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Law and Administration in the Collectio Avellana

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The Collectio Avellana is a collection of 244 various texts, mostly letters of popes and emperors from the period 367 till 533[1]. There is no need to set out the structure of the Collectio since Günther has done so already[2]. The texts 1-40 deal with the schisma of Ursinus and Eulalius, 41-50 with Pelagius, 51-55 are letters otherwise unknown of Pope Leo I, 56-105 other letters, 105-243 letters from or to Pope Hormisdas, and 244 is a letter to the bishop of Tyrus[3]. Of these the imperial letters interest the legal historian in the first place. The reason for this is that much legislation in Late Antiquity was realised through letters to functionaries. The Theodosian Code consists for that reason for the most part of letters to high officials. If they contained the designation of *lex generalis*, or indicated that they were meant to be general, their contents could be considered general. Other letters deal with the preparation, adjustment or implementation of general rules, or with the administration of everyday. They show the interaction between emperor and high functionaries[4]. This is also the case with some of the letters in the Collectio Avellana. And then the question, connected with the transmission of these texts, is: from which archives took the composers of the Collectio them? And might the Avellana supplement our knowledge of imperial legislation[5]?

1. See Markschies, *Collectio Avellana*; Baldwin, s.v. *Collectio Avellana*. There is no entry in the Pauly-Wissowa. As for the text, we have to rely on the edition of Günther, *Epistulae* (Vol. I, III for the contents), and its commentary in Günther, *Avellana-Studien*. Further there is the edition of Meyer, *Epistolae*. There is some literature on the Avellana letters. See the 2018 issue of *Cristianesimo nella Storia* and for an overview *The Collectio Avellana and its Revivals*, with the contribution of Evers, *The Collectio Avellana*, 13-28.

2. Günther, *Avellana-Studien*.

3. In the context of this contribution it is not necessary to enter deeply into the question of the groupings of the letters or on the schisma between Ursinus and Eulalius although these questions deserve more attention. See for the first Evers, *The Collectio Avellana*, 13-28, and for the second Lizzi Testa, *Senatori* and Torres, *The Presence*, 29-49.

4. As Schiavo, *Ricerche*, has shown for the interaction between prefects and emperor in the Late Empire.

5. Honoré has included the Avellana in his Palingenesia of imperial constitutions, an instrument still not fully used, probably because it is only distributed digitally: Honoré,

I shall concentrate on those of the first 40 texts of the Collectio which are of legal interest[6]. These imperial letters are not *leges generales*: they deal with specific matters and are of what we call dispositive nature, they are ordinances. But since we unfortunately do not dispose of many texts of this nature on this level (on provincial level there is more), they are of definite interest for us. The texts 1 to 13 deal with the struggle between Damasus and Ursinus[7], which started in 366/367. The bishop of Rome, Liberius, died in 23 September 366, his adversary the so-called Antipope Felix II on 22 November 365. Liberius' followers wanted Ursinus as his successor, while Felix's followers favoured Damasus as such. Both were elected on the same day, 1 October 366, in different places, with a raid of Damasians on Ursinians and an ensuing massacre. As consequence Ursinus was banished, leaving Damasus as the bishop in residence. Raimondi suggests that in the popular acclamation at the election, the people approved of Damasus and disapproved of Ursinus, this being the reason for the imperial decision[8]. The popular acclamation was certainly important, *vide* the Gesta Senatus and the papal synods. The unrest continued and on a synod in 378 Ursinus was condemned as heretic. The urban prefect was involved in this conflict because of the aspect of public order, but also because he wanted to influence the outcome of the conflict[9]. An example of the way the businesses of both the prefect and the bishop were linked is ep. 3 of 368, the order to build a basilica for St Paul. The prefect must inspect, together with the bishop, the Roman people and the senate, a certain designated area, apparently a public area, and have the basilica build there. The emperor will pay the expenses. Since the emperor had by that time the authority to make decisions regarding public space, it is all in order. Ep. 6 of 367-368 is the

Law in the Crisis of Empire, with the Palingenesia on diskette; now also accessible on https://www.ucl.ac.uk/volterra/laws-database-projet-volterra.

6. It should be mentioned that the remainder of the Collectio does not seem so promising for legal-historical reesearch.

7. On Damasus and Ursinus, see Moberly, s.v. *Damasus*, 246, and Barmby, s.v. *Ursinus*, 995-996. It is not our aim to discuss the dispute between the two candidates, nor to provide a new analysis of the corpora of letters within the Collectio Avellana.

8. Raimondi, *Elezione*, 169-208, referring to CTh 1.16.6 as legal evidence of the requirement. We indeed see in the papal synods the same acclamation system as in the Gesta Senatus.

9. See Günther, *Avellana-Studien*, 3-4. On this conflict: Raimondi, *Elezione*, 169-208; Dunn, *Imperial intervention*, 1-13; Venken-Dupont, *The conflict*, 219-250.

order to reopen church buildings if the disorder amongst the Christians has settled, which may be seen as the exercise of surveying public order (*disciplina publica*)[10].

Ep. 7 of 368 orders the exile of Ursinus' followers from Rome for 20 miles around the city (*Itaque quoniam animadversionum occasionibus non fauemus, Ursini sociis ac ministris, quos praecelsa sublimitas tua propter quietem urbis aeternae de medio putauit esse tollendos, Roma tantum*, ...). As such there is no doubt about it that the emperor could banish people when they threatened public order. The republican magistrates had it and through the *tribunicia potestas* and the *imperium proconsulare* it passed on to the emperors of the Later Empire, while high officials and the provincial governors retained it[11]. And those who went out to agitate by arguing about religion, disturbing the catholic faith, were such persons. This CTh 16.4 makes very clear (for example, CTh 16.4.3 says: *Deportatione dignus est, qui nec generali lege admonitus nee conpetenti sententia emendatus et fidem catholicam turbat et populum*). The constitutions in this title, however, date from 386, 388, 392 and 404. They are too late to have served as basis for the measure in ep. 7. They may be seen as specifications of the conditions under which exile could be imposed. Are these constitutions in the Code perhaps reflecting an existing practice? Did they supersede previous rulings? It is not impossible and in that case there would have been earlier constitutions on this. In accordance with this power to send into exile is the recall from exile in ep. 5 for Ursinus and his followers, dating from before 15 September 367: who can impose, can also rescind a penalty. Apparently his authority to exile existed already and so we see here indeed an application of this power.

More remarkable is, that the emperor writes this to the praetorian prefect, the urban prefect and the vicarius of the latter. Günther assumes all were written on the same day, 12 January 368[12]. This is possible. It appears from ep. 8 that the occasion for the measure was a letter from Aginatius, the vicarius, in which he complained about the tumult the Ursinians caused. It was he who also had to execute the order, as the letter to him implies, for which he could rely on the support of the urban and praetorian

10. It is, in view of the text, not likely that it concerns the execution of a verdict by a judge in a reivindicatory or possessory private law suit to return the church to its owner.
11. Medicus, s.v. *Exilium*, 482-483.
12. Günther, *Epistulae*, at the said texts.

prefect. Thus the combination makes sense: the prefects would have been informed by letter that they were expected to cooperate. But Günther's assertion, that the letters came from the archive of the urban prefect, does not tally with this[13]. If one letter, addressed to the urban prefect, could come from his archive, the other two could have come as well from the archives of the other functionaries. It is not probable that the urban prefect got copies of both these as Günther suggests, at the most only a copy of the letter to Aganitius. But why, if he himself received a letter informing him? And reversely, if such a copying would indeed have taken place, we might equally well expect in the archive of Aganitius the original of the letter to him, and copies of those addressed to the two others: since he had an interest in knowing of the support. But this letter only mentions the urban prefecture, and refers explicitly to the fact that two can do more than one. If one does not want to assume that the compiler used all three archives, the only solution is to assume that all three letters were copied from the copybook of outgoing letters of the imperial chancery. But in that case another question remains: why did the compiler include all three of them and not just only one, ep. 7?

A similar thing we see in ep. 11 and 12, dealing with the partial repeal of Ursinus' banishment. Ep. 11 is directed to the urban prefect, ep. 12 to his vicarius. Ep. 11 must derive from the urban prefect's archive, since it has the imperial greetings (*et manu imperatoris*). That is not likely the case with ep. 12, because in ep. 11 the emperor mentions that he has sent a letter with the same contents to the vicarius (Günther dates both to the same day, between 370 and 371). Ep. 12 must therefore have been taken either from the vicarius' or from the imperial archive, but not from the urban prefect's archive. As to the contents, the same can be said as about ep. 7: it is an ordinance regarding exile.

Ep. 13, issued according to Günther between 9 Augustus 378 and 19 January 379, is more interesting in this respect. It inveighs against those who rebaptise their followers, that is in this case the Ursinians. Rebaptisation implies that the first baptism was not an effective sacrament and undermines, naturally, the authority of those who did it. Heretics often used baptism as a ritual to initiate their followers, or allowed successive baptisms in case of sins. With Christians this would supersede the previous baptism. As such rebap-

13. Günther, *Avellana-Studien*, 12-13.

tisation was condemned[14]. Those bishops who did it were deigned unworthy of being a priest in 371 (CTh 16.6.1) and again in 377 (CTh 16.6.2), when additionally it was ruled that their churches should be handed back to the Catholic Church (there is a special title in the Theodosian Code on this phenomenon, CTh 16.6: *Ne sanctum baptisma iteretur*, with CTh 16.6.1 of Febr. 373 and 2 of 17 October 377, but this latter was issued in Constantinople by Valens; Gratian was at that time in Trier). *Rebaptizatores* was a generic term for heretics. It is not said that Ursinus rebaptised his followers; he is only imputed to have joined after 378 the Arian party, after which his banishment by Gratian followed. Gratian was also actively legislating against heresies, as in CTh 16.5.4 of 22 April 376/378 and in CTh 16.5.5 of 3 August 379[15]. But these laws do not mention banishment. The basis for this ruling must consequently be sought not in the rebaptisation but in the tumult and agitation these Ursinians caused, as indeed the *epistulae* say. Ep. 13 refers to public decrees[16]. The interdiction the emperors pronounce (at one point the majestic plural is forgotten for an *inquam*) is from now on banishment beyond 100 miles from Rome, this is, beyond the jurisdiction of the Urban Prefect[17]. Again there is a constitution (CTh 16.2.35) which says that if a bishop is deposed by his priests and attempts to stir unrest, and tries to get his position again, he will be banished a 100 miles away from Rome. That fits our case, but this law was issued in 400 or 405, while ep. 13 dates from 378 or 379. But the constitution also states that this banishing is according to a previous law of Gratian (*procul ab ea urbe quam infecit secundum legem divae memoriae Gratiani centum milibus vitam agat*), emperor from 367 till 383, and emperor for both parts of the empire in 378 till early

14. See Lake, s.v. *Baptism*, 379-389.

15. See on this Gottfried, *Ambrosius* 52 ss., 58-63 against the Donatists, first simply called *rebaptizatores*. Instead of the term *baptisma* the term *lavacrum* is often used in sources, such as the Theodosian Code.

16. Ep. 13.1-2: «1. *Ordinariorum sententias iudicum aut temporum limes aut contumacis pronuntiatio aut habitum coram partibus sancit examen et haee mediocris auctoritas labefactari atque conuelli nec a potentioribus nec ab impudentibus pertimescit : nostra praeeepta per vestram neglegentiam destituta quae tandem poterit ferre patientia? quam quidem dum despicitis excitatis, ut longae tolerantiae desperatos sumat accentus et officium metu cogat agnosci*. 2. *etiamne uiuidius est, quod Ursini inussit amentia, quam quod serenitas nostra mitibus persuasit edictis, ut omnes, qui impios coetus profanata religione temptarent, uel ad centesimum urbis miliarium pellerentur...*».

17. Kaser-Hackl, *Das römische Zivilprozessrecht*, 537.

January 379. Gratian was very concerned about orthodoxy and recalled in 379 the Edict of Tolerance. If the constitution referred to was one restricted to his western part of the empire, it might date from before 378, or after January 379, but also from the period he could legislate for the entire empire. In both cases it could be cited in CTh 16.2.35, a law issued in Ravenna. In any case, whether issued for the west or in 378 for the entire empire, it may have preceded this epistle. But it is also possible that Gratian's constitution cited in CTh 16.2.35 was the counterpart to ep. 13, meant to generalise the penalty of banishment over the empire (thus: not only against Ursinians), by way of an edictal letter to the Praetorian Prefect (ep. 13 is directed to the Vicar of the City). A first argument for this is the referencing in ep. 13 to bishops deposed by their diocese and trying to recover their seat (2: ... *condemnati iudicio recte sentientium sacerdotum reditum postea uel ad ecclesias, quas contaminauerant, non haberent* ...; 6: *Parmensis episcopus eo perniciosior, quod inclytae urbi magis proximus, et imperitorum multitudinem uicinus exagitat et ecclesiam de qua iudicio sanctorum praesulum deiectus est, inquietat* ...) and the fact that the sanction of banishment beyond a 100 miles is formulated.

The second argument to assume this is the sequel of the letter. In c. 11 and following letters the emperor rules that everyone who, having been condemned by a court of Damasus and five or seven bishops, or by catholics or their concilium, notwithstanding this condemnation retains his church or refuses to appear in court, and instead appeals to secular judges, must be transferred by the secular authorities to a bishop as judge or his delegate. And if partisanship is suspected, he may appeal to the bishop of Rome or a concilium of 15 bishops in the surroundings. Thus we find the confirmation that the deposition of bishops was, indeed, the actual cause of the unrest, and consequently the unreported law of Gratian will most likely have dated from the same time as ep. 13. It was not included in the Code since CTh 16.2.35 recapitulated it efficiently and adds that persons banished on this account may not approach the emperor with petitions (evidently with the plea for revocation of the banishment), and that if they succeeded in obtaining a rescript (evidently with a revocation and obtained by bribery), these rescripts are not valid. Thus it made sense to include this later constitution and not only the previous one[18].

18. Another argument to assume that the Theodosian Code as we possess it did not contain obsolete or superfluous constitutions.

The emperor closes with a reference to the *iustitia naturalis*. One wonders: is this a different justice than the divine one?

The second ruling is interesting in as much an ecclesiastical dispute settlement is confirmed by a secular procedure and verdict. We see here the emergence of canon law[19]. We do not find a parallel for it in the Theodosian Code, but there are two constitutions, issued relatively recently before, which come close to it. CTh 16.2.12 of 355 prohibits the accusation of bishops before secular courts. The emperor fears that otherwise they might be subjected to false accusations by fanatics (and we know that the Ursinians and Damasians did not always keep their heads cool). Accusations of that kind had to be handled before a court of bishops. In CTh 16.2.23 of 376, issued by Gratian in Trier, sets out that ecclesiastical disputes must be handled in the same way as civil cases, thus disputes and light religious delicts must be brought before the local synodes; criminal cases, on the other hand, must be handled by special judges. There was in any case some regulation. The precaution against fanatical and false accusations, which might result from partisanship, consisting of a restriction to ecclesiastical judges and courts in this constitution fits the disposition in the letter against partisanship: both uphold a fair trial. But the letter does more. It sets out precise rules for dealing with these cases and for the appeal from these cases. That was not done before (basing us on the Theodosian Code). These are issued here for the case of unrepenting Ursinians, but there is no reason why it could not have been applied in other cases as well. There were certainly more heretics than the Ursinians and heretic bishops who resisted their deposition and refused to render their churches to the orthodoxy. Yet we do not find it in the Theodosian Code, whereas the banishment had been converted into a general rule. Why not, if it would have been a useful addition to CTh 16.2.23?

One reason could be that the specific procedural rules, although theoretically applicable to other cases, were not envisaged as such. What were the criteria for an imperial text to be considered a *lex generalis*? A constitution of 426 had laid down criteria: if the word *edictum* or *edictalis* had been inserted into the text; if the order to promulgate it in all provinces by edict

19. For this the Council of Sardica of 343 was decisive: see Barnard, *The Council*; on its importance for the development of canonical law: Hess, *The Canons,* 109-127. Thus the decision of 368 fits well with this development.

of the provincial governor; if the emperor expressly stated that it was applicable in similar future cases; and, of course, if it was called a *lex generalis* (CJ 1.14.3). That we do not see in ep. 13. But on the other hand, it says that all have to comply or will be banished, and that the procedural rules apply to all cases (*omnis eius causae dictio*). There is at least a whiff of generality in the text. Further, there is always the possibility that the emperor had issued simultaneously an edict, or sent a letter to the senate, as the set of epp. 21-24 shows so nicely.

But this does not explain the absence of the procedural rules in the Code. CTh 16.2.41 of 411 or 412 repeats the rule of CTh 16.2.12: clerics may not be accused except before bishops. It gives prescriptions for the procedure. The accuser must provide proof. The penalty for a groundless accusation is deposition as bishop, what otherwise would have happened to the accused. As a matter of fact, we see here the normal rules for *delatores* of public crimes applied. Yet there is nothing in CTh 16.2.41 about which court is competent, or about appeal. Was it left to canon law, to the Church to include in a council decree? Or was it simply considered too special, only for the case of the Ursinians, and did the emperor want to keep to the usual rules for appeal? Or existed there indeed further rules but now issued by the urban or praetorian prefect, just as we see for the 5th and 6th century that the praetorian prefects are involved in the regulation and finetuning of legal procedure, as made clear by Schiavo[20]?

Ep. 14 of 418 and following texts form another selection, dating from 418 and later and dealing with the conflict between Bonifatius and Eulalius. Archdeacon Eulalius was elected bishop of Rome on 28 December 418 after the death of Zosimus. But followers of presbyter Bonifatius chose him as bishop. That led, as before with Damasus and Ursinus, to unrest in Rome. It appeared that Eulalius had been chosen in good order. Bonifatius was then banished from Rome but he appealed and the conflict dragged on[21]. Ep. 15 of 419 is an ordinance to the urban prefect to restore order in Rome. Ep. 23 of 419 is a letter to the Senate, dealing with the voluntary jurisdiction of the bishops (the *episcopalis audientia*)[22] and the lack

20. Schiavo, *Ricerche*, treats of the procedural edicts of the praetorian prefects, such as initiation of procedure, evidence and *missio in possessionem*.

21. On Bonifatius see Buchanan, s.v. *Bonifacius (1)*, 327-328; on Eulalius Barmby, s.v. *Eulalius (1)*, 277-279. Also see Laudage, *Kampf*, 42.

22. There exists ample literature on this subject. I restrict myself to the most recent

of time to judge cases, caused by the holidays like Easter. Is it taken from the imperial file book or from the Senate's archives? Its contents could be considered a general law, the text could have been recorded in the minutes of the Senate and deposited it in this way in the archives. Thus here two provenances are possible. The same goes for ep. 24 of 419, which translates the decisions into an edict for the people. Epp. 26, 27, 28, 31, 33, 35 and 37 all deal with public disorders due to Eulalius and as such they fit CTh 16.4 which in its six constitutions, dating from 386 till 404, thus all anterior to the Eulalian troubles, forbids this and sets sanctions.

We have seen that it is not possible without more to say that all letters of Collectio Avellana 1-40 derive from one archive, that of the urban prefect. That has indeed already been maintained and Günther has tried to solve this question[23]. But it was nevertheless still possible to say something more on this point. As to whether the letters can be fitted in the palingenesia of imperial letters and constitutions, this depends on their legal contents. But a survey showed that this did not render anything usable in this respect. There is no connection possible with immediately preceding and following constitutions[24].

On the other hand, these letters gave us a better insight in the reciprocal communication between emperor and functionaries and the way general rules were applied in practice. The mention in CJ 1.14.2 of *relationes* and *suggestiones* which bring problems to the attention of the emperor[25] refer to an exchange between emperor and officials, and here we see how it worked

monograph: Banfi, *Habent illi iudices suos*.

23. He assumes that the prefect also received copies of letters in matters in which he too could be involved, such as judge: Günther, *Avellana-Studien*, 12-13.

24. For this is used the palingenesia of constitutions, provided on disk with Honoré, *Law in the Crisis of Empire* .

25. CJ. 1.14.2 (a. 426): «*Theodos. et Valentin. AA. ad Senatum. Quae ex relationibus vel suggestionibus iudicantium per consultationem in commune florentissimorum sacri nostri palatii procerum auditorium introducto negotio statuimus vel quibuslibet corporibus aut legatis aut provinciae vel civitati vel curiae donavimus, nec generalia iura sint, sed leges fiant his dumtaxat negotiis atque personis, pro quibus fuerint promulgata, nec ab aliquo retractentur: notam infamiae subituro eo, qui vel astute ea interpretari voluerit vel impetrato impugnare rescripto, nec habituro fructum per subreptionem eliciti: et iudices, si dissimulaverint vel ulterius litigantem audierint vel aliquid allegandum admiserint vel sub quodam ambiguitatis colore ad nos rettulerint, triginta librarum auri condemnatione plectendi sunt. D. viii Id. Nov. Ravennae Theodosio xii et Valentiniano ii AA. conss.*».

in practice. They supplement, just as the edicts of the praetorian prefects, the texts we have in the Theodosian Code and which are only the replies of the emperor, and in a shortened version as well.

Further, the examination showed also that constitutions in the Theodosian Code may have had precursors. Without any specification, like the express mention that the rule is introduced, we should be careful to interpret them as new rules. They might be the confirmation of an existing rule, with or without an addition. They may have replaced a previous formulation. And we saw that in one case, that of ep. 13, the reference to a previous not included law of Gratian, could be connected with an Avellan letter and that we could, in all probability, date that lost constitution to the same time slot of 9 August 378 and 19 January 379. When it comes to analyse and supplement the Theodosian Code and particularly its 16th Book, or to supplement the palingenesia of the Late Roman constitutions, the Collectio Avellana is a source which must be taken into consideration because of its legal aspects.

Abstract: The Collectio Avellana is a collection of mainly letters, sent by the pope and the emperor and date from 367 till 533. The imperial letters have scholarly value inasmuch as they are ordinances, directed to the urban prefect or the vicar, of which on this level we do not have much examples. The texts 1–40 deal with the conflicts between Damasus and Ursinus and between Bonifatius and Eulalius, on who was the rightfully elected bishop of Rome. Due to the role the people had in these elections (they had to acclaim candidates), popular riots arose which required the intervention of the emperor. The various ordinances occasioned by these events are examined. They give information about the interaction in the administration and may point to legislation, not elsewhere transmitted.

Keywords: Avellana, Damasus, Ursinus, Bonifatius, Eulalius, CTh 1.16.6

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