

Novella XVII in the light of Lex Iulia de maiestate: Hilary of Arles case study

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1. Abstract

The main focus of this paper is an analysis of the Novella XVII¹ conducted with the aim of giving a general idea on the religious policy of the Emperors Theodosius II and Valentinian III. The edict titled *De episcoporum ordinatione*² is a great example of a legislative act blurring the line between *ius sacrum* and *ius publicum*³. The case presented in the Novel shows an imperial intervention provoked by a conflict between Pope Leo and Hilary, bishop of Arles. According to text of the constitution, the latter was guilty of various ignoble deeds that taken together constituted a serious crime. The character of those deeds taken in conjunction with the Emperor Valentinian's reaction suggests that what Hilary was accused of was *crimen maiestatis*. Some of the factual circumstances of his case are thus congruent with some of the hallmarks of crime described in Lex Iulia de Maiestate from the 1st century BC reproduced in the later Justinian's Digest. The remaining of the condemned deeds of Hilary however do not seem to be by any means understood as a public offence aimed at the Emperor or the State. This factor is thus particularly interesting and paves the way to a proper examination of the genuine reasons behind the imperial interference in the affair in question. Such study leads to a conclusion that the intervention of the Emperor was indeed extraordinary. Under the strong influence of St. Peter's successor Valentinian officially acknowledged the preeminence of Rome before all other churches in the Western Empire. Such act was to give grounds for the further emanation of the papal power as well as blurring the boundaries between the religious and imperial affairs.

¹ Nov. Val. XVII (Haenel XVI); Mommsen, Theodor, Meyer, Paulus (ed.), *Theodosiani leges novellae*, Berlin 1905, pp. 101-102.

² (eng:) On the ordination of bishops. Unless indicated otherwise, all translations in this article are my own.

³ Pietrzak, Michał, *Prawo wyznaniowe*, Warszawa 2013 (5th ed.), p. 57.

2. On law and religion in the Theodosian Code and Novels

The individuality of Christianity in the legal field circa 5th century consisted of a development of institutional and hierarchical features rather than formation of a complete and autonomous legal order⁴. Therefore the dependance of a religion on the State in such case remains quite obvious. It thus raises a question of more theoretical nature. Whether it was truly necessary for the legislator to interfere in the religious matters or „he”⁵ just took advantage of the public law in order to promote Christianity or manifest, declare the genuine faith of the emperor. The alternative case scenario would be that of using imperial constitutions with the aim of setting frames to the religion; that would be of a secular state approach. Establishing clear boundaries between the State and the religion alongside with its autonomy. Instead, the approach of the Emperors since Constantine⁶ appeared to be the exact opposite. To realize that it is enough just to have a rapid look at the Theodosian Code⁷. Apart from the specific ecclesiastical edicts granting privileges to the Church and its officials, there was also a whole chapter dedicated to the religion only⁸. Religion in the wide meaning. Understood as a cult, affirmation of faith and high regard for what had been established by the religious authority of the ancestors⁹.

⁴ Monnickendam, Yifat, *Late Antique Christian Law in the Eastern Empire. Toward a New Paradigm*, (in:) *Studies in Late Antiquity*, Spring 2018, p. 44.

⁵ The Theodosian Code originated in a decision of the emperor Theodosius II announced to the senate of Constantinople in a constitution of 26th March 429. It was however, likewise any other ancient codification, prepared by an editorial commission. The whole undertaking was meant to be a sequel to the codes of Gregorius and Hermogenianus. (Matthews, John F., *Laying Down the Law. A study of the Theodosian Code.*, Yale University Press: New Heaven, London 2000, p. 10).

⁶ Wipszycka, Ewa, *Kościół w świecie późnego antyku*, Warszawa 2017 (2nd ed.), p. 134.

⁷ C. Th. XVI; Book XVI of the Theodosian Code contains the following chapters dedicated to the religion: 1. *De fide Catholica*; 2. *De episcopis, ecclesiis et clericis*; 3. *De monachis*; 4. *De his, qui super religione contendunt*; 5. *De hereticis*; 6. *Ne sanctum baptismum iteretur*; 7. *De apostatis*; 8. *De Iudaeis, caelicolis et Samaritanis*; 9. *Ne Christianum mancipium Iudaeus habeat*; 10. *De paganis, sacrificiis et templis*; 11. *De religione*. See also: Boyd, William, *The ecclesiastical edicts of the Theodosian Code*, Columbia University Press: New York 1905.

⁸ C.Th. 16. 11. (Brev. 11. 5): *De Religione*.

⁹ C. Th. 16. 11. 3: (...) *Ea, quae circa catholicam legem vel olim ordinavit antiquitas vel patentum nostrorum auctoritas religiosa constituit vel nostra serenitas roboravit, novella superstitione submota integra et inviolata custodiri praecipimus.* (...).

3. *Novella XVII*

i. Introduction

Novella XVII issued in 445 by the Emperor Valentinian is one of many constitutions decreed in the Western Empire in the 5th Century. While there are only 26 Novels of Theodosius, the number of laws decreed by Valentinian, significantly higher, is 36. Although it may not seem as a groundbreaking difference it may be indeed quite thought-provoking. It was thus shortly before the collapse of the Western Empire that the above mentioned laws entered into force ¹⁰.

ii. Text of the Novel

The text of the Novel XVII ¹¹ consists of a letter addressed to Aetius, Patrician, Count and Master of both Branches of the Military Service by the emperor Valentinian III (cosigned by Theodosius II) on the 8th of July 445 CE. It starts with an affirmation of Christian faith and religion¹² which, according to the author, are of particular support to the imperial ruling. Following that, Valentinian refers to the leading role of the City of Rome in religious matters and underlines the primacy of the Apostolic See. He also presents the grounds of such statement. As to his argumentation, a universal (that is: of all the members) recognition of the power of the Apostolic See is crucial for the maintenance of peace. Having clarified that, he then proceeds to the merit, which is the case of Hilary ¹³. According to the text, Hilary was the first one to somehow violate the peace of the churches, for what is attested in a „trustworthy report” of Pope Leo of Rome¹⁴. As the report states, Hilary has attempted to presume certain illicit acts the result of which was an *abominabilis tumultus* in the transalpine churches. His ignoble deeds were to be the following:

- undue appropriation of some episcopal ordinations;
- undue removal of some of the bishops;
- unsuitable (episcopal) ordinations against the will of the citizens;
- gathering of an armed band;
- hostile invasion;

¹⁰ Dickerman Williams, C., Introduction (in:) Pharr, C., *Theodosian Code and Novels and the Sirmondian Constitutions a translation with commentary, glossary, and bibliography*, Princeton, New Jersey 1952, p. xvii

¹¹ Nov. Val. XVII.

¹² The concept of *religio* is described by Caroline Humfress in: Humfress, Caroline, *Orthodoxy and the Courts in Late Antiquity*, Oxford: Oxford University Press, 2007, pp. 235-237.

¹³ Saint Hilarius, the Bishop of Arles; for curriculum vitae: Starowieyski, Marek; Szymusiak, Jan, *Słownik wczesnochrześcijańskiego piśmiennictwa*, Poznań 1971, p. 192; *Vita S. Hilarii Arelatensis* (as it is commonly believed, of the authorship of S. Honoratus of Marseille).

¹⁴ This argument seems to be, above all others, extremely manipulated. Should the Pope be party to the conflict, his report was anything but trustworthy.

- leading (his army) to war.

Valentinian describes those acts as crimes against both the maiestas of the Empire and the reverence due to the Apostolic See. He then mentions a duly conducted trial that would result in rendering a sentence against Hilary- however still bishop of Arles, as he had not been removed by dint of the „humanity of his merciful superior”. That sentence was to be valid even without imperial sanction as the Emperor recognised papal jurisdiction in ecclesiastical matters ¹⁵. The Emperor went much further, openly prohibiting anyone to mingle arm into the ecclesiastical matters or even to oppose the regulations of the High Priest of Rome. Moreover, he defines those deeds with a name of the biggest crime ¹⁶. In order to avoid such practice in future, he decrees that the bishops of any provinces shall not attempt anything contrary to the ancient custom ¹⁷ without the authorisation of the Pope of the Eternal City. Finally, Valentinian gives binding power ¹⁸ to any sanction of the Apostolic See so that should any bishop called for trial ¹⁹ to Rome deny going, he would be captured and forced to do so by the governor of his province. Valentinian concludes the letter establishing a fine of ten pounds of gold for any judge who will permit that the imperial commands are violated.

iii. Main characteristics

A remarkable feature of such genre of laws as Novel XVII is that they have two different dimensions; an individual one and a more abstract one. It is thus clearly visible in *De episcoporum ordinatione*. Such legal text was of two purposes. On one hand it was aimed at a particular problem, following the presented factual circumstances. In this case it is the conflict of Leo and Hilary ²⁰. The Emperor used his legislative power to express his disregard towards the actions of the latter. Moreover he first addressed the text to Aetius. Presumably due to the fact that Aetius was a person

¹⁵ The original text goes as follows: *Quid enim tanti pontificis auctoritati in ecclesias non liceret?*

¹⁶ Valentinian describes it as *maximum crimen (quod est maximi criminis)*; Nov. Val. XVII.

¹⁷ *Contra consuetudinem veterem*; this ancient custom however is not explained in any way in the text.

¹⁸ As that of public law; Valentinian uses a very straight forward wording: *pro lege sit quidquid sanxit vel sanxerit*, and so the use of *lex* leaves the public character of such regulation beyond any doubt.

¹⁹ The latin term *iudicium* that is used here refers to the *iudicium episcopale* being the very same as the later justinianic *episcopalis audientia*. For further explanation: Sirks, A. J. B., *The episcopalis audientia in Late Antiquity*, (in:) *Droit et cultures* [En ligne], 65 | 2013-1, mis en ligne le 12 septembre 2013, consulté le 11 mars 2021. URL : <http://journals.openedition.org/droitcultures/3005>; see also: L'audientia episcopalis, organisation et développement, Gaudemet, J. *L'Eglise dans l'Empire Romain*, Paris 1989 (2nd ed.), p. 230; Banfi, Antonio, *Habent illi iudices suos. Studi sull'esclusività della giurisdizione ecclesiastica e sulle origini del privilegium fori in diritto romano e bizantino*, Milano 2005.

²⁰ The view of the pope himself is expressed i. a. in the dossier for the Second Roman Council, assembled in relation with the case of Hilary; *Concilium Romanum II sub Leone I. In causa Hilarii Arelatensis episcopi anno domini 445 celebratum* (in:) *Sacrorum conciliorum nova et amplissima collectio*, Tomus VI, ed: Mansi J. D., Labbe Ph., (repr.), pp. 463- 464.

who could possibly tend to support the incorrect ²¹ party of the given conflict ²². On the other hand the Novel promulgated as an act of public law had binding power in the whole Empire and was thus applicable erga omnes. This public legal character can be observed particularly in the final part of the text. Not only was it the aim of the Emperor to solve the particular case of Hilary, but also to make sure that a similar one would not occur. It was therefore crucial for Valentinian to provide a legal remedy that would be effective in any analogical situation. His idea however seems to be both the most surprising and risky one. Giving binding power to any sanction of the Apostolic See in the discussed matter goes far beyond a standard solution.

4. Lex Iulia de maiestate; on the concept of maiestas

i. Lex Iulia de maiestate as a iudicium publicum

The Institutes of Justinian in book four ²³ provide a list of the iudicia publica ²⁴. Lex Iulia de maiestate appears as the first one mentioned there. The descriptions of the law goes as follows: *Publica autem iudicia sunt haec. Lex Iulia maiestatis, quae in eos qui contra imperatorem vel rem publicam aliquid moliti sunt suum vigorem extendit. Cuius poena animae amissionem sustinet, et memoria rei et post mortem damnatur* ²⁵. As portrayed above, the offence in question could be aimed either at the emperor or the state itself. Such division seems to be successive to the original form of *Lex Iulia de maiestate*. When it was first issued ²⁶ the concept of *maiestas* of the princeps was not identical with the *maiestas populi romani* ²⁷. The latter is that of the Roman People, and in consequence of the state as a whole. Both the offence of the personification of the authority - *princeps*, and that of the subject of the very same authority - *populus* were seen as an expression of disregard for the precedent power. However since there was no equal sign between the two aforementioned „owners" of maiestas, neither the term could have equal significance in

²¹ That is of course Hilary since, as we know from the very beginning, in this case Pope Leo is the one enjoying imperial favour.

²² Vide: Mathisen, Ralph W., *Hilarius, Germanus, and Lupus: The Aristocratic Background of the Chelidonium Affair*, Phoenix, vol. 33 1979, p. 164.

²³ Inst. J. 4. 18. 3.

²⁴ The very concept of a public trial in the Roman Law has been a subject of many research. From the perspective of this paper it is not necessary to outline the characteristics of *iudicium publicum* as such. A detailed description of the concept, its evolution and characteristics can be found in: Bauman, Richard A., *Crime and Punishment in Ancient Rome*, London 1996, pp. 166- 123.

²⁵ Inst. J. 4. 18. 3. Principium; (eng:) „The public trials are thus the following. Lex Iulia maiestatis, which extends its recognition towards all those who attempt something against the emperor or the state.”

²⁶ The authorship of this law and therefore the exact period when it appeared remains unclear and is subject of academic disputes; see: Bauman, Richard. A., *Crime and Punishment...*, p. 267.

²⁷ Bauman, Richard A., *The Crimen Maiestatis in the Roman Republic and Augustan Principate*, Johannesburg: Witwatersrand University Press, 1967, p. 226.

both cases. Such legal status of maiestas had been changing alongside with the gradual changes of the regime. As to simplify; since the state power ceased to be understood as the exclusive competence of the people, and became a competence of the emperor, the maiestas of the latter would become the one of the state itself. There is enough evidence to claim that the concept of maiestas of the princeps substituted the hitherto maiestas of the Roman People already c. the third century CE ²⁸. The former thus became an autonomous technical legal concept that did not require to be taken in conjunction with the latter.

ii. *Hallmarks of crime*

A detailed description of Lex Iulia de maiestate is portrayed in the Digest ²⁹. It consists of a juxtaposition of fragments of juristic text of authorship of 7 jurists: Ulpianus, Marcianus, Scaevola, Venonius, Modestinus, Papinianus and Hermogenianus. Most of them introduce different hallmarks of crime. As a consequence, the scope of application of this law seems to be immensely wide. However, from the perspective of Novella XVII only some of those hallmarks are relevant. That would be those presented by Ulpianus³⁰ and Marcianus ³¹.

Ulpian starts with a definition of *crimen maiestatis* ³². According to what he writes, *crimen maiestatis* is to be understood as any action committed against the Roman People, or against their security. That makes it seem congruent with the aforementioned definition from the Institutes of Justinian. The jurist then proceeds to describe examples of actions contrary to the Law. Once more, there is no need to examine the whole text. The following fragment is perfectly sufficient:

„Quo tenetur is (...) quo armati homines cum telis lapidibusve in urbe sint convenientve adversus rem publicam, locave occupentur vel templa, quove coetus conventusve fiat hominesve ad seditionem convocentur: cuiusve opera consilio malo consilium initum erit, quo quis magistratus populi Romani quive imperium potestatemve habet occidatur: quove quis contra rem publicam

²⁸ Bauman, Richard A., *The Crimen Maiestatis...*, p. 288.

²⁹ Dig. 48. 4.

³⁰ Dig. 48. 4. 1.

³¹ Dig. 48. 4. 3.

³² The alternative names of the discussed law are: *crimen maiestatis populi romani imminutae*, *crimen maiestatis imminutae*, *crimen maiestatis minutae*, or *maiestas*. See: Bauman, Richard A., *The Crimen Maiestatis...*, p. vii. However the last term may lead to a confusion with the *maiestas* understood as a technical legal concept.

*arma ferat (...) quive milites sollicitaverit concitaveritve, quo seditio tumultusve adversus rem publicam fiat.”*³³

Among the deeds enumerated by Ulpian there are four particularly interesting; that would be:

- gathering together men armed with stones or offensive weapons;
- bearing weapons against the state;
- agitating soldiers;
- organising an assembly or a violent commotion against the state.

Whereas in the version of Marcianus, the essential fragment would be the following:

„Lex autem Iulia maiestatis praecipit eum, qui maiestatem publicam laeserit, teneri: qualis est ille, qui in bellis cesserit aut arcem tenuerit aut castra concesserit. Eadem lege tenetur et qui iniussu principis bellum gesserit dilectumve habuerit exercitum comparaverit (...)”

Hither the blameworthy actions would be:

- leading (an army) to war;
- ordering a mobilisation of an army;
- collecting an army;

without the consent or against the orders of the emperor.

5. Hilary’s case in the light of Lex Iulia de maiestate

i. Comparative analysis

The main characteristics of the Novel XVII as well as those of the Lex Iulia de maiestate have already been pointed out. One can now focus on their resemblances. Namely on the congruence of the factual circumstances of Hilary’s case as pointed out in the Novel with the hallmarks of crime from Lex Iulia de maiestate. There is no shadow of doubt that some of Hilary’s ignoble deeds correspond with the types of actions contrary to lex maiestatis according to both Ulpianus and Marcianus’ versions. Those would be: gathering an armed band, hostile invasion,

³³ (eng.) „<with this crime> will be charged the one who (...) <makes> armed men with stones or weapons stay in the city or gather there against the Republic, <the one who makes armed men> occupy places or temples, or the one who makes an assembly, or by whom men are summoned for an assembly; or by whose malicious efforts a counsel has been initiated so that someone of the magistrates of the Roman People or someone who holds either imperium or power would be killed; or the one who bears weapons against the Republic (...) or the one who agitated or rushed soldiers, or <the one who> organises an assembly or a violent commotion against the Republic.”

leading (his) army to war³⁴. A question thus arises in relation to an eventual qualification of the rest of actions condemned by Valentinian, since those had nothing do do with the *maiestas*³⁵.

ii. Reasons behind the imperial reaction

It is worth recalling, that the Emperor named the deeds of Hilary as contrary to the *maiestas* of the State and to the reverence for the Apostolic See. That is in fact an alternative; some of the deeds were contrary to the *maiestas* of the State and others to the reverence of the Apostolic See. Since this has been clarified, the remaining actions of Hilarius, namely: undue appropriation of some episcopal ordinations; undue removal of some of the bishops; unsuitable (episcopal) ordinations against the will of the citizens; would be classified as pertaining to the second category. Such behaviour was indeed contrary to the will of the superior of the Apostolic See. Although Hilary openly disregarded the person of St. Peter's successor, this was by no means to be understood as a public offence. The preeminence of the pope o Rome and so of the Apostolic See was originally only honorific³⁶. Novella XVII of the Emperor Valentinian is in fact the first imperial constitution that acknowledges the primacy of the Church of Rome over other churches³⁷. The delivery of such law must have been forced by the adamant attitude of Leo³⁸. This factor is presumably the most remarkable aspect of the case of the Bishop of Arles. The very fact that the pope did not seem thrilled about the welfare of the Gallic aristocrats obtaining episcopal office was not surprising at all. Whereas the peculiar submission of the Emperor and his interference in the affair was startling indeed. The very fact that the Novel XVII was, as mentioned above, the first imperial act to recognise the primacy of Rome and her Bishop may be a sufficient justification of this thesis.

³⁴ Vide: chapter 3. Novella XVII, ii. Text of the Novel.

³⁵ In this context *maiestas* is to be understood in both meanings; i. e. *maiestas principi* or *maiestas imperii* alongside with the *crimen maiestatis*. Neither the deeds in question were compatible with the hallmarks of crime nor aimed at the majesty of the Emperor.

³⁶ The historical context behind the development of papal influence is explained in: Wipszycka, Ewa, *Op. cit.*, pp. 53-64.

³⁷ *ibidem*, p. 64.

³⁸ Vide: *Attitude de Léon* (in:) Gaudemet, J., *Op. Cit*, pp. 433-434.

6. Conclusions

In spite of the fact that Novella XVII describes an individual case and hence an individually-oriented legal remedy one can notice in it a reflection of the imperial religious policy as a whole ³⁹. Once this has been made clear it is also worth recalling that in the light of the Emperor's immediate reaction to the pope's complaint there was no question of a fair trial. After all, Hilary had not faced any legal repercussions and even remained in his see. Despite the latter Valentinian openly condemned his behaviour that he had only known of due to a unilateral report of the second party of the conflict. The submission of the Emperor under the pressure of pope is quite a remarkable symptom of the approach of the former towards the religious affairs. Not any less attention worthy is the fact that alongside with the recognition of his primacy the Bishop of Rome had been given a specific legislative power in the field of *iudicium* ⁴⁰. The favours that the pope had been provided did not seem as consequences of a consistent imperial religious policy but rather a breakthrough from the latter. In the view of all the above Novella XVII should be considered one of the crucial acts regarding the development of the relations between Church and State in the late antiquity.

³⁹ It is not the aim of this paper to present the whole evolution of the imperial approach towards religious matters and hence the development of the religious policy. A brief description of the whole process can be found in more specific studies: e. g. Hunt, Hannah, *Byzantine Christianity*, in: *The Blackwell Companion to Eastern Christianity*, Ken Parry (ed.), Blackwell Publishing Ltd: 2010, pp. 73-80.

⁴⁰ Vide: Chapter 3. Novella XVII, ii. Text of the Novel; *in fine*.

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