original intent had been to deal with a different crime. Sulla had issued this statute to fight terrorism and to restore public order. He installed standing courts for various public crimes and one court to deal with murder by violence and by poisoning (*quaestio de sicariis et veneficis*). Later this court was replaced by the jurisdiction of the emperor or his legates.²⁷ The legal proceedings could be started by private persons supplying information (*nominis delatio*). Every citizen was permitted to initiate a case, provided he was willing to take the risk of being himself accused of *calumnia* if the defendant were acquitted. Though the criminal court disappeared in the course of time the older statute remained valid.

The statute itself has not been preserved, but can be recovered from the later legal discussion on it. *Quicumque <venenum malum hominis necandi causa> fecerit vendiderit emerit habuerit dederit . . . deque eius capite quaesito*²⁸ ('Whosoever has made, sold, bought, owned, or administered

²⁶ J. Gager (ed.), *Curse Tablets and Binding Spells from the Ancient World*. Oxford 1992.
²⁷ W. Kunkel, *Römische Rechtsgeschichte*. 12. ed. Köln/Wien 1990 Oxford 1973 pp. 66–73.

²⁸ Derived from Cicero, pro Cluentius 54, 148 ('The statute [lex] under which this court is set up bids the president of the court, . . . to try cases of poisoning . . . "Whosoever has made it, sold it, bought it, had it in his possession or administered it". What does this statute straightway go on to say? Read it: "And shall try him on a criminal charge" . . . "Whosoever has, or shall have, made a noxious drug"'). Reconstruction of the legal text by C.G. Bruns, *Fontes Iuris Romani Antiqui. Leges et negotia*. Tübingen 1909 p. 92.

<a noxious drug to kill a man>, shall be tried on a criminal charge'). The notion *venenum* was ambivalent and could cover natural as well as supernatural devices. For this reason Roman officials and lawyers could expand its range to cover explicitly spells and rituals. Because of the lack of a theory of natural causation, poison and unsanctioned religious activity could be brought under the same rubric.²⁹ It seems fairly probable to assume that the extended coverage of the meaning of *veneficia* was already known and acknowledged by the courts by the first century CE: A wave of lawsuits swept over Rome and the Senate, accusing citizens of high treason (*maiestas*). Sometimes the charge of ritual attacks was added. One famous case concerned a political rival of Germanicus, the adopted son and expected successor of Tiberius. Germanicus for incomprehensible reasons became seriously ill. Before dying, he accused Piso of having given him a *venenum*. After his death 'explorations in the floor and walls brought to light the remains of human bodies, spells, curses, leaden tablets engraved with the name *Germanicus*, charred and blood-smearred ashes, and others of the implements of witchcraft (*alia malefica*) by which it is believed the living soul can be devoted to the powers of the grave' (Tacitus, *Annales* 2, 69). When Piso later stood trial for a different crime scil. *maiestas*, he was also accused of *veneficia* but could invalidate this charge.³⁰ There are more cases like this in the first century CE in which a charge of *veneficia* was added to the crime of treason. Later sources for this meaning were pronouncements by the great Roman lawyer Iulius Paulus.

Because of this use the Latin *magia/magus* apparently changed its meaning. In the beginning an ethnographic term for Persian ritual specialists, it already appeared by the first century BCE incidentally in Vergil as a designation for private ritual practices (*Ecl.* 8, 66). Pliny was still familiar with the ethnographic reference, when discussing Persian *magi* in book 30 of his *Natural History*. Although he deplored

²⁹ The notion of 'unsanctioned religious activity' is used by C.R. Phillips III, 'Nullum Crimen sine Lege': Socioreligious Sanctions on Magic'. In: Chr.A. Faraone/D. Obbink (eds.), *Magika Hiera. Ancient Greek Magic and Religion*. Oxford 1991 pp. 260–276 esp. p. 264. Cf. his article 'The Sociology of Religious Knowledge in the Roman Empire to AD 284'. In: *Aufstieg und Niedergang der Römischen Welt* II, 16, 3. Berlin/New York 1986 pp. 2677–2773.

³⁰ W. Eck has published an inscription of the *senatus consultum* against Piso recently found in Spain. In contrast to Tacitus it doesn't mention the accusation of *veneficium* (*Annals* II 69) ('Das s.c. de Cn. Pisone patre und seine Publikation in der Baetica'. In: *Cahier du Centre G. Glotz* 4 [1993] pp. 189–208 on p. 195).

'the fraudulent lies of the Magi' (30, 1), he did not subsume the Latin notion under the crime of *venenum*. As F. Graf in a critical account of the change of meaning has argued, it was due to the Roman lawyers that *magia* and *veneficia* finally became equated.³¹

Pauli Sententiae: *The prohibition of the art of magic (3rd century CE)*

An anthology of writings of the great Roman lawyer Iulius Paulus (fl. 210 CE), the *Pauli Sententiae*, compiled about 300 CE contained legal rules. It may be that these rules did not originate in the lifetime of Paulus, but from the beginning of the fourth century CE. According to this writing 'it has been decided that persons who are addicted to the art of magic, shall suffer extreme punishment. Magicians themselves shall be burned alive' (Sent. 23, 17).³² The same source reported the statute: 'No one shall be permitted to have books on the art of magic in his possession, and when they are found with anyone, they shall be publicly burnt, and those who have them, after being deprived of their property, if they are of superior rank shall be deported to an island, and if they are of inferior station shall be put to death. <For not only is the practice of this art prohibited, but also knowledge of the same>'³³ (Sent. 25, 18).

The very same legal practice was implemented by the first Christian emperor Constantine. According to an early edict, he launched a prosecution of professional magicians, while tolerating the use of popular remedies. 'The science of those men equipped with magical arts (*magica ars*) . . . shall be punished and deservedly avenged by the most severe laws. But remedies (*remedia*) sought for human bodies shall not be involved in criminal accusation, nor the assistance that is innocently employed in rural districts in order that rains may not be feared for the ripe grape harvest or that the harvest may not be shattered by the stones of ruinous hail, since by such devices no person's safety (*salus*) or reputation (*existimatio*) is injured, but by their action they bring it about that divine gifts and the labours of men are not destroyed' (CTh 9, 16, 3; 317–319 CE).

³¹ F. Graf, *La Magie dans l'Antiquité Gréco-Romaine*. Paris 1994 pp. 46–73.

³² *Magicae artis consocios summo supplicio adfici placuit. Ipsi autem magi vivi exuruntur.*

³³ *Libros magicae artis apud se neminem habere licet: et penes quoscumque reperti sunt, bonis ademptis, ambustis his publice, in insulam deportantur, humiliores capite puniuntur. <Non tantum huius artis professio, sed etiam scientia prohibita est>.*

If we have a look at the entire history of the legal discourse about *magic*, we recognise three different kinds of accusations. First, the defendant was charged with harming the property and the reputation of a fellow citizen. Second, he was charged with having used potions and magical devices with the intention to harm people. Third, knowledge of the *ars magica* once highly respected, was persecuted. According to Marie Theres Fögen, author of a recent study about this subject, the reason for this expansion of the charge was the political development. Roman emperors after the third century CE claimed the control of divination and magic and usurped the sole right to apply them. But her argument seems incomplete to me. She does not take into account sources other than the technical legal-ones.³⁴ For this reason she treats the trial of Apuleius on merely one and a half page! But a closer look at the legal arguments in this lawsuit supplies valuable informations about the civic discourse in the period between the mainly historical sources from the first century CE and the technical-legal sources from the third century CE.

Evidence in the trial of Apuleius: clandestine rituals

Apuleius apparently had no difficulties in defending himself against most of the charges. On the contrary: He enjoyed defending *magia* in the same breath. Apuleius was the kind of philosopher Lucian had in mind. He deeply admired *magia* as 'an art acceptable to the immortal gods, full of knowledge of worship and prayer, full of piety and wisdom in things divine, full of honour and glory since the day when Zoroaster and Oromazes established it, high-priests of the powers of heaven' (apol. 26, 1). In his day such public defence of magic was still conceivable—a fact of some relevance to an analysis of the later legal discourse. Magical arts apparently were not yet considered punishable under the Cornelian law by the lawyers, unlike by Iulius Paulus later. The plaintiffs, however, thought otherwise. Some decennia later

³⁴ M.Th. Fögen, *Die Enteignung der Wahrsager. Studien zum kaiserlichen Wissensmonopol in der Spätantike*. Frankfurt 1993. Summary of her main thesis on pp. 160–162. Her argument regarding the non-legal sources is the following: 'Fehlenden Juristendiskurs durch einen Laiendiskurs zu ersetzen, der zwar Gesetze kennt, nicht aber von Recht handelt, scheint mir zu einer trügerischen Rechtsgeschichte zu führen' (p. 85). Ignoring ancient historians as witnesses for legal discourses appears to me equally deceptive.

in the third century CE their understanding of the *ars magica* as crime was an accepted part of the legal tradition.³⁵

Since a global charge of practising magic legally was insufficient, the plaintiffs had to present evidence for his alleged crime. They accused Apuleius of having studied some rare species of fish. The fishes called *veretilla* and *virginal* owed their names to their resemblance to male and female sexual organs. The plaintiffs regarded Apuleius' study as proof of magical activities. Apuleius had sought sea creatures for the purpose of using them as love-charms, they believed. The charge only shows their ignorance, Apuleius countered, fishes are of no value in the true science of *magia* (apol. 30f.). The tradition of the *ars magica* he quoted in defence of the charge! Whereas according to a more popular apprehension, the *magus* was already suspected of being a *maleficus*—a criminal guilty of magical crimes (*magica maleficia*) (apol. 1.61.68)—, the legal tradition did not yet allow convictions for practising the *ars magica*, as it still sided with a learned conception of magic. Apuleius was therefore acquitted. A second charge addressed the marriage. Apuleius must have bewitched Pudentilla. It is a pleasure to listen to him answering the charge of having charmed Pudentilla by writing love poems (*vorsus amatorii*). 'Does the mere fact of my being a poet makes me a magician?' (*an ideo magus, quia poeta?*) (apol. 9, 2).

Other charges in the trial bothered Apuleius more. In a couple of instances he was accused of having performed clandestine rites. Apuleius was charged, for example, with keeping a mysterious object in his house which he would worship with veneration. He explained to the Proconsul that he had been initiated into various Greek mysteries and had preserved certain objects of his initiation with the utmost care (55, 4). He was accused of possessing a figure fashioned of the rarest wood by some secret process for magical crimes (61, 1). It turned out to be a small figurine of Mercury (61, 2–4). During the lawsuit written evidence of a certain Crassus was presented: 'He (Apuleius) had performed certain nocturnal rites (*nocturna sacra*) at my house in company with my friend Appius Quintianus, who had taken lodgings there' (57, 2). Since it turned out that Crassus had been far away in Alexandria at that time, Apuleius could dispel the suspicion. Apuleius allegedly had taken a boy aside to a secret place with a

³⁵ R. Taubenschlag, 'maleficium'. In: *PW* XIV 1 Stuttgart 1928 pp. 870–875.

small altar and a lantern. Here he had bewitched him with an incantation so that he fell down (42, 2)

You have demanded fifteen slaves to support an accusation of magic; how many would you be demanding if it were a charge of violence (*vis*)? The inference is that fifteen slaves know something, and that something is still a mystery (*occultum*). Or is nothing mysterious and yet something connected with magic (*magicum*)? You must admit one of these two alternatives: either the proceeding to which I admitted so many witnesses had nothing improper about it (*inlicitum*), or, if it had, it would not have been witnessed by so many. Now this magic (*magia*), of which you accuse me, is, I am told, a crime in the eyes of the law, and was forbidden in remote antiquity by the Twelve Tables because in some incredible manner crops had been charmed away from one field to another. It is then as mysterious an art (*occulta*) as it is loathly (*tetra*) and horrible (*horribilis*); as a rule it needs night-watchers and concealing darkness, absolute solitude and murmured incantations, to hear which few free men are admitted, not to speak of slaves (Apuleius, apol. 47, 1–3).³⁶

Apuleius' refutation is indeed convincing, provided we start with the same assumption, that he did: magic that harms is always practised in secret and darkness. A philosopher like Apuleius cultivating a private religion apparently aroused suspicion, particularly in Roman eyes. It is not mere accident that his apology is a rich literary source for private religion. Not all private religious practices were regarded as illicit. But both Apuleius and his accusers knew that an allegation of magic had to be substantiated by proofs of clandestine rituals. Rituals in public were in the clear.

The equation of magical actions with concealed ones was at the core of the legal proceeding. To understand this argument we have to take into account two settings: a legal and a religious one. In Roman legal discourse secrecy served to distinguish illicit from licit rituals. In religious practice secrecy turned a religious action into a magical one.

³⁶ Apuleius, apol. 47, 1–3 (ed. R. Helm): *magiae accusans de XV servis denuntiasti: quid, si de vi accusares, quot tandem servos postulares? sciunt ergo aliquid XV servi et occultum est, an occultum non est et magicum est? alterum horum fatearis necesse est, aut inlicitum non fuisse, in quo tot consocios non timuerim, aut sic inlicitum fuit, scire tot consocios non debuisse.*

magia ista, quantum ego audio, res est legibus delegata, iam inde antiquitus XII tabulis propter incredulas frugum incebras interdicta, igitur et occulta non minus quam tetra et horribilis, plerumque noctibus vigilata et tenebris abstrusa et arbitris solitaria et carminibus murmurata, cui non modo servorum, verum etiam liberorum pauci adhibentur: et tu quindecim servos vis interfuisse?

A Roman legal tradition: clandestine rituals are illegal

To understand the legal assumption we have to take into account a long-lasting discourse revolving around the distinction between licit and illicit rituals. This discourse entered the interpretation of the Lex Cornelia. As mentioned above, this law had been subject to a reinterpretation which expanded its coverage. Not just the damage itself, but already the intention to damage became a punishable offence. The Digest of Justinian gleaned information from earlier centuries which is highly relevant for understanding the trial against Apuleius. Modestinus, a Roman lawyer (fl. 224–244), knew an authorised interpretation of the Lex Cornelia: 'By Senatus Consultum whoever performs or organises evil sacrifices is ordered to be condemned to the penalty of this statute'.³⁷ Unfortunately the SC itself is not extant. But the *Sententiae Pauli*, the anthology of writings of the lawyer Iulius Paulus (fl. 210 CE), compiled about 300 CE, contained a similar statute: 'Persons who celebrate, or cause to be celebrated impious or nocturnal rites, so as to enchant, bewitch, or bind anyone, shall be crucified, or thrown to wild beasts'.³⁸ This legal information may explain why Apuleius was accused of *nocturna sacra* (57, 2). The plaintiffs could have based their charge against Apuleius on this interpretation of the Lex Cornelia. Not only a damage caused by a spell, but already a secret ritual would have been sufficient evidence. A later legal source supports this understanding. 'Under the Lex Cornelia, guilty intention is presumed from the deed'.³⁹ Accordingly the plaintiffs of Apuleius tried to substantiate their accusation by adducing proofs of secret rituals which Apuleius had performed. It is particularly remarkable that Apuleius in his defence shared this assumption. Both sides knew: practising secret rituals was against the Roman Law. The judicial arguments centred on this issue; not on some kind of damage or injury or on a proscription of the *ars magica*.

The equation of 'illegal' with 'secret' can be called a genuine Roman tradition. It first appeared in a Roman statute on meetings. The XII Tables had laid down (VIII 26): 'No person shall have nocturnal

³⁷ Digest 48 <Ad Legem Corneliam de Sicariis et Veneficis> 8, 13: *Ex senatus consulto eius legis poena damnari iubetur, qui mala sacrificia fecerit habuerit.*

³⁸ *Qui sacra impia nocturnave, ut quem obcantarent, defegerent, obligarent, fecerint faciendave curaverint, aut cruci suffiguntur aut bestiis obiciuntur* (Sententiae 23 <Ad Legem Corneliam De Sicariis et Veneficis> 15).

³⁹ *In lege Cornelia dolus pro facto accipitur* (Digest 48, 8, 7).

meetings in the city'.⁴⁰ An archaic notion that night is a lawless time may have had some impact on the statute.⁴¹ During the repression of the Bacchanalia in 186 BCE this law was severely enforced and ever since Romans never forgot that secret meetings were illegal. Romans expected rituals to be performed in public. Secret rituals offended the divine order and were detestable.⁴² This principle already informed the policy that Roman officials applied towards astrologers and magicians in the first century CE. 'The seers (*manteis*) were forbidden to prophecy to any person alone', Augustus ordered by edict in 11 CE (Dio Cassius 56, 25, 5). In 19 CE Tiberius issued a similar edict: 'He forbade anyone to consult diviners secretly and without witnesses' (Sueton, Tiberius 63).⁴³ Divination was illegal except in the presence of an audience. It was this principle that impelled the rejection of secret rituals.

Centuries later the principle was still valid. The first Christian emperor, Constantine, argued likewise: 'We prohibit diviner (*haruspex*) and priests (*sacerdos*) . . . to approach a private home (*privata domus*). . . . We have provided punishment against them if they should disregard this statute (*lex*). But you who think that this art is advantageous to you, go to the public altars (*ara publica*) and shrines (*delubra*) and celebrate the rites of your custom (*consuetudo vestra*). We do not prohibit the ceremonies of a bygone perversion (*officia libera praeteritae usurpationis*) to be conducted openly (*luce tractari*)' (CTh 9, 16, 2; CE 319). Only if diviners performed their activities in public were they allowed to carry on their profession.

An ancient tradition: secrecy turns official religion into magic

Peter Schäfer has made an important point when saying that magical beliefs often cannot be distinguished from religious ones. The collection

⁴⁰ XII tab. *cautum esse cognoscimus, 'ne qui in urbe coetus nocturnos agitare'* (Latro decl. in Cat. 19).

⁴¹ See an illuminating collection of evidence regarding this idea by J. Carbonnier, 'Nocturne'. In: *Mélanges Henri Lévy-Bruhl, Droits de L'Antiquité et Sociologie Juridique*. Paris 1959 pp. 345–350.

⁴² R. Gordon, 'Religion in the Roman Empire: the Civic Compromise and its Limits'. In: M. Beard/J. North (eds.), *Pagan Priests. Religion and Power in the Ancient World*. Ithaca 1990 pp. 235–255; H.G. Kippenberg, *Die vorderasiatischen Erlösungsreligionen in ihrem Zusammenhang mit der antiken Stadtherrschaft*. Frankfurt 1991 pp. 396–398 (Pagans criticized Christians for concealing their belief).

⁴³ *Haruspices secreto ac sine testibus consuli vetuit* (Sueton, Tiberius 63).

of texts called 'Greek Magical Papyri' confirms his observation and permits to be more specific. It is one of the largest collections of ritual texts that has survived from late antiquity, J.Z. Smith wrote.⁴⁴ These rituals are embedded in the religious tradition and contained the usual elements. Yet regarding the sacrifices of animals a fundamental difference appears. They occur in a form rather exceptional in ancient Greek religion: the holocaust. In contrast to the usual sacrifice ending in a common meal of a group, this kind of sacrifice was not concluded by a communal public meal.⁴⁵ The gods addressed in magical rituals belonged to the established civic religion, but their characteristics were different from those of the official gods. They were portrayed not as aristocratic beings, as in the older Greek literature, but as capricious, demonic, and even dangerous, as in Greek folklore (H.-D. Betz).⁴⁶ Though most of the material of the 'Greek Magical Papyri' is derived from traditional religion, these deviations from common beliefs and practices reflect an opposition to the civic religion. In the words of F. Graf, who devoted a fine study to this subject: 'The main distinction of magic lies in the ritual, not so much in the forms of the ritual—they are shared between magic and religion—as in the function. The rituals of the magician put him in opposition to ordinary, "religious" ritual and isolate him from his fellow'.⁴⁷ The secret nature of magical rituals has left imprints on the reinterpretation of the official civic religion by the Greek Magical Papyri.

The departure of magic from official religion came about precisely because of the practice of secrecy, that turned an official religious ritual into a magical one. The case of prayer makes this particularly obvious. Prayers could become magical, when spoken silently. 'You uttered silent prayers to the gods in a temple, you are a *magus*', Apuleius was accused (Apol. 54, 5). For a definition of magic as put forward by J.G. Frazer, this is a truly astonishing sentence. According to his view human beings in prayer rely on the power of gods, while in magic they constrain and force the divinity by the their own

⁴⁴ 'Trading Places' op. cit. fn. 5 p. 21.

⁴⁵ F. Graf, 'Prayer in Magic and Religious Ritual'. In: Chr.A. Faraone/D. Obbink (eds.), *Magika Hiera. Ancient Greek Magic and Religion*. Oxford 1991 pp. 188–213 esp. p. 195.

⁴⁶ H.-D. Betz (ed.), 'Introduction to the Greek Magical Papyri'. In: *The Greek Magical Papyri in Translation, Including the Demotic Spells*. 2nd ed. Chicago 1992 p. XLV.

⁴⁷ F. Graf, o.c. p. 196.

power. Many ancient sources corroborate this view, as H. Versnel has shown.⁴⁸ If we study this evidence within the Roman legal discourse, we encounter a different context of this distinction than J.G. Frazer or H. Versnel assumed. Decisive for identifying the intentions of an individual was the situation of his religious action. If it occurred in public, it was licit. If it occurred in secret, it was illicit and magical. So we should not be astonished that the collection of the 'Greek Magical Papyri' contains genuine prayers next to spells. F. Graf has isolated typical ancient prayers in a couple of papyri. His examination of these prayers reveals that they did not differ in general structure, content, and context from ordinary ones, except for the *voces magiae*. Yet even these were not recited with the aim of forcing gods, but as credentials attesting to the competence of the magician.⁴⁹

Since ritual attacks took place in secret, to be rendered harmless they had to be brought to light. We can see this principle operating in a story reported by the ancient rhetor Libanius, who lived in Antioch at the beginning of the fifth century. One day he suffered from a headache and lost his much admired rhetoric. He then had a dream that seemed 'to portend spells, incantations, and the hostility of sorcerers'. Friends urged him to prosecute certain individuals who were rumoured to be responsible for this. But Libanius decided to offer up prayers rather than to have people arrested for machinations in the dark. However, he tells us in his autobiography, 'a chameleon turned up in the classroom from somewhere or other. It was an old specimen and had been dead for several months, and we saw the thing with its head tucked in between its hind legs, one of its front legs missing, and the other closing its mouth to silence it. Nevertheless, not even after such a revelation did I name anyone as responsible for its appearance, but it seemed to me that the guilty parties were overcome by panic and relaxed their pressure, so that I was able to move about again. Anyway, it was a stroke of good fortune that what had been buried deep should lie above ground, exposed for all to see' (Oration 1, 244–250). The disclosure of a ritual attack prevents it from doing harm. As for the suppression of magical writings by the state, a similar motivation was at work. Magical

books or written spells had to be kept secret.⁵⁰ In order to destroy their power their opponents tracked them down and burnt them in public.⁵¹

Differences between Greek and Roman legal discourses on magic

Hellenic laws dealt with magic in a similar way as the early Roman law had done. A woman of Lemnos named Theoris was condemned to death for *asebeia*, because she had used drugs and incantations (Dem 25, 79–80). Also condemned to death was a priestess named Ninos (Dem 19, 281). She too is said to have made potions. Both women were indicted for poisoning (*pharmaka*). Probably both were punished for the damage they had caused, rather than for using magical devices.⁵²

In Plato we can cast a glance at the legal discourse about poisoning in Athens. Although Plato's ideas are often remote from social reality of his time, his proposal to introduce 'a law about poisoning' (*nomos peri pharmakeias*) reflected and contributed to a Greek discourse on illegal religion.

Whosoever shall poison (*pharmakeuein*) any person so as to cause an injury not fatal either to the person himself or to his employees, or so as to cause an injury fatal or not fatal to his flocks or to his hives,—if the agent be a doctor (*iatros*), and if he be convicted of poisoning, he shall be punished by death; but if he be a lay person (*idiotes*), the court shall assess in his case what he shall suffer or pay. And if it be held that a man is acting like an injurer by the use of spells, incantations, or any such mode of poisoning, if he be a soothsayer (*mantis*) or diviner (*teratoskopos*), he shall be put to death, but if he be ignorant of the art (of soothsaying), he shall be dealt with in the same way as a layman convicted of poisoning (Leg. 933 d/e).

Plato's exposition reflects a concern similar to that of the Twelve Tables. It treats violating the rights of a citizen by spell, enchantment or incantation. The defendant can be convicted only for the damage he has caused. But this holds true only for private citizens.

⁴⁸ H.S. Versnel, 'Some Reflections on the Relationship Magic—Religion'. *NUMEN* 38 (1991) pp. 177–195.

⁴⁹ F. Graf op. cit. p. 192.

⁵⁰ H.D. Betz o.c. p. XLI; idem, 'Secrecy in the Greek Magical Papyri'. In: H.G. Kippenberg/G.G. Stroumsa (eds.), *Secrecy & Concealment. Studies in the History of Mediterranean and Near Eastern Religions*. Leiden 1995 pp. 153–175.

⁵¹ W. Speyer, 'Büchervernichtung'. In: *RAC* 13 (1970) pp. 123–152 esp. p. 141.

⁵² T. Hopfner, 'Mageia'. In: *PW* 14,1 Stuttgart 1928 pp. 301–393 on pp. 384–385.

The professional *goes* is a different case. Crucial is the proof of intention. If he caused damage intentionally, he had to suffer the most severe punishment: death. The practice in reality was different. Magicians, astrologers and philosophers were repeatedly banned from Rome, but only in one case from Athens.⁵³

Greek legal discourse differed from its Roman counterpart also in the issue of 'dangerous' private religion. In Hellenic and Hellenistic culture the idea prevailed that religious truth had to be kept hidden from the public.⁵⁴ The contrast to Roman legal culture is strong. While Roman law was expected to punish the performance of secret rituals, Greek law was expected to punish the divulgence of secret rituals. A man like Alcibiades, having publicised the secrets of the Eleusinian mysteries, found himself charged with *asebeia* in 432/1 BCE (Thuc 6, 27–29).⁵⁵ If Plutarch is correct—not all scholars think so—the law concerning *asebeia* was based on a decree issued within the 430s. 'Diopieithes brought in a bill providing for the public impeachment (*eisangelia*) of such as did not recognise the divine or who taught doctrines regarding the heavens' (Plut. Vit. Pericles 32).⁵⁶ Plutarch's rendering of *asebeia* fits the trial against Socrates some decennia later in 399 BCE.⁵⁷ Socrates was accused of not recognising the state gods, introducing new divinities and corrupting the youth. The decree of Diopieithes may have been an attempt by Athens to extend the scope of legal action from impious behaviour to atheistic speech and thought.⁵⁸ Since the official state mysteries commanded their adherents to keep *rituals* secret, a breach of that command could be punished as *asebeia*. To give an idea about the legal discourse on *asebeia*, Plato supplies some valuable information in his *Laws* (Leg 907d–909d). According to him the law against *asebeia* proscribed three kinds of offences against the gods: not believing in them; assuming, that they do not care about human beings; bribing them with gifts. Regarding

⁵³ F.H. Cramer dealt with their expulsion from Rome: *Astrology in Roman Law and Politics*. Philadelphia 1954 Part II. Chr. Habicht presented the Greek material: *Hellenistic Athens and her Philosophers*. 1988 David Magie Lecture. pp. 9–10.

⁵⁴ Cf. the articles by B. Gladigow, J.N. Bremmer, W. Burkert, L.H. Martin, R. Schlesier, R. Lamberton, H.D. Betz in: H.G. Kippenberg/G.G. Stroumsa op. cit.

⁵⁵ J.N. Bremmer, 'Religious Secrets and Secrecy in Classical Greece'. In: H.G. Kippenberg/G.G. Stroumsa o.c. pp. 61–78 esp. pp. 70–78.

⁵⁶ D. Cohen, 'The Prosecution of Impiety in Athenian Law'. In: *ZSRG.R* 105 (1988) pp. 695–701.

⁵⁷ W. Nestle, 'Asebieprozesse'. In: *RAC* Vol. 1 (1950) pp. 735–740.

⁵⁸ D.M. MacDowell, *The Law in Classical Athens*. London 1978, chapter XII 'Religion' esp. p. 200.

the punishment of these three offences, Plato introduced two kinds of culprits: those with bad intentions and those without. People without bad intention should be sent to prison, the others condemned to death. People initiating private mysteries and practising necromancy with the aim to force the gods are sent to prison for life. Plato introduced 'intention' as the crucial criterion for imposing the death penalty or the imprisonment.

Following the law against *asebeia* Plato proposed introducing a law against cults in private houses (Leg. 909d–910d). Allegedly these private cults offered impious men and women the opportunity to force the gods secretly into their service. It was certainly not by chance that the classical scholar J.G. Frazer defined magic along these lines and that recently H. Versnel, likewise a classical scholar, found support in Greek sources for distinguishing religion from magic accordingly. Greeks and Romans framed their discourses on the proofs of illegal religion differently. Whereas Greek philosophers looked for bad intention as sufficient evidence, Roman lawyers looked for secret rituals.

Roman—Christian continuities in defining illegal religion

Church historians tend to stress the discontinuity between Roman paganism and Christianity. With regard to *magic* however the continuity could hardly be greater. The edicts of the first Christian emperors subscribed to the old pagan Roman view.⁵⁹ Divining was legal, provided it occurred in public. An edict of Constantine laid down: 'That soothsayer (*haruspex*) who approaches the home of another, shall be burned alive, and the person who has summoned him by persuasion or rewards shall be exiled to an island, after the confiscation of his property. For those persons who wish to serve their own superstition (*superstitio*) will be able to perform their own ceremonies publicly (*publice ritum proprium exercere*)' (CTh 9, 16, 1; 319/320 CE; cf. 9, 16, 2 quoted already above: 'We do not prohibit the ceremonies of a bygone perversion to be conducted openly (*luce tractari*)').

It was a major advance in the study of ancient Christianity when F. Martroye in 1915 discovered the true meaning of an edict of Constantius: 'Superstition (*superstitio*) shall cease; the madness of sacrifices

⁵⁹ Still valuable: J. Gaudemet, 'La législation religieuse de Constantin'. In: *Revue de l'histoire de l'Église de France* 33 (1947) pp. 25–61.

(*sacrificiorum insania*) shall be abolished' (CTh 16, 10, 2; 341 CE). *Superstitio* here and elsewhere did not refer to pagan religion in general but to the practice of magic in particular.⁶⁰ The Christian emperors adopted the Roman legal tradition. But soon they did more and sanctioned the view of the common people, banning all *magi* as *malefici*: 'The Chaldeans and *magi* and others whom the common people call criminals (*malefici*) because of the magnitude of their crimes' (shall become silent) (CTh 9, 16, 4). A wave of lawsuits against people using magical devices swept over the empire in 356/7 CE.⁶¹ Ammianus Marcellinus narrated revealing details about the persecutions. 'If anyone consulted a soothsayer about the squeaking of a shrew-mouse, the meeting with a weasel on the way, or any like portent, or used some old wife's charm to relieve pain (a thing which even medical authority allows), he was indicted (from what source he could not guess), was haled into court, and suffered death as the penalty' (Ammianus Marcellinus 16, 8, 2). Practising magic had become a crime, independent of any damage it caused or not. Not even a private plaintiff was necessary. The state itself prosecuted it.

A striking example for continuity from Roman pagan religion to Christianity is the great theologian Augustine. In *De civitate Dei* (8, 19) he dealt with the *artes magicae*. He emphasised that the Romans, not the Christians, had started prosecuting them. Pagan public opinion (*lux publica*) was strongly against magical arts. 'Why are such practices so severely castigated by the law, if they are the work of deities who deserve worship? Or was it perhaps the Christians who introduced these laws under which the magic arts are punished? ... Does not Cicero record the fact that in the Twelve Tables, I mean in the most ancient laws of Rome, the practice was noted and a penalty prescribed for anyone who did so?' Augustine was so convinced by ancient Roman law that he transmitted some of the quotations of

⁶⁰ F. Martroye, 'La Répression de la Magie et le Culte des Gentils au IV^e siècle'. In: *Revue Historique de Droit Français et Étranger* IV. Ser. 9 (1930) pp. 669–701. D. Grodzynski carefully examined the ancient notion and confirmed Martroye's interpretation: "'Superstitio'", in: *Revue des Études Anciennes* 76 (1974) pp. 36–60. Implied in this notion was the reference to a private cult. Cf. Seneca: *religio deos colit, superstitio violat* (Seneca, de clementia 2, 5, 1).

⁶¹ Besides the article by Martroye, see also J. Maurice, 'Le terreur de la Magie au IV^e siècle'. In: *Revue Historique de Droit Français et Étranger* IV. Ser. 6 (1927) pp. 108–120. Recently M.Th. Fögen has dealt with Ammianus Marcellinus' report (op. cit. pp. 151–170).

the Twelve Tables, highly valuable for the modern reconstruction of the original law code.

Augustine reminded his readers of the trial against Apuleius. 'Was it before Christian judges that he was accused of practising magic arts?', he asked. He is indignant about Apuleius defending the *ars magica* in an elegant speech and at the same time denying responsibility for certain actions. 'He defends himself against the charge of practising the arts of magic and shows no desire to appear innocent except by denying actions which cannot be performed by an innocent man. But all the miracles performed by magicians, whom he rightly judges to be worthy of condemnation, are accomplished by the teachings and the actions of the demons. Let him find some reason to explain why he thinks that they should receive honour, why he maintains that they are necessary for conveying our prayers to the gods, when in fact we ought to shun their works, if we wish our prayers to reach the true God. Now, I ask, what kind of prayers of men does he suppose are carried to the good gods by demons—magical prayers or legitimate (*preces magicae an licitae*)?' (De civitate Dei 8, 19). In Augustine's eyes the plaintiffs of Apuleius had been right, Apuleius was guilty of magical practices.

Legal, historical and theological sources support the idea that the differences between Greek and Roman legal discourses on magic has had some impact on the history of Christian religions. When Christianity like other Near Eastern religions, travelled west, it had to cross legal systems that differed in evaluating secrecy. In Hellenistic cities Christian groups expressed their beliefs and rituals in Greek forms and conceptions. That the divine truth was hidden from the profane marketplace, was evident to those Christian groups, labelled 'Gnostics'. They adopted a Greek assumption and propagated a world view and ethics in agreement with that principle. The true Christian should hide his transcendent identity from the demonic ignorant ruler of this world instead of confessing his faith in public.⁶² When Christians came within the realm of Roman law, they established themselves as *collegia*. Since these associations were tolerated by state officials only if they obeyed the Roman laws, the issue of secrecy became an urgent one. Pagan adversaries of Christianity, Celsus et alii, depicted

⁶² H.G. Kippenberg op. cit. (cf. fn. 42) chapter IX: 'Die gnostische Ablehnung eines öffentlichen Bekenntnisses der Gläubigen' pp. 369–425.

Christians as forming secret illegal associations (Origenes, *Contra Celsum* 8, 17; Minucius Felix, *Octavius* 10, 2). Christian theologians—Justin Martyr, Irenaeus, Tertullian, Origenes—reacted to these accusations and defended Christian practices and doctrines in complete accordance with Roman laws. Not surprisingly they were among the first Christian theologians who fought gnosticism in the early Church. They attacked in times of persecutions gnostic Christians for concealing their identity instead of confessing publicly and accepting martyrdom. The price the Church Fathers had to pay for this kind of legal defence of Christianity was high: They banned gnostic Christians as heretics.⁶³ It was a logical step that the Christian emperors already in 326 CE prohibited all meetings of various Christian sects. The same policy was applied to the Manicheans who had already been prosecuted under the pagan emperor Diocletian. In an edict issued at Trier in 372 CE Valentinian ordered: 'Wherever an assembly (*conventus*) of Manicheans or such a throng (*turba*) is found, their teachers (*doctores*) shall be punished with a heavy penalty. Those who assemble shall also be segregated from the company of men as infamous and ignominious, and the houses and habitations in which the profane doctrine is taught shall undoubtedly be appropriated to the resources of the fisc' (CTh 16, 5, 3). Manicheans practised dissimulation as gnostic Christians had done in former periods. Religious communities practising secrecy were suspected of conspiring with the devil.

Conclusion

The notion of *magic* in Western tradition is a loaded term presenting certain religious activities as deviant/illegal/dangerous. A historical study of the legal discourse led us to the roots of this view. Long before Christianity arrived on the *forum romanum*, Roman officials had stressed the public status of religious practices and associations. Since the suppression of the Bacchanalia 186 BCE a concern for a public control of religious groups preoccupied Roman officials and entered the civil discourses about religions. A close study of this ancient discourse brings us to the roots of a common Western attitude towards *magic*.

In modern times only Émile Durkheim and Marcel Mauss fully realised that magic could be studied in terms of private religion. The world of magic, preserved in Greek, Jewish and Christian papyri, indeed can be regarded as a main source for private rituals, prayers, and other individual religious activities in antiquity. Private religion itself was not per se suspect. But in contrast to modern Western society the private domain was never seen as the genuine place for the practice of religions. This place was reserved to the official cult of the political community.

⁶³ H.G. Kippenberg op. cit. (cf. fn. 42) pp. 375–398.

STUDIES IN THE HISTORY OF RELIGIONS

(NUMENBOOK SERIES)

EDITED BY

H.G. KIPPENBERG · E.T. LAWSON

VOLUME LXXV



ENVISIONING MAGIC

A PRINCETON SEMINAR AND SYMPOSIUM

EDITED BY

PETER SCHÄFER

AND

HANS G. KIPPENBERG



BRILL
LEIDEN · NEW YORK · KÖLN
1997