



Comparisons of Religions in the *Ius Commune* of the Late Middle Ages

Functions and Criteria

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ABSTRACT In medieval legal commentaries, comparisons of religions served—above all—as an egress from structural imbalance: numerous regulations pertaining to Jews and heretics are contrasted by only a few regulations regarding Gentiles and Muslims. Lawyers applied three main criteria of comparison: a dogmatic proximity to Christianity; a weighing up of the guilt of sin; and the implications for the social order. Depending on the criterion, the results of these comparisons could be varied. The dogmatic proximity of Judaism to Christianity and the social compatibility of Jewish with Christian life continued to be emphasized until early modern times. The privileged position of the Jews, inherited from Roman law, was however ultimately replaced by a comparatively better social position of the Muslims. In the process, fragments of theological discourse were selectively adopted. A special dynamic of legal development can be observed on the Iberian peninsula in particular.

KEYWORDS Canon law, Roman law, Jews, Muslims, Gentiles, Heretics, marriage law, conversion

Introduction

Inequality provokes comparison. The late medieval *Ius commune* was highly unequally structured regarding the treatment of people of other faiths: Jews, Muslims, Gentiles, and heretics. A considerable number of *leges* and *canones* for dealing with Jews and heretics found only partial parallels in a handful of regulations concerning Muslims and Gentiles. These regulatory gaps not only led to practical problems in the application of the law, but were also perceived by contemporaries as deficits in the system of the *Ius commune* and stimulated compensatory reflexes.¹ Extensive interpretation and conclusions by analogy offered solutions inherent to

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1 As a representative of the perception of contemporaries, see the very influential *Speculum iudiciale* of Guillaume Durant († 1296), bishop of Mende and curial jurist; Duranti (1486, f. 210rb), here on the problem of

the system—but any such active engagement by scholars presupposed a fundamental similarity of case constellations and legal entities. Common treatment of infidels became standard, but sometimes a special legal situation forced a specific differentiation, for which criteria had to be found. Comparisons of religions were thus necessarily part of an unbalanced system. Particularly with regard to heretics, and later the Jews as well, mechanisms of polemical degradation through scandalising comparisons with other religious groups, which have been noted on many occasions in this volume, soon started to manifest in legal traditions.

Scholars have already shown interest in the legal treatment of non-Christians in Roman and canon law—usually rather more interest than contemporary jurists themselves, as we will see below.² Manual-like studies and concise overviews, developed by modern scholars, are therefore available, although the focus is usually on only one religious minority, and the aspect of comparison is only introduced as a complementary element.³ In the context of the present study, a comprehensive and exhaustive description of the development of legal doctrine is neither possible nor useful. Instead, certain representative tendencies of the use of comparisons of religions in the scholarly legal literature of the Middle Ages are identifiable. The focus will lie on the most influential and widespread commentaries, treatises, and *Consilia* from the period between the fourteenth and fifteenth centuries, including Marquardo Susanna, an author who extensively compiled the precedent traditions of the late Middle Ages. Commentaries, that is, texts following the structures of the legal codifications and rooted in academic doctrines, are to be distinguished from treatises in general as monographic treatises on particular legal fields offering legal expertise intended for practical use in the course of lawsuits. Although the genre boundaries are interesting in terms of the genesis of individual arguments, they were of little importance in the discussions within the legal community. Even factional *Consilia* were fully citable and were listed on an equal status with texts written in academic teaching until well into the sixteenth century.⁴

The academic opinions on Roman and canon law were—like the rules of the *Ius commune*—supposed to provide the legal framework for the whole of Christendom. However, they may have been shaped by the different horizons of experience of the individual authors. Nevertheless, they consistently asserted the claim of supra-regional relevance and were usually distributed without consideration of the conditions in the local academic tradition. Likewise, the statements arising from different textual genres became part of a broader discourse on the treatment of Jews, Muslims, pagans, and heretics, which was detached from the framework

tithes: *Est sciendum, quod licet de Iudeis habeamus expressum, quod tenentur ad decimas prediales (...), quia de Saracenis nihil habemus expressum, in regnis Christicolarum, in quibus habitant Saraceni, sepe de his disputatur; et allegatur pro Saracenis, quod iure nullo de eis cautum est, quod teneantur (...)* (“It is to be known: Although we have an explicit law about the Jews that they are obliged to pay tithes (...) in Christian countries where Saracens live, this is often a matter of dispute because we have no explicit law about the Saracens; and in favour of the Saracens it is argued that there is no law that requires them to do so.”) On Guillaume Durant, see Murano (2016a). On the problem of tithe payments, see Freidenreich (2011, 58). The observation of the obvious imbalance of regulations on Jews and Muslims is one of the commonplaces in the commentaries.

2 See at n. 6–11.

3 A concise comparative overview of the canonical legal situation of Religious minorities is provided by Becker (2009). For similar listings of the legal passages and comments, see Kedar (1992); García y García (1995). For the best overview of the legal situation of Muslims, see Freidenreich (2011). On the position of the Jews in canon law, see extensively Pakter (1988); see also Quaglioni (1995); Quaglioni (2009). Brand-Pierach’s (2004) dissertation, despite its general title, is solely concentrated on the exegetical tradition of X 3.34.8 (*Quod super his*). A very concise compilation of the problems is now provided by the example of the famous Paduan jurist Francesco Zabarella († 1417): Condorelli (2020). Very extensive access to individual problems is offered by the example of Bartolus de Saxoferrato: Treggiari (2014).

4 On this evolution, see Woelki (2018).

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conditions of the textual genres. Analyses of the conditions of origin of individual arguments can therefore be reserved to studies with a focus on singular regions and persons. After a short overview of the position of people of different faiths in Roman and canon law, the criteria used for the comparison of religions will be examined.

Non-Christians in the *Ius Commune*

a) Roman Law Traditions

In particular, the treatment of Jews in Roman law marked out the standard paths that were characteristic of the medieval debate.⁵ The noticeable ambivalence in the *Codex Iustiniani* and the Digests between systematic discrimination, on the one hand, and privileged protection against infringements, on the other, continued in the high and late medieval legislation of the Decretals and was transferred to other religious groups.⁶ The systematic statements about the responsibility of the Christian jurisdiction for non-Christians are ambiguous. Demonstrative indifference and the claim of universal jurisdiction are sometimes found side-by-side.⁷ The relevant sections *de haereticis* (C. 1.5) and *de Iudaeis* (C. 1.9)—despite their prominent placement in an exposed position in the first book of the *Codex Iustiniani*—did not generate an intensive tradition of commentary and were often passed over in the widespread *lecturae* of the great masters of law.

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b) Canon Law Traditions

The *Decretum Gratiani* contains some scattered individual rules on how to treat Jews, but it rarely features regulations on how to handle Muslims who were, however, included in an undifferentiated manner in the rules on *pagani*.⁸ There is also a clear differentiation in the relationship of Christians with Jews and that of Christians with Muslims: C. 23 q. 8 c. 11, a decree of Pope Alexander II (1063), calls for combat against the Saracens and for peace with the Jews.⁹ But the comparison of religions suggested here was immediately levelled again in favour of an external criterion: the call to fight was based solely on the hostility of the Muslims. Muslims living in peace, just like Jews, should not be attacked.¹⁰

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The tendency towards an undifferentiated treatment of Jews and Muslims is also systematically anchored in the *Corpus iuris*, since a separate title—*de Iudeis et Sarracenis*—was integrated in the *Compilatio prima* of Bernard of Pavia (1188/92) and then in the *Liber Extra* (1234), with

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5 On the developments in late Antiquity, see especially Grayzel (1968). On the legal treatment of Jews in Roman law, see also Juster (1914); Linder (1987); Rabello (2000); De Bonfils (2002); Nemo-Pekelman (2010).

6 For further discussion, see Becker (2009, 103–04); Quaglioni (2009, 204–05). For long-term trends, see also Borgolte (2014, 405–06, 423–24).

7 See the passages below at n. 19.

8 A compilation of the relevant Gratian passages is offered by García y García (1995, 224–28); Becker (2009, 105–06); Pennington (2012).

9 C. 23 q. 8 c. 11 (*Dispar*), ed. Friedberg II (1879, 1:955): *Dispar nimirum est Iudeorum et Sarracenorum causa. In illos enim, qui Christianos persecuntur, et ex urbibus et propriis sedibus pellunt, iuste pugnatur; hii ubique seruire parati sunt.* (“For good reason Jews and Saracens are to be treated unequally. For those who persecute Christians and drive them out of their own cities and towns are rightly combatted, but those are ready to serve everywhere.”)

10 On the interpretative tradition of C. 23 q. 8 c. 11, see Herde (1967, 364–68); Simonsohn I (1988, 35–36); Kedar (1992, 209); García y García (1995, 225); Brand-Pierach (2004, 8–10); Becker (2009, 105); Freidenreich (2011, 45).

a brief addition in the Clementines.¹¹ Only now did fundamental statements about Islam find a *sedes materiae* in canon law. Furthermore, relevant titles on common cases, which resulted from the relationship of Christians with people of other faiths, offered the opportunity to make general statements about other religions.

c) Specific Problems and Needs to Compare Religions

The problem of the validity of oaths gave rise to fundamental considerations about the jurisdiction of the church over infidels and about just war (in the Liber Extra: X 3.34.8).¹² The works circulating beyond the tradition of commentary, which were usually decisive for the further development of the law, are largely absent here: there are no influential repetitions or disputations. In the *Consilia* collections of the great teachers of law, apart from that of Oldrado da Ponte († ca. 1335) and Alessandro Nievo († 1484), there are only a few—mostly scattered—expert opinions on this subject.¹³ The first systematic treatise, *De Iudeis et Saracenis*, was only written in the sixteenth century by the Udinese jurist Marquardo Susanno († 1578). Along with repertories, it is the best place to access medieval discourses on the legal treatment of Muslims and Jews.¹⁴

The need for systematic regulations on deviant religious groups had already arisen from the fact that simple religious affiliation or orthodoxy was a decisive criterion in many areas. The simple status of faith was already—under certain circumstances—a criminal offence. This was undisputed in the case of heretics, but problematic in the case of Jews and Muslims. In the collections of decrees from the *Compilatio prima* to the Clementines, the title *de Iudaeis et Sarracenis* also appeared in the fifth book, which covered criminal law, in the specific context of an escalating aggravation between simony and heresy.¹⁵ In the broadest sense, all forms of deviance were understood as heresy.¹⁶ A doctrine of Judaism as a crime—which, however, is not pursued in practice—deepens the inherent dilemma in the system.¹⁷

In addition, the crime of apostasy follows directly from religious conversion and in essence sanctions apostasy from Christianity. But what about conversion outside Christianity—for

11 For this, see Kedar (1992, 210–11); Brand-Pierach (2004, 10–11); Becker (2009, 106); Freidenreich (2011, 41–42); Condorelli (2020, 109).

12 For an extensive discussion of this, see Brand-Pierach (2004). The analysis in Becker (2009, 106–11), also focuses on this decretal; see also Condorelli (2020, 117–120).

13 For the *Consilia* of Oldrado da Ponte, see Zacour (1990); Valsecchi (2000). For the distinctly anti-Jewish *Consilia* of Alessandro Nievo, see Angiolini (1986); Quaglioni (1995, 194–95); Murano (2016a).

14 Susannis (1568, written 1558); on the person, see Cargnelutti, Liliana. Susanna, Marquardo (1490–1578). Giurista, in: *Dizionario Biografico dei Friuliani*, accessed 16 June 2020, <http://www.dizionariobiografico.friulani.it/susanna-marquardo>. A good overview of the relevant authorities is provided by Bertachini III (1570–1573, 1–4:125–30 s.v. *Iudaeus*), and V (1570–1573, 1–4:11 s.v. *Saracenus*). See also Monte I (1480, s.v. *Iudeus*); Corsetti (1499, f. 141rv).

15 For contemporary reflection on the systematic classification of the title, see the *Summa Decretalium* by Berhardus Papiensis († 1213), who also compiled the *Compilatio prima*; Bernhardus Papiensis (1860), 210: *Egimus de his, qui spiritum sanctum per simoniam blasphemant; nunc de his agimus, qui Deum male colendo inhonorant, ut sunt Iudaei, Sarraceni et haeretici*. (“We have already treated those who insult the Holy Spirit by simony; now we treat those who humiliate God by bad worship, like the Jews, Saracens and heretics.”) This passage was revisited several times, sometimes literally, as in Raimundus de Peñaforte (1715, 44, chapter I 4); Goffredus de Trano (1564, 411, ad X 5.6); Segusio II (1512, f. 27rb, ad X 5.2, rubr.); Tudeschi V (1477, unfoliated, ad X 5.6, rubr.); cf. Quaglioni (2009, 221); Condorelli (2020, 110, each with further references).

16 See below at n. 30 and 32.

17 See in summary, Corsetti (1499, 141va): *Item esse Iudeum large sumendo est delinquere (...), sed stricte sumendo quo ad forum temporalem non est delictum (...)* (“To be a Jew is a crime in the broadest sense (...), in the stricter sense with regard to secular jurisdiction it is not a crime (...).”) Similarly, Susannis (1568, 8).

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instance, from Judaism to Islam?¹⁸ Are Jews who do not follow their own religious doctrines punishable for heresy?¹⁹ And who is responsible for adjudication in these cases: spiritual authorities, secular bodies, or autonomous Jewish jurisdiction?²⁰

Furthermore, religion is often a decisive constituent element of crime: sexual contact between Christians and Jews or Muslims is just as punishable as adultery, rape, and fornication with spiritual persons, among other offences. However, the question of the relative severity of the crime leads to massive uncertainties. Is the killing of a Christian, for instance, worse than that of a pagan?²¹ [10]

Religion was also a criterion for access to public life. Offices and dignities, the doctorate, the admissibility of testimonies in court, and the validity of testaments and contracts were all bound to Christian orthodoxy.²² Jewish doctors were even excluded from treating Christians.²³ In family law, religious affiliation was an important criterion for the legal validity of marriages and maintenance obligations for relatives.²⁴ Must a Christian care for a heretical or infidel father?²⁵ A particular problem that illustrates this dilemma was the securing of a widow's property by means of a lien on the husband's possessions, which, as we shall see below, was tied to the wife's orthodoxy.²⁶ [11]

The practising of other religions in public was a particular source of conflict. The right to maintain synagogues and mosques, prayer rights, the visibility of people of other faiths in public space—it was precisely in this locus that obvious unequal treatment and differentiated new regulations often triggered reflections on the comparison of religions.²⁷ But even [12]

18 For more details, see below at n. 70–75.

19 Hence, with the assertion of the competence of the inquisitor, in Angelo degli Ubaldi (1534, f. 3vb, ad Dig.1.1.1.4 *Ius gentium*): *Querit Inn(o)centius, si Iudeus committit heresim circa legem suam, an inquisitor heretice pravitatis possit ipsum punire de illa heresi et determinat, quod sic.* (“Innocent [IV] asks whether the inquisitor can punish a Jew if he commits heresy according to his (the Jewish) law and decides: yes.”) On Angelo degli Ubaldi, see Woelki (2016). The reference to Innocent IV is, however, disproportionate here, since he only postulates the competence of the pope generally, but does not argue for the competence of the Christian inquisitors for (non-converted) Jews; see Innocent IV, vol. III (1570, f. 430rb): *Item Iudaeos potest iudicare Papa, si contra legem evangelii faciunt in moralibus, si eorum praelati eos non puniant et eodem modo, si haereses circa suam legem inveniant.* (“And so, the pope can punish the Jews if they act against the gospel in moral matters and their prelates do not punish them, and likewise if they discover heresies according to their law.”) On differentiated casuistry for the competence of the inquisitor, see Rosate (1518, f. 42rb, ad C. 1.9.0); Corsetti (1499, f. 141rb); Susannis (1568, f. 86rv). In contrast, commentators often demonstratively emphasized the Church's lack of competence: see Segusio II (1512, f. 27vb, ad X 5.6.5, *Iudei sive Saraceni*): *De his, qui foris sunt, non iudicat ecclesia (...)* *Sed nec intromittit se de Iudeis in his, in quibus nobis non preiudicant nec preiudicare possunt (...)* (“The Church does not judge those who are outside (...) And it does not interfere in the affairs of the Jews as long as they do not harm us or are unable to harm us (...).”) Similarly, Rosate (1518, f. 42va, ad C. 19.9.0). On the cited author, Alberico da Rosciate († 1360), see Giazzi (2016).

20 A discussion of the jurisdictions can be found in Susannis (1568, f. 86v–90r).

21 For these problems, see below at n. 38 and 41–42.

22 For an overview, see Becker (2009, 113–14); Condorelli (2020, 126); for more details on the problem, see Pakter (1988, 173–200).

23 In the commentary literature, this prohibition is usually reduced to the personal physicians of popes or emperors, since they are not allowed to hold offices with which an official dignity (*dignitas*) was associated. See Susannis (1568, f. 94v). However, the Bolognese canon Giovanni d'Anagni († 1457) reports, probably from his own experience, about a Jewish Magister Elias, who is said to have been the personal physician of popes Martin V and Eugenius IV; see Anania I (1497, unfoliated, ad X 5.6). On this problem, see Becker (2009, 114). Similarly, a Jew cannot be employed as the cook for a prince, because this office is associated with dignity; see Pontano (1508, unfoliated, Sing. 655); Susannis (1568, f. 94v).

24 Becker (2009, 112).

25 On this question, see the gloss on D. 30 c. 1 (*Si qui filii*); Teutonicus (1512, f. 31rb); Baisio (1480, unfoliated, ad D. 30 c. 1, *Si qui filii*); Rosate (1518, f. 38vb, ad C. 1.5.0, *de haereticis*); Anania I (1497, unfoliated, ad X 5.6.5, *Iudei sive Sarraceni*); Susannis (1568, f. 22r, 161v).

26 For more details, see below at n. 54–58.

27 For more details, see below at n. 59–68.

beyond religious practice in a narrow sense, everyday rules had to ensure social peace and defend the discriminatory social order, especially in towns and cities. The issue of identifying marks for Jews and, analogously, for Muslims when visiting public institutions such as bath-houses, schools, and universities, or employing Christian nannies, provided material for legal discussion.²⁸

Lastly, in the legal commentaries, there are also reflexes of a learned dialogue between Christians and people of other faiths, for instance, about the increased susceptibility of Christians to the whispers of demons, about the names of the places of worship, and about which was the more noble writing direction: from left to right or from right to left.²⁹ [13]

In all these arenas—from criminal to family law and administrative norms, to academic and cultural comparisons—legal authors were offered starting points for reflection on the relationship among religious groups. Such relationships often could not be resolved by simple extension of the applicability of existing norms. When an explicit norm was lacking, this absence could be interpreted either as a regulatory gap or as deliberate, substantively justified unequal treatment by the legislator. Conclusion by analogy and reverse conclusion were thus in competition. Comparisons of religions were therefore necessary in order to resolve such normative conflicts. [14]

Criteria of Comparison

Three main criteria for comparison emerged. These were sometimes applied competitively [15]

28 For an overview, see Becker (2009, 115–20); Quaglioni (2009, 207); Freidenreich (2011, 42); Condorelli (2020, 123–24). On the issue of school and university attendance, see below at n. 50.

29 On vulnerability to demons, see Baisio (1480, unfoliated, ad D. 33 c. 5, *Usque adeo*): *Vexari impropriavit Iudeus Christiano, quod Christiani vexarentur a demone, sed Iudei numquam; unde inferebat conditionem Iudeorum et sectam deo magis acceptam. Christianus responsione congrua eum confundit dicens: Illi flagellantur a domino, qui ab eo diliguntur, immo esce eius sunt electi. Sed diabolus alium diabolium quomodo vexabit, sicut nec digitus digitum intrare potest?* (“A Jew wanted to vex a Christian by saying that Christians are afflicted by the demon, but never the Jews, from which he deduced the condition of the Jews and thought that this sect was more accepted by God. The Christian countered him with the appropriate answer: Everyone is tormented by God who is loved by him and favoured by him. But how could one devil offend the other devil if one finger cannot penetrate the other?”); see furthermore Rosate (1518, f. 42ra, ad C. 1.9.0); Corsetti (1499, f. 141va); Susannis (1568, f. 38v). Regarding the name of the religious houses, see Baisio (1480, unfoliated, ad D. 1 c. 8 de cons., *Ecclesia*): *Apud Iudeos olim dicebatur et adhuc dicitur sinagoga, id est congregatio, quia virga legis, que erat dura et aspera, populus ille velut irrationabilium pecorum grex congregabatur. Sed in catholicis dicitur ecclesia, id est convocatio, quia amore spiritus sancti populus iste ad unam fidem velut ad dei iudicia ad Christi convivium convocatur (...)* (“Among the Jews it was and is called synagogue, that is, congregation, because the rod of the law, which was hard and bitter, gathered this people together like an unreasonable shepherd. But among the Catholics it was called Ecclesia, that is, gathering, because this people is called to the table of Christ through the love of the Holy Spirit for faith as for the judgment of God (...)”); Ubaldi, B. I (1489, unfoliated, Cons. 316); Anania I (1497, unfoliated, ad X 5.6.3); Susannis (1568, f. 10v), Tudeschi V (1477, unfoliated, ad X 3.6.3, *Iudei*) adds clarification: *Et nostrum vocabulum est prestantius illo: Nam convenit etiam pecoribus illud, quia congregantur, et inde grex, quia congregantur.* (“And our word is better than that, because it also fits for sheep that are gathered together. Therefore, a sheep herd is called ‘grex’ because the sheep are gathered together in it [‘congregantur’].”) About the name of the mosque, see Étienne Hugonet (Stephanus Hugoneti), *Commentaria ad Clementinas*, Paris, Bibliothèque Nationale de France, lat. 4117, f. 99vb, ad Clem. 5.2.1 (*Cedit*): *Et forsitan ideo Sarraceni mesquitas appellant domos, in quibus conveniunt ad orandum, quia dicunt, quod in civitate Meche deputatus fuit loco Machometo, et eius sequacibus ad hoc.* (“And maybe the Saracens call the houses where they meet to pray mosque because they say that in the city of Mecca this place was assigned to Mohammed and his followers.”) On Hugonet and his work, see Zacour (1961); Bertram (1997, 153). Similarly, Susannis (1568, f. 10v). The intellectual discussion about the more noble direction of writing can be found in the *Tractatus de insignis et armis* of Bartolus de Saxoferrato [(1493), f. 35v–36r]; Susannis (1568, f. 58v).

and led to widely differing results: a dogmatic criterion; a moral-eschatological criterion; and a pragmatic-social criterion.

a) Proximity and Distance

The frequently considered argument that non-Christians are beyond the church and therefore damned was practically never sustained.³⁰ Instead, jurists often attempted a classification of the various religious groups on the basis of their dogmatic proximity to and distance from Christianity. The dogmatic classification of religious groups according to their respective share of truth or the extent of their error allowed for a flexible gradation of religious groups. In Azzo of Bologna's († 1220) very influential commentary on the *Codex*, the gradation of this classification is still very rough: he divides the forms of piety into a perfect (*plene*) and an imperfect (*semiplene*) worship of God.³¹ The field of imperfect forms of piety is very broad and assigns both Judaism and Islam to 'heresies.'³² Early canon law roughly distinguished among Christians, Jews, and Gentiles, but it encountered difficulties when seeking to integrate Muslims into this system. While they were initially often classified under the category of pagans, from the thirteenth century onwards, there was a tendency to transfer to Muslims the norms that were applicable to Jews by analogy.³³ In terms of substance, this was sometimes interpreted as the result of the comparison of religions: because Muslims, over time, increasingly adopted Jewish ways of life and specific Jewish forms of piety (the key verb is: *iudaizare*). That is, Muslims followed food regulations, clothing norms, and circumcision rituals, which allowed them to be equated with the Jews.³⁴ However, the classification of Muslims as Christian heretics, which gradually became commonplace in theological literature, failed to become influential in the legal commentary tradition, although the story of the instruction of Mohammed by a Nestorian monk was propagated in certain prominent legal texts.³⁵ In general, the distance between Islam and Christianity remained greater than the

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30 See Rosate (1518, f. 42ra, ad C. 1.9.0): (...) *iste ambe secte tolerantur a nobis (...) et quia in utraque est in statu damnationis, non est curandum (...)* ("Both sects [i.e. Jews and Muslims] are tolerated by us (...) and because both are equally in the state of damnation, we do not have to care about them (...)")

31 Azzo (1584, col. 20, ad C. 1.9, rubr.): *De haereticis in genere dictum est supra, modo ponit in specie. Vel sic: Supra dictum est de Christianis, qui plenissime divinam religionem colunt: nunc videamus de Iudaeis, qui semiplene et ad literam Deum reverentur et colunt, et levius errant quam alii haeretici.* ("The heretics have already been discussed in general terms above, but now they will be dealt specifically. One could also say: Above, there was talk about the Christians, who fully practice the divine religion. But now let us turn to the Jews, who worship God only imperfectly and in the literal sense and are less inclined to err than the other heretics.") For this, see Kedar (1992, 210); Quagliani (2009, 215).

32 See n. 30. A similarly vague distinction can be found in Ubaldis, B. I (1489, unfoliated, Cons. 316): *Hereticus stricto sumpto vocabulo differt ab infideli et scismatico, licet quilibet infidelis, Iudeus et paganus large possunt dici heretici.* ("The heretic, strictly speaking, is conceptually different from the unbeliever or schismatic, although in a broader sense any infidel, Jew or Gentile can be called a heretic.")

33 On the equal treatment of Muslims and Gentiles, see Azzo (1584, col. 22, ad C. 1.11): *Dictum est supra de Iudeis, modo ponit de paganis, id est de Saracenis, qui deos innumeros deasque imo demones collunt et adorant (...)* ("Above the Jews were treated, now it is about the Gentiles, that is to say the Saracens, who worship and adore countless gods and goddesses and even demons (...)"); see Kedar (1992, 208–09); Freidenreich (2011, 42–43). On the equating of Muslims and Jews and the tendencies towards conclusion by analogy, see Bussi (1935, 466–69); Freidenreich (2011, 54–57).

34 See expressly for example Raimundus de Peñaforte (1715, 46): *et Sarraceni hodie iudaizant: unde eadem causa prohibitionis et idem periculum utrobique.* ("and the Muslims are acting like Jews these days. Therefore, both are subject to the same reason for prohibition and the same danger."); Goffredus de Trano (1564, 411, ad X 5.6); Susannis (1568, f. 18v and 70r), who, for this reason, considers marriage between Jews and Muslims to be legal. Further examples can be found in Nirenberg (2003, 150); Freidenreich (2011, 53, 67). For the prohibition of eating together, see Freidenreich (2008, 2013).

35 For example, in the Clementine commentary of the Benedictine monk Guillaume de Montlaurun († 1343); Monte Lauduno (1517, f. 147va, ad Clem. 5.2.1, *Cedit*). On Guillaume de Montlaurun, see Hitzbleck (2009,

distance between Judaism and Christianity. It is only in the work of Marquardo Susanna that we can identify the notion that Muslims were easier to convert than Jews because of their doctrinal proximity to Christianity.³⁶

b) The Gravity of Guilt

The dogmatic classification of religious groups in a coordinated system of deviance led to ambivalent conclusions. The Jews, for example, were—on the one hand—credited with the fact that their faith contained the initial bases of the Christian truth (*primordium veritatis*). On the other hand, the conscious turning away from the path of Christian truth constituted a more significant and active departure than a mere continued absence.³⁷ Apostasy was a greater crime than remaining attached to the unbelief into which one was born. However, this eschatological economy of sin was also marred by ambivalence. Even though higher value had to be attached to the life of a Christian than to the life of a non-Christian, the killing of a non-Christian could well constitute a greater crime than the killing of a Christian. While the latter crime anticipated the redemption of the victim due to his faith, the killing of the unbeliever prohibited the victim's possible conversion – destroying not only his body, but also his soul. This offence thus intervened even more drastically in the divine plan of salvation.³⁸ The controversial question of whether it was worse to have intercourse with a Jewish woman or a Christian nun was subject to similar considerations.³⁹

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c) Social Order

Beyond the dangers to the salvation of souls, the relationship between the religious groups was often based on simple pragmatic criteria for maintaining the social framework.⁴⁰ Thus, marriages between Christians and Muslims or Christians and Jews were regarded as far more harmful than occasional sexual contact.⁴¹ While inter-religious marriages were regularly punished with the most severe penalties, brothel visits by Jews, by contrast, could be trivialised and punished with small fines—or even go completely unpunished.⁴² The invalidity of Jew-

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- 95 – 112). On the classification of Islam as Christian heresy or as a conglomeration of different heresies, see Tolan (2002, 135 – 70); Gleis (2013, 394). The anecdote was often used in the commentary on Clem. 5.2.1. See Condorelli (2020, 115), with further references to Giovanni d'Andrea and Francesco Zabarella.
- 36 See Susannis (1568, f. 124r – 125r), with the arguments that Muslims nevertheless also sing the psalms of David and at least acknowledge Christ as a prophet. For him, they only lack little in their quest for the truth.
- 37 Representative of many such statements: Susannis (1568, f. 60v): *melius est viam domini non agnoscere quam post agnitam retroire ... Et gravius puniuntur, qui votum fecerunt aut fidem perceperunt et votum non perfecerunt aut in malis vitam finierunt, quam illi, qui sine voto aut fide mortui sunt (...)* (“It is better not to know the way of the Lord than to turn back after the knowledge ... And those are punished worse who took a vow or accepted the faith and then did not keep the vow or terminated his life in a bad way than those who died without vow and faith (...”).
- 38 See the gloss to D. 4 c. 108 (*Rebaptizare*), Teutonicus (1512, f. 417rb); Corsetti (1499, f. 141va); Susannis (1568, f. 52v – 53r). However, see a *Consilium* of the Bolognese College of Doctors from 1405 in the case of a poison murder in Trieste. For the consultants, it was irrelevant that the victim was a Jew. See Ziletti (1559, 1:69 – 71).
- 39 The debate is reported in detail in Susannis (1568, f. 54r – 55r).
- 40 Freidenreich (2011, 42).
- 41 Detailed compilation of the casuistry can be found in in Susannis (1568, f. 64v – 67v).
- 42 Alessandro Tartagni († 1477) discusses one such case and explains that similar cases have already been resolved several times with fines; Tartagni VII (1590, f. 12ra – 13rb, Cons. 13, *Attentis his*). On the author, see Murano (2016b). Pietro degli Ubaldi († 1412) discusses the case of a Jewish brothel client from Città di Castello and even argues for the impunity of the delinquent; Ziletti (1559, 1:51 – 54). On Pietro degli Ubaldi, see Woelki (2016). A *Consilium* of the relatively little-known author Honofrius de Perusio on the

ish testimonies was justified less theologically than pragmatically: it had been shown that Jewish witnesses were unreliable because of their bad character, not necessarily because of their faith.⁴³ However, oaths of Jews or Gentiles to their respective God were considered valid, unlike the oaths of heretics, as heretics “do not observe any law, but turn their own opinion into the law”, according to the Bolognese jurist Giovanni d’Anagni.⁴⁴ Great caution was called for in the context of statements made by newly converted Christians.⁴⁵ Numerous rules had the primary purpose of preventing Jews (and, by analogy, Muslims) from obtaining rights of dominion over their fellow Christian citizens. The ban on employing Christian nannies in Jewish households derived from this precise notion. Consequently, it was argued that should the Jewish infants otherwise starve, it would be permissible for them to be breastfed by Christian nannies *outside* their homes.⁴⁶ The imperative of Christian charity, which consistently resonated in the legal commentaries, formed a peculiar counterweight to the equally omnipresent warnings against the inner enemy.⁴⁷

The casuistry of contacts with nannies also shows that one motive for the construction of religious inclusion and exclusion—namely, cultic purity, which is otherwise often regarded as decisive—played practically no role in legal discourse.⁴⁸ The admission of Christian nan-

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same case imposes a fine of 25 lb.; Ziletti (1559, 1:64–65). In the case of a Jewish brothel client in Taranto, the jurist Franciscus de Placentia already considers the accusation to be invalid because it was based on the testimony of a prostitute and insists that sexual contact with prostitutes should be punished more leniently; Ziletti (1559, 1:191–93). Harsh punishments even for extramarital contact are advocated by Oldrado da Ponte, Cons. CCCXXXIII, ed. Zacour (1990, 90): *dictum Iudeum in amissione virilium condemnauerunt, cuius nomen erat Pandonus, et ego vidi virilia incisa ante palatium*. (“They condemned the said Jew, whose name was Pandonius, to be castrated, and I saw the genitals cut off in front of the palace [i.e. the pope palace in Avignon]”). This passage apparently impressed the commentators so much that they reproduced it regularly; see Corsetti (1499, f. 141rb with further references).

43 For example, Segusio II (1512, f. 27vb, ad X 5.6.5, *Iudei sive Saraceni*): *Secundo a testimonio contra Christianum, quia cum viles sunt, de facili forsitan falsum testimonium ferrent, nec legitimis actibus sunt digni (...)* (“Secondly, Jews are prohibited from testifying against Christians, for because they are worthless, they may more easily bear false witness and are not worthy of executing legal acts (...).”) See Pakter (1988, 191).

44 Anania I (1497, unfoliated, ad X 5.6.19, *Nulli Iudeo*): *hereticus nullam legem tenet, secundum propriam opinionem sibi facit legem*.

45 Pontano (1508, unfoliated, Sing. 675); Susannis (1568, f. 78r, 166r).

46 Tudeschi V (1477, unfoliated, ad X 5.6.8, *Ad hec*): *Et iste intellectus est humanior: nam possent Iudeorum creature perire, si non reperirent nutrices christianas extra domum*. (“And this interpretation is more humane, because the creatures of the Jews can die if they do not find Christian nannies outside the house.”) Similarly, Susannis (1568, f. 12r, 18r).

47 One key point of this ambivalence was expressed by a widespread proverb—“Whoever feeds the snake on the bosom will be badly rewarded”—which in a somewhat twisted form was also present in canon law; see X 5.6.13 (*Etsi Iudeos*), ed. Friedberg II (1879, 1:776): *tanquam misericorditer in nostram familiaritatem admissi, nobis illam retributionem impendunt, quam, iuxta vulgare proverbium, mus in pera, serpens in gremio, et ignis in sinu suis consueverunt hospitibus exhibere*. (“Charitably taken up in our proximity, they give us the return service which, according to the well-known proverb, the mouse in the sack, the snake in the lap and the fire in the bosom usually offers its hosts.”) On this passage, see Quagliani (2009, 210). On the proverb, see Singer X (2000, 10:129–30). It was a commonplace in the sermon literature; see, for instance, Jacques de Vitry, *Sermones*, Paris, Bibliothèque Nationale de France, lat. 17509, f. 101rb, in a correct and complete formulation: *Multas enim in hospitiis inuenietis meretrices et malas mulieres, que insidiantur incautis et male remunerant hospites suos velud mus in pera, serpens in sinu et ignis in gremio, spina in pede, clavis in oculo. Tucius autem esset dormire inter demones, qui signo crucis fugantur quam prope hiis pessimas mulieres, que ebriis insidiantur*. (“In many taverns you will find harlots and bad women who wait for the incautious and reward their hosts as badly as the mouse in the sack, the snake in the bosom, the fire in the lap, the thorn in the foot and the key in the eye. It would be safer to sleep among demons fleeing from the sign of the cross than among these bad women who lie in wait for the drunkard.”)

48 For this, see Colominas Aparicio (2014, 119–20, and especially 124) with theories on the purity of breast milk. On the importance of cultic purity as a criterion of religious inclusion, see also Cavarzere (2015, 386).

nies into Jewish households was not regarded as forbidden for the reason of preventing the contamination of individuals through physical contact. Instead, it was prohibited in order to prevent the subordination of the Christian servant to the *patria potestas* of the Jewish householder. The opposite case—the inclusion of Jewish servants in Christian households—was not forbidden in principle (not even for nannies), but it was considered questionable, because the Jews could have a corrupting effect on the orthodoxy of household members. Therefore, the admission of Jews was more likely to be accepted in educated households, whose inhabitants would be less vulnerable to Jewish influence.⁴⁹ The controversial issue of the admissibility of Jews to schools and universities points to the same line of argumentation. Niccolò Tudeschi († 1445), archbishop of Palermo and the most influential canonist of the fifteenth century, held—in contrast to common contemporary thought—the view that if Jews were denied the right to visit bath houses, where contact with Christians is merely temporary and only adults meet, then this must apply *a fortiori* to schools, where easily influenced young people meet and form friendships.⁵⁰ The aforementioned casuistry of sexual contact supports the general observation that the criteria of social order were much more important in legal discourse than aspects of cultic purity.

Concrete Comparisons of Religions: Individual Topics

a) Religion and Marriage Law

Family law in particular—as a typical area of interference between legist and canonical tradition—offers concrete views on the uncertainties in dealing with different religious groups.⁵¹ The repeatedly emphasized inferior position of the heretics with regard to the Jews and other unbelievers collides within family law with sacramental logic: marriages between Christians and Jews were invalid; whereas marriages between orthodox Christians and heretics were sinful, but valid and indissoluble.⁵² Muslims were generally integrated into the system in the same way as Jews. Marriages between Jews and Muslims were usually considered valid.⁵³ A particular problem arose from a special institute of Roman law for securing the pension rights of wives, the *privilegium tacite hypothecae*.⁵⁴ The Christian wife was entitled to a statutory lien on her husband's property to secure her widow's benefit (*dos*), which had priority even over other creditors' claims. This privilege was expressly excluded for heretic wives.⁵⁵ The treatment of Jewish and Muslim wives was unclear. In the legist tradition up to the monumental *Tractatus de dote* of Baldo Bartolini († 1490), this privilege was granted

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49 Hence, Tudeschi V (1477, unfoliated, ad X 5.6.8, *Ad hec*).

50 Tudeschi V (1477, unfoliated, ad X 5.6.1, *Presenti*): *Nam si prohibetur sola balneatio, ubi est cohabitatio temporalis et quasi momentanea, fortius debet prohiberi ingressus scolarem, ubi inter scolares contrahitur nedum consortium, sed etiam intrinseca amicitia. Et quia iuvenes habent annos etatis molles, de facili possent subverti ex astutia et perfidia Iudeorum. Consuetudo tamen habet contrarium.* (“For if bathing together is already forbidden, where contact is only temporary and almost instantaneous, school attendance must be all the more forbidden, where not only a community is formed between the pupils, but also an inner friendship. And because the boys in these years of life are still soft, they can be overpowered all the more easily by the perfidy and malice of the Jews. But the practice is different at present.”) So, too, Susannis (1568, f. 17v). Petrus de Monte I (1480, unfoliated, s.v. *Iudeus*), expresses doubts on this view. See Condorelli (2020, 126). On the life and career of Niccolò Tudeschi, see Pennington (2000; Murano 2012a).

51 On this subject, see Becker (2009, 112).

52 This is extensively discussed in Susannis (1568, f. 69r).

53 See Rosate (1518, f. 42ra, ad C. 1.9.0); Susannis (1568, f. 70r); Condorelli (2020, 120).

54 Regulated in C. 5.12.30pr/1 and C. 5.13.1.1b. For this, see Kaser (1959, 10, 3, 3:230–31).

55 Prescribed in C. 1.5.1; for this, see Rosate (1518, f. 39rb, ad C. 1.5.1).

only to marriages recognized by the church and was excluded for all unbelievers.⁵⁶ However, because marriages between heretics also fell under the purview of the marriages approved by the church, the legislator had to specifically exclude them. Following this strain of logic, the legal position of heretics in marriage law remained privileged over that of non-Christians. Here, the legists' general tendency to rigorously defend the systematic dogmatics of their *Leges* and to deviate from it only in exceptional cases becomes apparent. Regarding the Jews, the Aristotelian principle of *equitas/epikeia* is even explicitly excluded.⁵⁷

The canonical tradition of commentary from Enrico da Susa (Hostiensis) and Giovanni d'Andrea up to the treatise *De Iudaeis et aliis infidelibus* of Marquardo Susanna was different: here, the *privilegium tacitae hypothecae* was generally granted to Jewish wives and sometimes extended to Muslims and Gentiles.⁵⁸ The reasoning for this was based on a theological comparison of religions: those who have never accepted the Christian faith are always preferable to apostates. Matrimonial law clearly shows the uncertainties inherent to the comparison of religions. The dogmatic criterion of proximity to Christianity, which here operated in favour of heretics, competed with the weighting of the sinfulness and reprehensibility of the deviant beliefs. Especially in the canonist tradition, the privileged position of the Jews, which was derived from Roman law, proved to be extraordinarily enduring, especially compared to Christian heretics. Moreover, it emerges that Muslims could also benefit from this traditional privilege by analogy.

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b) Places of Religious Worship

A special occasion for reflection on the ranking of religions was provided by the regulations on the places of religious practice. Here, too, Roman law explicitly privileged Jews over heretics by clearly allowing Jews to operate existing synagogues, but forbidding heretics from administering any gathering spaces (C. 1.1.2). In the discussion of the reasons for the superiority of the Jews, the dogmatic and eschatological classification dominated here: Judaism contained

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56 Bartolini (1515, f. 71va – vb, chap. XI 21): *Differentia, quia privilegia data dotibus pro favore matrimonii (...) optinent in matrimonio vero et rato seu confirmato ab ecclesia fidelium et apostolica, ut est matrimonium contractum inter catholice fidei personas, non sic in matrimonio, quod esset inter infideles, quia, licet matrimonium inter istas personas sit permissum, tamen non est ratum et confirmatum ab ecclesia, (...) Et ideo dotes talium mulierum infidelium non gaudent privilegio aliarum dotium mulierum fidelium, quorum matrimonia sunt vera et rata ab ecclesia (...)* (“Here it should be distinguished that the privileges in favour of marriage (...) apply only to true marriage confirmed by the Apostolic Church of the faithful, namely marriage between persons of the Catholic faith, but not to marriage between infidels, because although marriage between these persons is permitted, it is not valid and confirmed by the Church (...) And therefore, the dowry of such unfaithful women does not enjoy the same privilege as the dowry of other faithful women whose marriages are true and recognized by the Church (...).”).

57 See Susannis (1568, fl. 76v-77r with a plethora of references and case scenarios). On the concept of *equitas/epikeia*, see Woelki (2011, 418–19 with extensive references in n. 97), and now: Kriechbaum (2021).

58 Susannis (1568, f. 60v).

an initial grain of truth (*primordium veritatis*).⁵⁹ The Jewish belief is not entirely wrong. There is hope for the redemption of Jews.⁶⁰

The integration of Muslims into this system was problematic. The locus of the debate was a decree of the Council of Vienne (1311), which became the only canon included in the title *De Iudaeis et Sarracenis* of the Clementines (Clem. 5.2.1).⁶¹ The text in itself only prohibited the muezzin's call to Muslim Friday prayers, but in the commentary tradition, it was generally interpreted as prohibiting the public practice of religion and the existence of mosques in Christian countries.⁶² It is only the admissibility of clandestine Muslim religious services that remained controversial.⁶³ Yet this strict interpretation, which put Muslims in a much

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- 59 Cinus (1578, f. 2va, ad C. 1.1.2): *Oppone, sicut errant haeretici et deviant a fide, sic Iudaei. Tamen Iudaeis permittitur synagogas antiquas habere et reparare, ut infra de Iudaeis l. In synagoga [C. 1.9.4]. Solutio: Dicit glossa, quod aliud in Iudaeis, quia ipsi acceperunt legem a Domino, alii non. Unde leges iste sunt diverse non adversae. Iudei enim sustinentur et quibusdam privilegiis per iura et principem muniuntur, quia Iudaei primordio veritatis utuntur, nec in totum est falsum, quod utitur primordio veritatis, (...)* (“It is objectionable that heretics as well as Jews deviate from the faith. Nevertheless, Jews are allowed to maintain and renovate old synagogues, as stated below in the title ‘de Iudaeis’ in the lex ‘In Synagoga’. The solution: the gloss says that the Jews are to be treated differently because they have received their law from God, but the others have not. Therefore, these *leges* are different but not contradictory. For the Jews are tolerated and have received various privileges through the laws and the prince, because they hold the origin of truth; and in what the origin of truth is contained, that is not entirely wrong (...); Ubaldi, B. (1539, f. 9ra, ad C. 1.1.2): *Et est ratio, quia fides Iudeorum habuit principium veritatis, et ideo non sunt detestabiles Iudei sicut heretici secundum doctores.* (“The reason is that the faith of the Jews contained the beginning of the truth, and that is why, in the opinion of scholars, the Jews are not as despicable as heretics.”) Marquardo Susanna even concedes a prefigurative function to Judaism; Susannis (1568, f. 10r): *Ex quibus patet ritus et ceremonias eorum esse umbram et figuram veritatis nostrae et redemptionis testimonium. Non autem sic tollerantur ritus aliorum infidelium, cum nihil veritatis aut utilitatis nobis afferant (...)* (“This means that their rite and ceremonies contain a shadow and an image of our truth and a testimony of salvation. The rites of the other unbelievers, however, are not tolerated in this way because they bring us nothing in terms of truth and benefit (...).”)
- 60 Cinus (1578, f. 2va, ad C. 1.1.2): *Vel sustinentur, quia possunt salvari, unde dicitur in Evangelio: In illo tempore salvabitur Iuda. [Jer. 33,16]* (“One can also say that they are tolerated because they can be redeemed. Therefore, the gospel says: ‘In those days, Judah will have salvation’”). Similarly, Anania I (1497, ad X 5.6.7, *Consuluit*).
- 61 For this, see Bussi (1935, 479–488); Freidenreich (2011, 57); Condorelli (2020, 111–13, 133–38).
- 62 So, explicitly, in Susannis (1568, f. 11r): *Et prohibentur mesquiae Saracenorum et publica Maumetis invocatio in terris Christianorum et eius adoratio per Maumistas (...)* (“And the mosques of the Saracens as well as the public invocation and worship of Mohammed by Muslims is forbidden in Christian countries (...).”). Freidenreich (2011, 57), assumes that mosques would be permitted in analogy to synods. However, the passage cited by him in Bernhardus Papiensis does not contain this statement.
- 63 Rejected by Jesselin de Cassagnes, *Apparatus super constitutionibus Clementinis*; Vatican City, Biblioteca Apostolica Vaticana, Vat. lat. 2583, f. 101r–211v, f. 191vb, ad Clem. 5.2.1 (*Cedit*) s.v. *Publice: Videtur ergo a contrario, quod occulte possit tollerari. Sed contra credo, cum talis secta nullo iure sit approbata, ut pote omni carens lege, ut argumentum a contrario sensu locum habet hic, cum ex ipso absurditas vel peccatum sequi sicut alibi contingit. (...)* *Sed ideo dicit hic publice, quia de tali professione publica premissum fuerat.* (“Public: Here, the reverse conclusion seems to suggest that it can be tolerated in secret. But I do not believe this, because this sect is not approved by any law, so that it seems completely unlawful to apply the inverse conclusion here if this would result in absurdity or sin.”) On the Clementine commentary of the curial jurist Jesselin de Cassagnes († 1334), which was quite widespread in the fourteenth century but remained unprinted, see Tarrant (1979); Bertram (1997, 156). For this passage, see also Freidenreich (2011, 57). The position rejected by Jesselin was taken by Paolo de’ Liazari († 1356) with a pragmatic argument; Paolo de’ Liazari, *Apparatus super Clementinis*, Vatican City, Biblioteca Apostolica Vaticana, Vat. lat. 1437, f. 75r–134v, f. 124va, ad Clem. 5.2.1 (*Cedit*), s.v. *Publice: In secreto non prohibentur, quia illud non cedit in obprobrium Christiane fidei.* (“In secret it is not forbidden, because this does not offend the Christian faith.”) On the author, see Bertram (1997, 155–56); Bartocci (2005); Murano (2012b). Francesco Zabarella († 1417) presents the different positions in detail and then follows Paolo de’ Liazari; Zabarella (1513, f. 131rb): *Mihi placet dictum Pauli. Nulla enim absurditas, quod Saraceni talia faciant secreta, et sic non est prohibendum nec approbandum, quia de secretis iudicium est deo relinquendum; xxii (!) dist. Erubescant [D. 32 c. 11, ed. Friedberg I (1879, 1:120)].* (“I prefer the opinion of Paul. For it is not absurd if the Saracens do this in secret, and therefore it is neither forbidden nor confirmed, because the judgment on secret things is left to God.”) On the debate, see also Condorelli (2020, 138).

worse position than Jews, was prescribed neither by the text of the law nor by systemic constraints. One could have also interpreted the prohibition of the muezzin's call analogously to corresponding restrictions against Jews, who were required to stay at home on Good Friday and keep their shutters closed, as a pragmatic measure of protection of the Christian neighbourhood against harassment.⁶⁴ Instead, the decretal became a central place of discussion about the ranking of Jews and Muslims within the Christian scale of values, which here consistently disadvantaged Muslims. Why was this the case? The influential commentary on the Clementines by Jesselin de Cassagnes made it clear: Jews are tolerated in their rites because they worship the true God. Muslims, however, worship only the “perfidious Baphomet Muhammad.”⁶⁵ It was even argued categorically that Muslims, unlike Jews, had not been explicitly legitimized as a religious group in Roman and canon law.⁶⁶ Further arguments were added: the eschatological necessity of the conversion of the last Jews at the end of time demanded tolerance and forbearance towards the Jews, simply out of one's own soteriological interest.⁶⁷ Muslims, however, were not affected by these considerations. Furthermore, the existence of Jews and Gentiles was useful for testing and preserving one's own Christian faith.⁶⁸ The extensive peaceableness and submissiveness of the Jewish communities—which, unlike the Muslims on the European periphery, did not pose a threat to the Christian faith—are also repeatedly cited.⁶⁹ The priority of the Jews over the Muslims and heretics, which was clearly formulated in the regulations on mosques and synagogues, was revealed here to be a reflex that was also firmly rooted in the legal tradition.

64 On this prohibition, see X 5.6.4 (*Quia super his*), ed. Friedberg II (1881), 772. See Freidenreich (2011, 57).

65 Jesselin de Cassagnes, *Apparatus super constitutionibus Clementinis*; Vatican City, Biblioteca Apostolica Vaticana, Vat. lat. 2583, f. 101r–211v, f. 191va–b, ad Clem. 5.2.1 (*Cedit*): *Non ergo isti in suis ritibus tollerantur, quia deum verum non colunt, sed istum perfidum baffometum Machometum. Secus Iudeis.* (“They [i.e. the Muslims] are not tolerated in their rites because they do not worship the true God but this perfidious Baphomet Muhammad. The Jews are different.”) The position of Jesselin de Cassagnes is regularly taken up in the comments; for example, in Giovanni da Legnano († 1383), München, Bayerische Staatsbibliothek, Clm 14014, f. 157rb [on Legnano, see Pio (2018)]; Anania I (1497, ad X 5.6); Susannis (1568, f. 11r). The widespread and influential commentary on Clementines of Francesco Zabarella also adopts this position, but attributes it to Matthaëus Romanus; Zabarella (1513, f. 131va), ad Clem. 5.2.1 (*Cedit*): *Secundo opponere, quod non debuerit inhiberi Saracenis adorare Machometum, cum etiam permittatur Iudeis celebrare suas festivitates, nec debent prohiberi per Christianos; eo ti(tulo) Consuluit* [X 5.6.7, ed. Friedberg II (1881, 2:773)] et c. *Sicut Iudei* [X 5.6.9, ed. Friedberg II (1881, 2:774)]. *Solutio Mathei, quod Iudei collunt deum vivum et verum, Saraceni hominem facinorosum et nephandum. Ideo Iudei sustinentur in ritibus eorum, Saraceni non quo ad talem cultum.* (“Secondly, it is objectionable that the Saracens should not be forbidden to worship Mohammed, because the Jews are also allowed to celebrate their feasts and this is also not to be forbidden by the Christians; see in the same title the chapters ‘Consuluit’ and ‘Sicut Iudei’. The solution of Matthew is that Jews venerate the living and true God, but the Saracens adore only a nefarious and sacrilegious man. So, Jews are tolerated in their rites, but the Saracens are not tolerated in such a cult.”) For this passage, see Condorelli (2020, 137). On the commentary of Matthew Romanus, which has been preserved in only a few manuscripts, see Bertram and Rehberg (1997).

66 See the passage of Jesselin de Cassagnes quoted in n. 63.

67 Rosate (1518, f. 42rb, ad C. 1.9.0).

68 Hence, Rosate (1518, f. 42rb, ad C. 1.9.0), but without clear distinction of religious groups: *Iudei tanquam capsarii nobis serviunt. Nam studentibus nobis codices inpurgant, ut per eorum codices, quibus sunt lex et prophete, per quos Christus predicatus est, et fidem nostram probemus cum paganis et aliis infidelibus. Nam cum codices nostri eis sint suspecti, melius eos per codices inimicorum convincimus.* (“The Jews serve us as bookkeepers. For by studying we purify the books, so that it may become clear from their books what the Law and the Prophets are, about whom Christ preached, and so we strengthen our faith with Gentiles and other infidels. For because our books seem suspicious to them, we better convince them with the books of our enemies.”)

69 For this argument, see above at n. 10.

c) Apostasy Outside Christianity

But this legally established hierarchy—Jews before Muslims and Gentiles—proved to be extremely fragile in the late Middle Ages, as the problem of the conversion of Jews to Islam revealed. The nucleus of the debate was not constituted by authoritative commentaries, but instead, by a *Consilium* of the lawyer Oldrado da Ponte, who worked in the environment of the Avignon Curia, drawing on the legal practice of southern France and Spain († 1335).⁷⁰ He leaves unanswered the question of whether a Christian jurisdiction, either clerical or secular, is at all competent. Despite this lingering ambiguity, however, he nevertheless approaches the comparison of religions as a central starting point for the resolution of that ambivalence, for whoever chooses the less bad among two bad ways remains unpunished. To weigh up the lesser evil, Oldrado breaks away from the legal tradition and draws on a long history of biblical exegesis as strategic reserve—above all, Christ’s word: “It will be more bearable for Sodom (i.e. the Gentiles) on the day of judgment than for you (i.e. the Jews)” (Mt 11,24). Oldrado’s position found its way into various commentaries, and this such extensive popularity was also due to the extremely widely disseminated *Singularia* of Lodovico Pontano († 1439). It gained such renown that it was impossible to ignore it in the systematic treatment of the subject.⁷¹ Pontano refers on this occasion to a learned conversation with the Dominican theologian Andreas Chrysoberges († 1452), which suggests that the comparison of Judaism and Islam was an unresolved problem in academic Christian discussion.

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The Spanish canonist and bishop of Avila, Alfonso Tostado de Madrigal († 1455), reports similarly from his own experience that conversions between Islam and Judaism were a thoroughly practical problem.⁷² The particular situation in Castile, with the increased presence of different religions, stimulated this debate and favoured creative solutions. However, this did not result in a certain ranking of the religions. Madrigal also reports that the discussion of this issue among his contemporaries was inconclusive. There are even voices that essentially approve of a conversion from Islam to Judaism, because Judaism is closer to Christianity than Islam, and thus—as a quasi-intermediary status—Judaism is to be preferred.⁷³ He himself disagreed vehemently with this obviously still justifiable view and expressly joined the position

[25]

70 Oldrado da Ponte, Cons. 51, inc. *Iudeus transivit ad sectam Saracenorum*, ed. Zacour (1990, 77, English translation and resolution of the allegations 42–43, for this *Consilium* also 21–22). On this text and the problem of Jewish conversions to Islam, see Stalls (1983); Woelki (2011, 133–135); Freidenreich (2011, 64). Special analyses with reference to the Aragonese context of the problem are offered by Stalls (1983) and García-Arenal (1997, 240–41); Nirenberg (2003, 142–43). About the *Consilia* of Oldrado in general, see also Schmidt (1995); McManus (1999); Valsecchi (2000).

71 Pontano (1508, unfoliated, Sing. 680): *Cras Christus ascendit ad celos. Modo quero, an veniet Iudeus puniendus aliqua pena se convertens ad fidem Sarracenorum. Et de hoc fui alias interrogatus a magistro Andrea de Constantinopoli valentissimo homine coram cardinali Rothomagensi, et mu[s]sitavi, quod nescivi respondere. Demum investigans reperi solum Oldra(dum) de Laude consilio et lege.* (“Tomorrow we celebrate Ascension Day. So, I ask if a Jew is punished for converting to the Saracen faith. This was a question I was once asked by Andrew of Constantinople, an excellent acolyte of the Cardinal of Rouen. I did not speak because I did not know the answer. Finally, I found the answer only in a *Consilium* of Oldradus of Lodi [= Oldrado da Ponte].”) On this passage, see Woelki (2011, 133–35, here also with further information about Andreas Chrysoberges in n. 141). On the textual genre of the *Singularia*, see Woelki (2014). The debate is reported in detail in Johannes Andreae, *Additio ad Duranti III* (1486, f. 210vb); Rosate (1518, f. 42rb–va, ad C. 1.9.0); Anania I (1497, unfoliated, ad X 5.6.18) (*Ex specialii*); Susannis (1568, f. 70v). It is also briefly mentioned in Corsetti (1499, f. 141rb). On Oldrado da Ponte, see n. 70. His comparison of religions was partially based on a liturgical argument: because Christians pray for the Gentiles on their knees on Good Friday, and for the Jews standing, Gentiles were considered preferable to Jews.

72 For this, see Nirenberg (2003, 144–149), with detailed analysis of an unprinted *Consilium* treating the case of a Saracen woman who had converted to Islam, preserved in: Salamanca, Biblioteca Universitaria, ms. 70, f. 86va–111vb.

73 Nirenberg (2003, 149).

of Oldrado and Pontano, to whose arguments he added some theological commonplaces, especially from the Passion story.⁷⁴ Ultimately, the conscious decision to take an incorrect path, be it Islam or Judaism, weighed far more heavily for the Spanish jurist than sticking to the religion into which one was born.⁷⁵ Here, too, the moral economy of sin ultimately triumphed over the dogmatic determination of proximity and distance.

Concluding Remarks

The necessarily selective impressions discussed here demonstrate that practices of comparing different religions and adherents of different faiths were present in medieval legal thinking, although they were not accorded analytical predominance. More intensive attention and impulses for legal development came specifically from jurists who were active in the Spanish kingdoms. Even in this context, however, such comparisons did not result in the construction of a clear-cut hierarchy. Rather, it appears that they remained part-and-parcel of an ongoing process in which relative hierarchies are negotiated with regard to varying challenges of everyday inter-faith encounters. Not least, different gradations and criteria of comparison contributed to these varying outcomes. [26]

General trends are nevertheless apparent. An admittedly ambivalent but very enduring privileging of Judaism over other forms of non-Christian life—notably, Islam—eroded in the late Middle Ages due to a selective inclusion of elements from theological discourse, which are already noticeable in the work of Oldrado da Ponte, recorded by Lodovico Pontano and Alfonso de Madrigal. But these theological elements remained peculiar and somewhat alien in legal thinking and by no means led to a genuine crossover of academic disciplines. The most striking example of distinct scholarly cultures, which remain unmixed in an emulsion-like manner, is arguably the treatise of Marquardo Susanna, whose very extensive theological reflections constitute largely unrelated chapters to the main legal elements of the text. [27]

The inclusion of the theological set pieces helped, above all, in reassessing the position of the Jews in the system of valence of deviant religious groups. Initially, they were privileged compared with Gentiles and Muslims by considerations of the dogmatic proximity to Christianity (i.e., Jews shared in the truth and in the worship of the true God), as well as by pragmatic-social criteria (peaceableness and submissiveness). However, at the threshold of the modern age, they moved to the other end of the legal scale of values, together with the heretics, due to a more moral, eschatological, and theologically armoured argumentation. [28]

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74 Nirenberg (2003, 149); Freidenreich (2011, 64).

75 Nirenberg (2003, 148).

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