

The Ulpianian *Libri ad edictum* on the Shelf of Legal Books in Lactantius' Library? The Evidence of *Ius fraternitatis*

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ABSTRACT

The aim of this research is to wonder about the possibility of Lactantius having read the *Libri ad edictum* of Ulpian. This question arises regarding the expression *ius fraternitatis*, which Lactantius uses to represent an idea of fraternity among all human beings that implies some obligations towards all men. However, this expression has a history: before Lactantius, it appears in two more texts as well. The first one is a fragment of Tertullian's *De cultu feminarum* and the second one, a fragment belonging to the commentary of Ulpian to the edict of the *praetor*, which has arrived to us via Justinian's *Digest* (D. 17. 2. 63 pr.). Whereas the expression in Tertullian's text seems to have been deprived from its most technical legal content, an analysis of the content of the expression in the Ulpianian fragment reveals that it is coherent and sheds light on Lactantius' thought. This consistency, together with some other reasons that are analysed in this article, make us think that Lactantius probably accessed and read the Ulpianian text.

I. Ulpian and Lactantius: a controversial relationship

That Lactantius knew the name and, at least, some of the works of Ulpian is something undeniable, since he himself states in *Inst.* V 11, 19:

Domitius, in his seventh book about the charge of the Proconsul, collected disastrous rescripts of the princes to teach with which penalties those who proclaimed themselves to be worshippers of God should be afflicted.¹

Despite this statement, in his work *The library of Lactantius*,² Robert Maxwell Ogilvie suggested that Lactantius would not have read Ulpian thoroughly and he would only quote his *De officio proconsulis* because their legal *status* was something all Christians should know in times of persecution. In his opinion, this fact did not imply the knowledge of the whole work at all. Concerned about the risk of assuming too promptly that any explicit mention of an author or

¹ Domitius, *de officio proconsulis libro septimo, rescripta principum nefaria collegit, ut doceret quibus poenis affici oporteret eos qui se cultores dei confiterentur*.

² Robert Maxwell Ogilvie, *The Library of Lactantius* (Oxford, 1978), 49.

work implies Lactantius' real knowledge of that work, Ogilvie might have rushed to too bold denials and to too hasty conclusions, in my opinion, at least as far as Ulpian is concerned. It is noticeable that he does not even include a chapter dedicated to Lactantius' possible legal bibliographical influences, leaving aside the possible existence of a shelf of legal books in his library. Despite Ogilvie neglecting legal sources, a closer examination looking for vestiges of Ulpianian works in Lactantius' ones renders some fruits: not only can we attest a general influence of Ulpianian legal thought (whose evidence requires, obviously, a long explanation and goes beyond the aim of this article), but we can also conjecture that Lactantius read some other works of Ulpian, in addition to the one he explicitly quotes. To try to demonstrate this, we are taking a legal expression appearing in Lactantius' work, the expression *ius fraternitatis*, as a precious laboratory sample to carry out some research on the topic. Apart from Lactantius, this expression is only attested twice: once in Tertullian's work and another time in the commentary *ad edictum* of Ulpian.

1. *On Lactantius' knowledge and use of Roman Law*

The question about whether or not Lactantius read the Ulpianian commentary *ad edictum* and took from it the expression *ius fraternitatis* cannot be addressed in an isolated way. It should fit into a broader framework: his general knowledge and use of Roman law, which is a question that obviously goes beyond the mere use of legal terminology. The presence of legal terms in the work of a philosopher and theologian like Lactantius should not lead us to take his knowledge of law for granted, since legal terms often become integrated into ordinary language. On the contrary, it is necessary to look for more significant types of evidence.

The analysis of legal terminology in Lactantius' works has long attracted scholars, but the topic has been controversial and a definitive answer has not been found yet, since very different opinions have been proposed.³ Probably, the most favourable opinion of Lactantius having a deep knowledge and understanding of Roman law is that of Francesco Amarelli, who states that Lactantius had a legal sensitiveness, refers to the breadth and strength of his legal knowledge and even talks about him having a mentality nourished by legal studies.⁴ This statements deepen the earlier held opinion of Contardo Ferrini, the first scholar who addressed the question,⁵ which were contested some decades later

³ For a general presentation of the use of patristic sources in the field of Roman Law, see Caroline Humfress, 'Patristic sources', in David Johnston (ed.), *The Cambridge companion to Roman law* (Cambridge, 2015), 97-118.

⁴ Francesco Amarelli, *Vetustas-Innovatio. Un'antitesi apparente nella legislazione di Costantino* (Napoli, 1978), 135-9.

⁵ Contardo Ferrini, 'Contributi allo studio critico delle fonti del diritto romano. Nota II. Le cognizione giuridiche de Lattanzio, Arnobio e Minucio Felice', *Memorie della Regia Accademica*

by Jean Gaudemet, who held a more sceptical and nuanced opinion.⁶ On the opposite side, we can find the very critical position of Remo Martini,⁷ who finds Amarelli's position reckless and extreme.

It is worth stopping for a while to examine Martini's arguments against Amarelli's. According to Martini, when Lactantius states he is following the jurists who composed *institutiones*, he himself reveals his own ignorance about their content, since he says jurists composed them to solve controversies, which is not true. Even more surprising, for Martini, is the legal figures who Lactantius quotes as part of the content of these *institutiones*, because they were archaic institutions such as the *manus conserere*, not even mentioned in Gaius' *Institutiones* (second century AD). As it can be seen, Martini's objections are well founded and need to be addressed seriously. To the first one, it can be said that we should not lose sight of Lactantius' purpose when writing his *Divinae institutiones*: he wants to give a clear and elegant explanation of the Christian doctrine mainly to pagans who are lost in false beliefs. These pagans are, for Lactantius, like students who need a textbook. This textbook should provide them with a clear, understandable, firm and secure knowledge. The controversies Lactantius is thinking about are those of the philosophers and the heathen's mythological explanations of the world, and not those of the jurists. But the aim of a textbook is, irrespective of the field of knowledge, to provide this type of first approach in a simple, non-controversial way. This is, in my opinion, how controversies and *institutiones* come together in Lactantius' mind. Martini's second objection is more difficult to address, since only a very detailed study of legal references in Lactantius' work can reveal a certain archaizing taste in his choice of legal figures which, however, is not arbitrary, because usually it has some apologetic usefulness.⁸ His choices might seem strange at first sight, but we have to consider the possibility of them being intentional and not the mere fruit of ignorance.

In my opinion, not to remain stuck at this point and to advance this debate, it would be useful to try to move forward from the mere pointing out of legal terminology and move to a demonstration of how these legal terms play a role in

di scienze, lettere, ed arti in Modena 2 (1894), 195-212; *id.*, 'Su le idee giuridiche contenute nei libri V e VI delle Istituzioni di Lattanzio', *Rivista Internazionale di scienze sociali e discipline ausiliare* 2 (1894), 581-6 (= *Opere di Contardo Ferrini. Vol. 2: Studi sulle Fonti del Diritto Romano. A cura di Emilio Albertario* [Milano, 1929]); *id.*, 'Die juristischen Kenntnisse des Arnobius und des Lactantius', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 15 (1894), 343-52.

⁶ Jean Gaudemet, 'Lactance et le droit romain', in *Atti dell'Accademia romanistica costantiniana* 2 (Perugia, 1976), 83-101; *id.*, *Le droit Romain dans la littérature occidentale chrétienne du III^e au V^e siècle*, *Ius Romanum Medii Aevi* I.3.b (Milano, 1978), 19-23 and 53-70.

⁷ Remo Martini, 'Sui prestesi modelli giuridici delle *Divinae Institutiones* di Lattanzio', in *Atti del III Seminario romanistigo gardesano* (Milano, 1988), 423-32.

⁸ See *infra* n. 10.

Lactantius' theological building.⁹ Only an analysis of the accuracy and functionality of legal terms in the whole of his thought will shed light on the extent and the depth of his knowledge of Roman law. Along this path, it will be necessary to be aware that this knowledge might admit a wide range of nuances. It might not be sound to defend his global knowledge of law, but rather to talk about his knowledge of one particular institution, a single jurist or one piece of work.

It is also mandatory to take into account that, as a philosopher and theologian, Lactantius' purpose is not to reliably transmit legal information, so we need to pay attention to the intention with which he uses legal terms and figures. It would not be right to assume (as sometimes Remo Martini does) that the lack of legal accuracy always reveals the lacking knowledge of Roman law, since it might be due to theological purposes. Lactantius, as some other Fathers of the Church or ecclesiastic writers do, uses indeed legal terms as a sort of metaphor to explain his religious view. This gives him a freedom and creativity in the use of legal terminology that is absent from the task of a jurist. We just cannot expect to find the legal accuracy of a jurist in Lactantius' work, but we also must be aware of the fact that when someone uses a term, extracted from whatever field of knowledge, as a metaphor to explain a different reality, this usually presupposes a true knowledge of the technical meaning of the term, at least to the extent of securing that the comparison makes sense and is useful for his purposes.¹⁰ Legal terminology is present in Lactantius' work as one more piece of the puzzle, but it is an important and very functional one, since it helps him create networks of meaning that structure his thinking and also constitute a link with Roman culture, in which law is configured as a key element of identity.¹¹

Despite us knowing very little about Lactantius' personal life,¹² except for his last years, we can conjecture by that little information that some circumstances of his life could have granted him some kind of familiarity with law. The environment in which Lactantius' life took place probably assured him a constant dealing with people close to the legal world, those he trained to

⁹ See, as an attempt to apply this perspective of study to the figure of *paterfamilias* in Lactantian thought, Carmen Palomo Pinel, *El paterfamilias en el pensamiento de Lactancio* (Madrid, 2017).

¹⁰ For example, Lactantius sometimes uses in his work an anachronistic view of the legal powers of the *paterfamilias*, whereas in some in other places he uses the postclassical notion for a theological purpose, he pursues. See C. Palomo, *El paterfamilias* (2017), 113-36.

¹¹ For the question of the so-called *Romideologie*, see Blandine Colot, *Lactance. Penser la conversion de Rome au temps de Constantin* (Firenze, 2016), 3-56; 'Lactantius and the philosophy of Cicero: *Romideologie* and Legitimation of Christianity', in Oliver Nicholson (ed.), *The Classical or Christian Lactantius = SP 80* (2017), 79-95 and also her contribution in this very volume. See also Stefan Freund, 'When Romans become Christians ... The Romanisation of Christian Doctrine in Lactantius' *Divine Institutes*', in Oliver Nicholson (ed.), *The Classical or Christian Lactantius = SP 80* (2017), 63-77; C. Palomo, *El paterfamilias* (2017), 351-86.

¹² See Oliver Nicholson, 'The Christian Sallust: Lactantius on God, Man and History', in Oliver Nicholson (ed.), *The Classical or Christian Lactantius = SP 80* (2017), 119-37.

serve in the imperial administration as a teacher and the public servants with whom he would share his day-to-day life in the Constantinian court.¹³ Even if, as his own words reveal, Lactantius was not a legal expert and he never stepped on the forum, he was surrounded by persons and means (perhaps libraries?) of acquiring his knowledge of law which went beyond that of an average person.

All these considerations lead us directly to the object of this research: the possibility of Lactantius having read the Ulpianian commentary *ad edictum*, based on the clue that the use of a very particular expression, *ius fraternitatis*, reveals.

II. *Ius fraternitatis*: Tertullian, Lactantius and the Roman contract of partnership

Ius fraternitatis is not an expression we can frequently find in the sources.¹⁴ However, it is present in Lactantius' work and it is important to understand its deep meaning for a better comprehension of his thought.

In *Inst.* V 22, 7-8,¹⁵ Lactantius uses it together with the expression *ius humanitatis*, to which it is closely linked:

However, he who is good and wise, since, as Laelius says, 'he considers all that as human goods and his as divine ones', neither desires anything that isn't his, not to harm anybody against human rights, nor craves power or glory, not to cause injury to anybody – for he knows, indeed, that we all, generated by the same God in the same condition, are linked by a law of fraternity –, but he is happy with the little he has, because he remembers his fragility, he does not look for more than is necessary to sustain life and, since he is pious, shares what he has with he who doesn't have it; because piety is the supreme virtue.

This paragraph synthesizes many of Lactantius' essential ideas: piety as the supreme virtue, which consists of the recognition and cult of the true God, and human fraternity as founded by Him. The importance of these ideas in the context of the whole of his philosophical and theological building has

¹³ Peter Garnsey, 'Lactantius and Augustine', in Alan K. Bowman, Hannah M. Cotton, Martin Goodman and Simon Price (eds), *Representations of Empire: Rome and the Mediterranean World* (Oxford, New York, 2002), 153-79, 156.

¹⁴ Apart from the texts discussed here (Tertullian and Ulpian), only Maximus of Turin will use it, only once, after Lactantius (*Collecto sermonum antoqua, sermo* 17, 4).

¹⁵ *Iustus uero ac sapiens quia illa omnia humana, ut est a Laelio dictum, sua bona diuina iudicat, nec alienum quicquam concupiscit, ne quem contra ius humanitatis laedat omnino, nec ullam potentiam honoremue desiderat, ne cui faciat iniuriam – scit enim cunctos ab eodem deo et eadem condicione generatos iure fraternitatis esse coniunctos –, sed et suo contentus et paruo, quia fragilitatis suae memor, non amplius quaerit quam unde uitam sustentet, et ex eo ipso quod habuerit inperit etiam non habenti, quia pius est; pietas autem summa uirtus est.*

been explained in a very accurate and, I dare say, definitive way by Blandine Colot.¹⁶

Nevertheless, together with its more than likely Ciceronian influence, it is important to notice that the text has an undeniable legal flavour that we can appreciate both in its terminology and in its general sense. It namely reminds of the famous *tria iuris praecepta* which the jurist Ulpian enounced in the text extracted from the second book of his *regulae* and collected in *D. 1. 1. 10. 1: Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere*. Lactantius also insists that the just and wise man is the one who does not harm anybody at all (*ne ... laedat omnino*) and does not desire anything that is not his (*nec alienum quicquam concupiscit*). In consequence, he gives to each one what is his or, we would rather say in this case, he respects what is each one's.

Moreover, the expression *ne cui faciat iniuriam* is clearly a legal one. Although it is also possible to use it in a non-technical sense, I tend to think that, according to the legal connotations of the text on its whole, probably in this case Lactantius also has a legal figure in his mind: the *iniuria*, a private delict under which the Romans gathered different behaviours not fitting into other legal figures.

This legal intensity of the text predisposes us hermeneutically to recognize the weight of law as a metaphor in the configuration of its meaning. However, the most technical expression from a legal point of view we find along the whole paragraph is, undoubtedly, *ius fraternitatis*. This expression belongs to Lactantius more than to anybody else, since, as this work intends to show, in his work it is operative and useful, and not a mere incidental attachment in the whole of his thought.

1. *Ius fraternitatis* in *Tertullian's De cultu feminarum II 1, 1*

The expression appears, prior to our author, once in Tertullian's work, namely in the text *De cultu feminarum II 1, 1*:¹⁷

Slaves of the living God, my fellow-servants and sisters, the right which I enjoy with you (I, the meanest in that right of fellow-servantship and brotherhood) encourages me to address to you a discourse, not, of course, of affectation, but paving the way for affectation in the cause of your salvation.

Tertullian uses the expression to refer to a fraternal relationship with the women he is talking to, with which he also shares the condition of being a slave (*conseruitii*). Despite having, obviously, a legal meaning (as 'having the right

¹⁶ B. Colot, *Lactance* (2016), 103-68.

¹⁷ *Ancillae Dei uiui, conseruae et sorores meae, quo iure deutor uobiscum, postremissimus omnium quidem, eo iure conseruitii et fraternitatis audeo ad uos uerba ista facere, non utique affectationi sed affectationi procurans in causa uestrae salutis.*

to say something to you'), it is very improbable that the sense in which he employs *ius fraternitatis* is a technical one. It could be equated instead to a sort of familiarity or confidence between relatives, which allows them to be honest and blunt in talking to each other. It is, according to Tertullian, the same kind of frankness existing among co-slaves. But there is not such a thing as a right of co-slavery in Roman Law, because relationships between slaves, such as in the case of *contubernium*, the stable union between slaves, always remain non-recognised by law because they belong to an infra-legal level.¹⁸ Therefore, we can state that in this case, the expression is not used in a technical sense, as it is known as *ius fraternitatis* in Roman Law. Instead it is a good example of how legal language can appear in a different field by the particular use of an author,¹⁹ still keeping some legal connotations but undressed of its most precise and technical content. Moreover, Tertullian's legal education determines an abundance and a taste for legal terms in his works,²⁰ which are often used for theological purposes. Nevertheless (or, better said, namely because of this), it is necessary to be cautious in assessing the expression, since not always does the use of a legal term include a purely technical legal meaning.

¹⁸ For example, C. 9. 9. 23, which quotes an imperial constitution of Diocletian and Maximian, states that a slave cannot be accused of adultery for having violated the *contubernium* (*Servi ob violatum contubernium adulterii accusare non possunt*). Ulpian (5,5) is very explicit: *cum seruis nullum est conubium*. Also in the *Sententiae Pauli* we can read (2.19.6): *Inter seruos et liberos matrimonium contrahi non potest*.

¹⁹ See some examples in poetry in Consuelo Carrasco, 'Una compraventa poética, Horacio, Epístola 2.2', *Revue d'Histoire du Droit* 85 (2017), 79-114; 'Vicios y virtudes de la amistad. Metáforas jurídicas en Horacio (epíst. 2.2/ sat. 1.3)', *Revue historique de Droit Français et Étranger* 2 (2017), 161-88.

²⁰ It is not easy to tell to which extent this education was, in fact, that of a jurist, or simply the legal background every member of elite should have. It has been long discussed too if Tertullian the theologian could be the same person as Tertullian the jurist. The opinion in favour of this identification lies in the facts of Tertullian's name being infrequent, them both living around the same time and in Eusebius of Caesarea referring to Tertullian as an expert in law. However, these arguments have found criticisms, that in inscriptions there is evidence of other people bearing of the same name, that it was not necessary to be technically a jurist to have a remarkable knowledge of law, and by claiming uncertainty on the handled dates or doubting Eusebius' qualification to make such claims. Cf. Johannes Quasten, *Patrology*, vol. 2: *The Ante-Nicene Literature after Irenaeus* (Utrecht, 1950, repr. 1995); see *contra*, Timothy D. Barnes, *Tertullian: A Historical and Literary Study* (Oxford, 1971). A more balanced approach in David Ivan Rankin, 'Was Tertullian a jurist?', *SP* 31 (1997), 335-42, who opts for Tertullian's upbringing as a rhetorician and forensic speaker rather than a jurist (which, in my opinion, does not imply an ignorance of law, but rather the opposite). On Tertullian's legal knowledge and use of legal terms for theological purposes, see also Remo Martini, 'Tertulliano giurista e Tertulliano padre della chiesa', *SDHI* 41 (1975), 79-124 (very sceptical on the idea of Tertullian being a jurist); Jill Harries, 'Tertullianus and son?', in Z. Rogers, M. Daly-Denton and A.F. McKinley (eds), *A Wandering Galilean: Essays in Honor of Séan Freyne*, Supplements to the Journal for the Study of Judaism 132 (Leiden, 2009), 385-99.

2. *Ius fraternitatis in D. 17. 2. 63 pr.*

Apart from this fleeting appearance in Tertullian's work, it is possible to find the expression *ius fraternitatis* only in an important Roman law text referred to as the contract of partnership. It is worth stopping here to explain its meaning to understand the extent and the sense of Lactantius' use of *ius fraternitatis*. It is the aforementioned text of Ulpian. It belongs to the 31st book of his commentary to the edict of the praetor, collected in the excerpt of *D. 17. 2. 63 pr.*²¹

Sabinus' opinion is correct: that if the partners are not general partners, but only partners for one sole purpose, they must however be judged to the extent of their resources or to what they did in bad faith to pay less. This is absolutely reasonable, since partnership somehow contains in itself a law of fraternity.

The second title of the seventeenth book of the *Digest* is devoted to the contract of partnership and the legal problems that can arise in its context. The text in which the expression *ius fraternitatis* appears refers to a very precise problem: the amount a partner was condemned to pay when another partner sued him because of some controversy or any other problem born inside the partnership. Two different jurists appear in the text. Ulpian (*ca.* 170-228 AD), its author, starts by quoting the opinion of Sabinus, a jurist of the first century AD who worked in the time of Tiberius, and approving it. Sabinus was in favour, both in the case of a partnership of all goods and in the case if a *societas unius rei*, of the debtors being condemned *in id quod facere possunt*. This means 'with the limit of what is possible for the debtor to pay'.

In the case the debtor had done himself something to have a lower capacity of payment (for example, by willingly decreasing his patrimony), the condemnation will also include this amount, provided he had done it with *dolus malus*, that is, with the purpose of getting a lower condemn. Once Ulpian has shown Sabinus' opinion, he adds the explanation of its reason: *societas ius quodammodo fraternitatis in se habeat*. Roman law scholars have discussed the question whether this sentence was genuinely Ulpian's or, on the contrary, if it was an interpolation introduced in the sixth century by the Justinianic compilers.²²

Regarding this point and without going deep into the question of interpolations, it seems clear that in the first sentence of the fragment Ulpian is clearly referring to a previous dispute among jurists, in which he places himself in favour of Sabinus. This implies that, in this first sentence, he is just giving

²¹ *Verum est quod Sabino videtur, etiamsi non universorum bonorum socii sunt, sed unius rei, attamen in id quod facere possunt quodve dolo malo fecerint quo minus possint, condemnari oportere. Hoc enim summam rationem habet, cum societas ius quodammodo fraternitatis in se habeat.*

²² Antonio Guarino, *La condanna nei limiti dello possibile* (Napoli, 1975), 29. Guarino has stated that there is no aspect in the text, neither formal nor material, which demands the consideration of the expression having been interpolated by the Justinianic compilers, an opinion with which I totally agree.

historical information. The second sentence (*Hoc enim summam rationem habet, cum societas ius quodammodo fraternitatis in se habeat*) seems to be Ulpian's clarification and explanation of the *ratio* that lies behind Sabinus' opinion. Therefore, it is Ulpian's personal contribution to the question. If we stated that Justinianic compilers interpolated it, we would simply leave this Ulpianian text void of any Ulpianian content, which does not seem to make much sense. Moreover, I believe that the fact that Lactantius quotes this very expression with a meaning that is very coherent with that of Ulpian, can lead us to accept that he knew and took the expression from Ulpian's work. This undoubtedly provides one more argument in favour of the denial of the text having been interpolated.

The Ulpianian sentence still has quite a few enigmatic aspects inside. Ulpian writes it as a clarification of the *ratio* of Sabinus' opinion. He seems to presuppose a knowledge in his reader about the implications of this *ius fraternitatis*, although, due to the amputations that the texts of the classic jurists suffered when they were collected in the *Digest*, we do not know whether or not Ulpian continued his text with a deeper explanation of the content of that *ius fraternitatis*. However, the mention of the *condemnatio in id quod facere potest* can shed some light about it.²³ We know that it was a special type of *taxatio* that invited the judge to fix his judgement inside the limits of the true possibilities of fulfilment the condemned debtor had. By doing so, the debtor would be able to pay his condemnation and he would avoid the execution of the judgement through a procedure of insolvency that would imply the seizure and auctioning of his property (*bonorum venditio*). As in this case, he would incur a situation of *infamia*, which means that he would suffer from civil, political and legal limitations, what would constitute a social *stigma*.

When we know this, we can better understand why Ulpian talks of the *ius fraternitatis* in this situation. It is not proper for one brother to desire and look for a situation of infamy for another brother, even if he has had to use against him the *actio pro socio*. A relationship of brotherhood implies certain limits,

²³ Together with other cases, it was applied both to the insolvent who had suffered a *bonorum venditio* (*D.42.1.51* and *C.7.75.6*) and to the insolvent that has made a *cessio bonorum* (*D.42.3.4* pr. and *C.7.71.4* pr.), which are the assumptions related to our text. About this limit of condemnation see, among others, Antonio Guarino, 'Nihil facere posse', in *Scritti in onore di Contardo Ferrini pubblicati in occasione della sua Beatificazione* (Milano, 1947), I 299-304; *id.*, 'Studi sulla "taxatio in id quod facere potest"', *SDHI* 7 (1941), 5-34; *id.*, *Sul 'beneficium competentiae' dei milites* (Milano, 1939); *id.*, 'Il beneficium competentiae del "Promissor dotis". Contributo storico-dogmatico alla teoria del cosiddetto "beneficium competentiae"', *RISG* 14 (1939), 153-206; *id.*, 'Sul "beneficium competentiae" dell'extraneus promissor dotis', in *Festschrift für Paul Koschaker* (Weimar, 1939), II 49-79; Sirio Solazzi, 'Sull'exceptio in diminuzione della condanna', in *Scritti di diritto romano III* (Napoli, 1960), 268-90; Matteo Marrone, 'Note di diritto romano sul c.d. "beneficium competentiae"', *AUPA* 36 (1976), 5-47; Juan Carlos Prado Rodríguez, 'Aspectos procesales de la *condemnatio in id quod debitor facere potest* en favor del insolvente', *Revue Internationale des Droits de l'Antiquité* 57 (2010), 359-95.

duties and obligations of legal nature that in this case bear parallels with the relationship between partners, which is based on good faith, and are applied to the contract of society because of their similarities. We can appreciate that the *ius fraternitatis* means, in the Ulpianian text, avoiding to cause any harm, namely, to create a situation of *infamia* following a procedure for insolvency against a partner.

3. *A meaning consistent with Lactantius' thought?*

After this approach to the meaning of *ius fraternitatis* in its occurrence in the Ulpianian text, it is necessary to wonder whether this legal meaning meets somehow the Lactantian use of the term. A positive answer is mandatory to sustain the affirmation that Lactantius probably red Ulpian. It has to be said that the meaning of *ius fraternitatis* is, in this sense, fully coherent with the sense of the Lactantian text, which explains that a fair and wise man is the one who does not cause any harm to another.

The dimension of not asking for more than what it is possible to give which is the meaning of *ius fraternitatis* according to Ulpian's text, is somehow present in the Lactantian work as well. When Lactantius explains the need for performing pious acts, namely because of *humanitas*, and faces the reluctance of somebody who will be afraid of losing all his property, he states (*Inst.* VI 12, 38²⁴): 'If you alone are not enough to do great works, do your best to practice justice (...)'. Therefore, the limit of what is possible is also accepted by Lactantius as a minor evil, which is also shown in his advice to the rich man of perhaps not spending more, but spending the same amount he used to, but in a better way: charities rather than amusements (*Inst.* VI 12, 39²⁵):

And do not think that you are now persuaded to diminish or exhaust your heritage, but to give a better use to what you were ready to spend in frivolities. Today you buy beasts: redeem prisoners instead; you feed savage beasts: better feed the poor; you buy men to be gladiators: better bury the dead.

III. *Fraternitas* and the partnership contract: a long history in Roman legal memory

This is all we can extract from Roman law for an understanding of the expression *ius fraternitatis* because, unfortunately, there are no more occurrences in

²⁴ *Si solus magnis operibus non sufficis, pro uirili parte operare iustitiam, sic tamen ut quantum diuitiis inter ceteros, tantum opere praecellas.*

²⁵ *Neque nunc suaderi tibi putes ut rem familiarem tuam minuas uel exaurias, sed quae in superuacua fueras inpensurus, ad meliora conuertas: unde bestias emis, hinc captos redime, unde feras pascis, hinc pauperes ale, unde homines ad gladium comparas, hinc innocentes mortuos sepeli.*

the texts that have come down to us. Nevertheless, there is a text prior to Ulpian's that deals with a legal problem related to the one here discussed. It is one of the *declamationes minores* of Pseudo-Quintilian, namely, the 320th. It is necessary to point out that, obviously, it is not strictly a legal source, but Roman law scholars have long studied the *declamationes* as quite a reliable source of knowledge for some aspects of Roman Law.²⁶ In the *declamatio* 320 the expression *ius fraternitatis* is not used *verbatim*, but in its text we can find the concept of *fraternitas* linked to the contract of partnership to explain that, in this contract, earnings and losses must be shared.

In paragraph 4 we can read:

[§ 4] '*Sociorum communia damna et lucra sint.*' *Sacra res est et quaedam fraternitas propositorum, animorum * * **. (...)

'May losses and earnings of the partners be shared'. It is something sacred, and a certain brotherhood of purposes, of intentions.

Therefore, fraternity seems to be linked to the contract of partnership in the Roman legal universe also in the sense that partners suffer the same fate and that they share both earnings and losses. It is true that, in the declamation, *fraternitas* seems to be used rather as a sort of metaphor, whereas in Ulpian's text it implies a true legal obligation, it is a true right, a true *ius fraternitatis*.

Coming back to Lactantius, how does the knowledge of the Ulpianian text and of the declamation contribute to our comprehension of his thought? We can understand that Roman law established an analogy between the contractual relation linking partners and the relation linking brethren. This relation is concretized in two aspects from a legal point of view: first, not to cause any harm to the other partner, or to try to avoid it as much as possible, not asking for more than what he can pay (as we have seen, to avoid a situation of *infamia*). Second, to share their fate, that is, both earnings and losses depending on the fortune of the partnership.

The roots of this comparison might be very ancient; most of Roman law scholars accept that the oldest form of partnership was the *consortium ercto*

²⁶ An accurate summary of the question in Ana María Rodríguez González, 'Las declamaciones quintilianas y la experiencia jurídica romana', *Seminarios Complutenses de Derecho Romano* 28 (2015), 941-57. See also, as key work to understand this approach, Dario Mantovani, 'I giuristi, il retore e le api. Ius controversum e natura nella Declamatio maior XIII', in Dario Mantovani and Aldo Schiavone (eds), *Testi e problemi del giusnaturalismo romano* (Pavia, 2007), 323-85; *id.*, 'Declamare le dodici Tavole: una parafrasi di XII Tab. V,3 nella declamatio minor 264', *Fundamina* 20 (2014), 597-605. See also Ana María Rodríguez, 'Duo testamenta (Ps. Quint. decl. min. 308). El derecho en la escuela', *Athenaeum* 101 (2013), 569-603; Marta Bettinazzi, 'La lex Roscia e la declamazione 302 ascritta a Quintiliano. Sull'uso delle declamazioni come documento dell'esperienza giuridica romana', in Jean-Louis Ferrary (ed.), *Leges Publicae. La legge nell'esperienza giuridica romana* (Pavia, 2012), 515-44; *La legge nelle declamazioni quintilianee, Una nuova prospettiva pos lo Studio della lex Voconia, della lex Iunia Norbana e della lex Iulia de adulteriis* (Saarbrücken, 2014).

non cito, a very ancient institution of the *ius civile*.²⁷ It was the consortium of brethren that was constituted after the death of the *paterfamilias* and to which the jurist Gaius²⁸ refers to as a natural society (*societas naturalis*). In it, until the decenviral legislation, the patrimony was inherited in an indivisible manner. This explains the name of *consortium* because, by doing so, the brethren/partners could do nothing but share their fate.

The later development of partnership still kept in its configuration some features of the *fraternitas*, like the *affectio societatis* or its being a contract *intuitu personae*, in which the identity of the partners was extremely important.

When Lactantius states that all men are linked *iure fraternitatis*, this has a very precise legal meaning. What he does is to extend this obligations of the contract of *societas* to the *societas* of all men, to which he refers to as a *divini iuris societas* (it is interesting to point out that the pair *divini iuris/humani iuris* is widely used in Roman law to determine the legal nature of goods).

This extension of the *ius fraternitatis* that rules the contract of partnership to the whole human society allows Lactantius to use *ius fraternitatis* and *ius humanitatis* as synonyms. As Blandine Colot has shown in her work, the term *humanitas*, which had a long history in pagan Rome, is a term Lactantius uses as a synonym for others as *misericordia*, *pietas* or, to a lesser extent, *caritas*. However, it is important to point out that here Lactantius does not use barely *humanitas*, but *ius humanitatis* as a synonym for *ius fraternitatis*. The addition of *ius*, undoubtedly, gives both terms the nuance of a greater enforceability. They are conceived as true legally binding obligations. The content of these obligations are all those actions that can be considered as deeds of piety or justice. They are not conceived as actions whose accomplishment depend on man having a feeling of compassion for his equals, but as actions owed to God because of *pietas* and to the rest of humankind for *humanitas*. Undoubtedly, the addition

²⁷ Bernardo Albanese, *La successione ereditaria in diritto romano antico*, Annali del Seminario giuridico dell'Università di Palermo 20 (Palermo, 1949); Mario Bretone, 'Consortium e comunio', *Labeo* 6 (1960), 163-215; Jean Gaudemet, *Les communautés familiales* (Paris, 1963); Vincenzo Arangio-Ruiz, *La società in diritto romano* (Napoli, 1950); Sirio Solazzi, 'Tutoria auctoritas e consortium', *SDHI* 12 (1946), 7-44; Mario Talamanca, 'Società (Diritto romano)', in *Enciclopedia del diritto* XLII (Milano, 1990), 814-960; Wolfgang Kunkel, 'Ein unbeachtetes Zeugnis über das römische Consortium (Plin. Epist. 8, 18)', *Annales de la Faculté de Droit d'Istanbul* 4 (1954), 56-78; Armando Torrent, 'Consortium ercto non cito', *AHDE* 34 (1964), 479-502; Laura Gutiérrez-Masson, *Del consortium a la societas* I. Consortium ercto non cito (Madrid, 1987); María Salazar Revuelta, *Evolución histórico-jurídica del condominio en el derecho romano* (Jaén, 2003); Giuseppina Aricò Anselmo, "'Societas inseparabilis" o dell'indissolubilità dell'antico consorzio fraterno', in *Iuris Vincula. Studi in onore di Mario Talamanca* (Napoli, 2001), I 149-91.

²⁸ Gai 3.154a: *Est autem aliud genus societatis proprium civium romanorum. Olim enim mortuo patre familias inter suos heredes quaedam erat legitima simul et naturalis societas quae appellabatur ercto non cito, id est dominio non diviso: erctum enim dominium est, unde erus dominus dicitur: ciere autem dividere est: unde caedere et secare [et dividere] dicimus.*

of *ius* implies that the matter is not conceived only as belonging to the social or religious realm, but as a true legal obligation.

The foundation for the existence of that *ius fraternitatis* is that we have been united by God and generated by Him in the same condition (*cunctos ab eodem deo et eadem condicione generatos*). It is filiation with God that founds the law of fraternity. It is important to notice that, to refer to kinship with God, Lactantius uses the term *cognatio*. This means he refers to the family founded on blood links. He does not use the term *agnatio*, referred to the family founded on the legal link of being subjected to the same *patria potestas*.²⁹ The *fraternitas* Lactantius refers to is, as Blandine Colot has shown, that founded in the 'anthropological fact of birth'.³⁰ This is how Lactantius expresses it in *Epit.* 60, 3: *Si enim ficti ab uno deo et orti ab uno homine consanguinitatis iure sociamur, omnem igitur hominem diligere debemus*. We must remark that, once again, we find a reference to *societas* (*sociamur*).

Also in *Epit.* 54. 6 Lactantius uses the word *societas* to designate the unity of humankind:³¹

The origin of this evil, by which the mutual society of men, by which the link of kinship has been dissolved, arises from ignorance of the true God (...).

This idea of the *cognatio* of humankind can also be found in some texts of Roman law. In *D.* 1.1.1.3, the jurist Florentinus, talking about self-defence, states: (...) *cum inter nos cognationem quondam natura constituit, consequens est hominem homini insidiare nefas est*. Florentinus was a jurist that probably lived in the Severian age, and all the jurists of that time, Ulpian included, show in their works a concern of writing for a new generation of jurists who live in a new reality, that is, an orb populated with Roman citizens after the *Constitutio antoniniana*. This constitution goes beyond pursuing taxation purposes,³² since it also has the religious motivation of integrating all inhabitants of the Empire in one cult to Gods. Consequently, the idea of human kinship is widespread at

²⁹ *Inst.* V, 17, 34: *Sapientia est enim intellegentia vel ad bonum rectumque faciendum vel ad abstinendam ditorum factorumque improborum. Lucro autem nunquam sapiens studet, quia bona haec terrena contemnit, nec quemquam falli patitur, quia boni viri officium est errores hominum corrigere eosque in viam reducere, siquidem socialis est hominis ac benefica natura, quo solo cognationem cum deo habet.*

De ira, 7, 4: *Nondum uenio ad uirtutes animi et ingenii quibus homini cum deo manifesta cognatio est: nonne ipsius corporis status et oris figura declarat non esse nos cum mutis pecudibus aequales?*

³⁰ B. Colot. 'Lactantius and the Philosophy of Cicero' (2017), 94.

³¹ *Sed origo huius mali, quo societas inter se hominum, quo necessitudinis uinculum dissolutum est, ab ignoracione ueri dei nascuntur (...)*. See Ubaldo Pizzani, 'Precetto evangelico dell'amore e divini iuris societas in un passo del *De ira Dei* di Lattanzio', *Augustinianum* 17 (1977), 145-51.

³² Serena Querzoli, *Il sapere di Fiorentino. Etica, natura e logica nelle Institutiones* (Napoli, 1996), 162-3.

this time. It has to do with the *oikeiōsis*, the familiar relationship of all human beings. Understanding this legal climate helps us to know why Lactantius, some years later, probably found inspiration in the text of Ulpian.

The expression *ius humanitatis*, that in the text comes together with *ius fraternitatis*, can also be found in more Lactantian texts.³³ Namely, in *Inst.* VI 10, 8 he states: *ergo pro beluis inmanibus sunt habendi qui homini nocent, qui contra ius humanitatis et fas omne spoliant cruciant occidunt exterminant*. Here, he talks about ‘monstrous beasts’ to name those who harm human beings, against all human right and divine law. The distinction *ius/fas* was used since the rise of Roman law to distinguish between human and divine law. However, the use of the term by Lactantius goes beyond this meaning, because he does not refer to *ius* in its ordinary sense within Roman law, as that who has its source of production in the human institutions. The genitive *humanitatis* is not a superfluous addition, since it indicates that there is a treatment that is due to man because of the bare reason of being a man. It is indeed possible to read the expression in the text in two possible ways, because whoever injures anybody harms that *ius humanitatis* which protects the one who has been injured; but it is also true that he harms his own humanity as well; he behaves as something different than a man, and that is why Lactantius calls him a ‘monstrous beast’. In the Lactantian *ius humanitatis* we find together the two possible conceptions of law: the objective law (in this case, in the form of a natural law founded on human nature), and the subjective law, as a right for everybody to be respected because of his human nature.

In this sense, the translation of *ius humanitatis* as *droits humaines* by Christiane Ingremeau seems proper to me, in spite of the obvious anachronism of talking about ‘human rights’ in this time. It is true that outstanding Roman law scholars like Mario Talamanca and Jean Gaudemet (the former, with great energy; the latter, more nuanced on the topic) have warned about this danger of applying the modern theory of human rights to the Roman experience,³⁴ but it is possible to recognize, if not a seed, at least an inspirational idea for this future theory in these Lactantian texts. Anyway, although this advice is to be

³³ The expression *ius humanitatis* can be found two times both in Apuleius (*Apologia* 86 and *Metamorphoses* III 8) and in Cicero (*Pro rege Deiotaro oratio* 30 and *Pro L. Valerio Flacco oratio* 24) on the pagan side, and in Arnobius (*Adversus nationes* 7, 4) on the Christian side. Later on, Augustine will use it only once (*sermo* 164A, 66).

³⁴ Mario Talamanca, ‘L’antichità e i diritti dell’uomo’, in *Convegno in occasione del cinquantenario della Convenzione del Consiglio d’Europa per la protezione dei diritti umani e delle libertà fondamentali. In onore de Paolo Barile. Roma 16-17 novembre 2000* (Roma, 2001), 48-51; Jean Gaudemet, ‘Des droits de l’homme, ont-ils été reconues dans l’Empire Romain?’, *Labeo* 33 (1987), 7-23. See also Gianfranco Purpura, ‘Brevi riflessioni sull’*humanitas*’, *AUPA* 53 (2009), 287-98; Jacob Giltaij and Kaius Tuori, ‘Human rights in Antiquity? Revisiting anachronism and Roman law’, in Pamela Slotte and Miia Halme-Tuomisaari (eds), *Revisiting the Origins of Human Rights* (Cambridge, 2015), 39-63. On the contrary (and very criticised), Tony Honoré, *Ulpian, Champion of Human Rights*, 2nd ed. (Oxford, 2002).

considered right regarding the historical experience of Roman law, especially in the warning of not confusing *humanitas* with a precedent of *human* rights, we should not forget that we are not talking about a Roman jurist, but about a Christian philosopher and writer. In this sense, Lactantius does not feel so constricted by the stretching frame for argumentation which a Roman jurist had, who was limited by law, and it is easy to understand why such ideas of human dignity found a breeding ground in the work of a Christian author like Lactantius rather than in the work of Roman jurists.³⁵

In any case, the matter poses a problem of translation. For example, the translator into Spanish, Sánchez Salor, translates it as 'contra todo derecho humano y divino', 'against all human and divine law', but the problem is evident, because he simply seems to refer to the traditional *ius/fas* binomial, and loses all the previously explained nuances.

The expression *ius humanitatis* also appears in the text of *De mortibus persecutorum* 23, 8³⁶ when Lactantius narrates the atrocities which the policy of taxation of Galerius caused. He says:

So, when taking care of nobody hiding away from cense by simulating begging, he slayed a multitude of true beggars against all law of humanity/human right.

In this text, we can see how this law of humanity or, better said, this human right assists everybody just because of the fact of being a man, no matter what his condition or richness is, as it is clear in the case of the beggars. It is necessary to insist that Lactantius is not referring just to a general idea of *humanitas* or to a feeling of humanitarianism. It is a right, a binding *ius* that points directly to the idea of human dignity. Therefore, *ius fraternitatis* and *ius humanitatis* are closely linked expressions.

IV. The Ulpianian *Libri ad edictum* on Lactantius' shelf of legal books

Coming back to this research's departure point, Ogilvie's 'library of Lactantius', after this journey through the expression *ius fraternitatis* in Roman law and in Lactantius' thinking, it is even more difficult to share his opinion. Lactantius'

³⁵ Paul Vignaux, 'Humanisme et historicité; à propos de problèmes philosophiques posés par les Déclarations de droits de l'homme', in H. Santiago-Otero (ed.), *Humanismo y tecnología en el mundo actual, Actas de Las Jornadas Internacionales de Investigación Humanística. Madrid, 11-16 de abril de 1977* (Madrid, 1979), 21-33, 30; Paul O. Kristeller, *El pensamiento renacentista y sus fuentes* (México, 1982), 231. A work that emphasizes the importance of human dignity for Lactantius in general is that of Wolfram Winger, *Personalität durch Humanität: Das ethikgeschichtliche Profil christlicher Handlungslehre bei Laktanz: Denkhorizont, Textübersetzung, Interpretation, Wirkungsgeschichte* (Bern, Frankfurt am Main, 1999).

³⁶ (...) *Ita dum cavet ne quis simulatione mendicitatis censum subterfugiat, multitudinem verorum miserorum contra omne ius humanitatis occidit.*

knowledge of Ulpian, to whom he refers by his name, *Domitius*, goes much further than this eventual quotation, revealing a true knowledge of his legal thought.³⁷ We can say that, in some parts of his work, Lactantius carries out a hidden dialogue with the jurist of Tyre. In this sense, it is mandatory to renew the assumptions over which our research about the library of Lactantius is built. As Stefan Freund has argued and exposed with great accuracy in this very volume,³⁸ we must go further and work with a wider range of possibilities, moving from explicit testimonies to *sources* in a more general sense of the term, according to his distinction, and assuming that many of the references might be implicit ones.

Could we consider the mention of *ius fraternitatis* as a verbatim quotation of Ulpian's work by Lactantius, since no other author uses this expression besides them both (Tertullian excluded)? On the other hand, could Lactantius, on the contrary, have taken the expression directly from Tertullian? Is there a possibility of Lactantius maybe having taken it from any intermediate text, which implies a second-hand quotation? Could he even have taken it from a different commentary *ad edictum* of another legal author? Did the legal and the rhetorical realm share this expression as part of the common linguistic acquis, so that Lactantius might have got to know it without having read Ulpian directly?

The core of the question is, whether it is possible to state without any doubt that Lactantius knew the text of Ulpian. Obviously, when talking about non-explicit quotations and influences, we seem to be always condemned to remain in the foggy realm of probability. Nevertheless, an analysis of the aforementioned questions can lead us closer to an almost indubitable answer.

1. *Common, rhetorical or technical legal content?*

Firstly, it is remarkable that the expression *ius fraternitatis* is extremely technical and precise. Indeed, except for the aforementioned occurrences, we cannot find it outside the field of law. It is not the kind of knowledge a layman without a legal education possesses just because of his general culture, since it is referred to in a very particular situation that can appear in the middle of litigation (not even litigation in general, but litigation inside a trial related to a contract of partnership). Its clearly technical character is a solid basis. Moreover, the lack of occurrences of *ius fraternitatis* testifies against its dissemination outside the legal field. If the expression had taken the leap from the technical language of law to common language, it would be easy to find more testimonies in other types of sources, but that is not the case. Therefore, the scarcity of

³⁷ C. Palomo, *El paterfamilias* (2017), 223-31.

³⁸ See Stefan Freund, 'The Hidden Library of Lactantius', in this volume, p. 183-95.

occurrences can be interpreted as another argument in favour of the expression being taken by Lactantius directly from a legal source.

However, a related question remains: even if *ius fraternitatis* did not become part of the common linguistic *acquis*, could it have entered into Lactantius' terminology through his rhetorical education instead of through a direct read of Ulpian? As it has been exposed, a very similar idea is present in one of the Pseudo-Quintilian's declamations, and it would be unsound to deny that Lactantius was much more familiarised with the world of rhetoric than with the world of law. Nevertheless, we have not found the *verbatim* textual evidence in a declamation, but in a fragment of a legal book, and this is a sufficient reason to give precedence to the hypothesis of Lactantius having read Ulpian.

It must also be pointed out that we have no more occurrences in the works of the Roman jurists outside Ulpian's. This is important because, although there were several *Libri ad edictum* from different jurists, such as Paulus and Gaius (*ad ed. prov.*) up to the point of constituting a literary legal genre in itself, the expression *ius fraternitatis* cannot be found in them (nor in any legal work belonging to whatever legal genre), which constitutes another point in favour of Lactantius having read directly Ulpian's commentary. In this sense, the source in which the expression was collected also is of a highly technical nature: the commentary *ad edictum* of Ulpian. The *Libri ad edictum*, which contained commentaries of the jurists to the edict of the praetor, were legal works facing procedural remedies. According to Franz Wieacker, they were widespread through the Empire in the Prejustinianic age.³⁹ The fact of having found fragments of the commentaries *ad edictum*, and in particular of the Ulpianian one, in postclassical works such as the *Collatio legum mosaicarum et romanarum*⁴⁰ or the *Fragmenta Vaticana*,⁴¹ as well as in legal papyri,⁴² renders evidence of its wide diffusion. It is not hard to imagine that one sample of Ulpian's commentary *ad edictum* or any re-working of it could have ended up in Lactantius' hands. This seems to me a more likely case than assuming Lactantius had taken the expression directly from Tertullian because, as it has been shown, in his work *ius fraternitatis* can be simply equated to a fraternal relationship in the affective sense of the term. The text of Ulpian, however, uses the expression in a technical legal sense that really sheds light on what Lactantius wants to say, revealing that they both share a mental structure, a legal *forma mentis*.

Moreover, the *De officio proconsulis*, which he explicitly quotes, is also a work of a deeply technical nature. It is not the kind of work every Christian would know just because of having found himself in a situation of persecution,

³⁹ Franz Wieacker, *Textstufen Klassischer Juristen* (Göttingen, 1960), 231-70.

⁴⁰ *Coll.* 12. 7.

⁴¹ 266.

⁴² P. Ryl III 474b, PSI XIV 1449.

as Ogilvie says. Neither the *De officio proconsulis* nor the commentary *ad edictum* are generic literature. It is necessary to pay attention to the literary genres to which these two works belong. The *De officio proconsulis*⁴³ is a somehow peculiar work, since most of the Roman jurists' works are devoted to private law. This one, together with some other of Ulpian's works, is one of the few dedicated to tasks and duties of a public servant; therefore, it deals with public, administrative law. We do not intend to deny the possibility of Lactantius having made specific use of this book in looking for information about the normative dispositions regarding persecutions, but it is clear that, because of its non-informative nature, at least he should have had a foregoing knowledge of the (very technical) content of the work. He somehow got to know that the information he was looking for could be found in that piece of work, which presupposes at least a slight knowledge of its content and the fact that it was accessible for him.

2. Some other clues

All the aforementioned reasons lead me to think this Ulpianian work could be considered part of 'Lactantius' hidden library'. It would not be unsound to say that even some other books of Ulpian which are not mentioned by Lactantius could have been part of the latter's library. More than a century ago, Carusi pointed out some vestiges in Lactantius' works that showed his knowledge of other Ulpianian works: mainly his *Institutiones*, but also his commentary *ad legem Iuliam de adulteriis*. Finally, also to the commentary *ad edictum* (although he did not analyse this text).⁴⁴

In addition, the prominent Roman law scholar Contardo Ferrini, who studied the presence of technical expressions in Lactantius work, derived from Roman law, thought that the model for the Lactantian *Divinae Institutiones* probably was the institutional handbook of Ulpian.⁴⁵ However, as it has been exposed *supra*, Martini's objections compel us to search for more nuanced and detailed affirmations regarding Lactantius knowledge of Roman Law, which should be especially look at the institutional model that Lactantius followed. Nevertheless, we cannot disregard the fact that Ulpian seems to be the Roman jurist with whom Lactantius seems to be more familiarised than with others and he is the only one which Lactantius explicitly quotes; this should be enough to explore the 'Ulpianian way' first.

⁴³ Dario Mantovani, 'Il *bonus praeses* secondo Ulpiano. Studi su contenuto e forma del *De Officio Proconsulis* di Ulpiano', *Bulletino dell'Istituto di Diritto Romano 'Vittorio Scialoja'* 35-6 (1993), 203-67.

⁴⁴ Evaristo Carusi, *Diritto romano e Patristica*, Studi Fada 2 (Napoli, 1906), 91.

⁴⁵ C. Ferrini, *Opere* (1929), 2, 472.

All these reasons make me think that it is more than probable that Lactantius knew the content of the *ius fraternitatis* in the context of a contract of partnership, according to its meaning in the Ulpian's fragment. This true knowledge is recognisable in the intention with which Lactantius uses it, trying to give a foundation to the legal enforceability of a behaviour that implies not harming others, but, somehow, also sharing their fate. This will consequently lead to make some deeds of piety or mercy and shapes human society as a *divini iuris societas*. I believe that, in the hidden library of Lactantius, we can place the Ulpianian 83 *Libri ad edictum praetoris* on the shelf of legal books without fear of being too mistaken.