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## THE ABUSES OF *EXACTORES* AND THE *LAESIO ENORMIS* – A FEW REMARKS

Abuses of tax collectors were frequently quoted by legal and narrative historical sources dating from Roman times<sup>1</sup>. According to a common opinion the great number of emperors' enactments concerning them demonstrate the increase of abuses and corruption in Late Antiquity, which seems to be an exaggeration<sup>2</sup>. The emperors constitutions expressed first of all the current political views shared by the emperor himself and the circle of his closest collaborators. The bombastic language and the repetition of the same items in imperial law were used as the means to teach subjects and state officers about them<sup>3</sup>. In a world without mass media, the

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<sup>1</sup> The latin term *lex* was then the equivalent to *constitutio principis*. Cf. e.g. E. VOLTERRA, *Il problema del testo delle costituzioni imperiali*, [in:] *Atti del II Congresso Internazionale della Società Italiana di Storia del Diritto, Venezia, 18–22 Settembre 1967*, ed. B. PARADISI, vol. II, Firenze 1971, p. 821–1097; F. MILLAR, *The Emperor in the Roman World (31 B.C. – A.D. 337)*, London 1977, esp. p. 228–240, 252–259, 313–341; N. VAN DER WAL, *Die Textfassung der spätromischen Kaisergesetze in den Codices*, BIDR 83, 1980, p. 1–27; P. KUSMAUL, *Pragmaticum und Lex. Formen spätromischer Gesetzgebung 408–457*, Göttingen 1981, esp. p. 75–77; N. VAN DER WAL, 'Edictum' und 'lex generalis'. *Form und Inhalt der Kaisergesetze im spätromischen Reich*, RIDA 28, 1981, p. 277–313; D. LIEBS, *Das Gesetz im spätromischen Recht*, [in:] *Das Gesetz in Spätantike und frühem Mittelalter. 4. Symposium der Kommission „Die Funktion des Gesetzes in Geschichte und Gegenwart“ der Akademie der Wissenschaften in Göttingen*, ed. W. SELLERT, Göttingen 1992, p. 11–27; N. VAN DER WAL, *Opuscula varii argumenti*, SGr 6, 1999, esp. p. 141–146.

<sup>2</sup> Cf. R.M. HONIG, *Humanitas und Rhetorik in spätromischen Kaisergesetzen: Studien zur Gesinnungsgrundlage des Dominats*, Göttingen 1960; W.E. VOSS, *Recht und Rhetorik in den Kaisergesetzen der Spätantike. Eine Untersuchung zum nachklassischen Kauf- und Übereignungsrecht*, Frankfurt am Main 1982, esp. p. 33–81; J. HARRIES, *Law and Empire in Late Antiquity*, Cambridge 1999, p. 56–98 – against the opinion about their limited effectiveness as stated in e.g. by A.H.M. JONES, *The Later Roman Empire (284–602). a social, economic and administrative Survey*, vol. II, Oxford–Cambridge Mass. 1964, p. 741, 752; R. MACMULLEN, *Roman Government's Response to Crisis A.D. 235–337*, New Heaven–London 1976, p. 71–95, or IDEM, *Corruption and the Decline of Rome*, New Heaven–London 1988, p. 168; J.L. CAÑIZAR PALACIOS, *Propaganda y Codex Theodosianus*, Madrid 2005; F. MILLAR, *A Greek Roman Empire: Power and Belief under Theodosius II (408–450)*, Berkeley–Los Angeles 2006, esp. p. 7–13, 34–38; M. STACHURA, *Wrogowie porządku publicznego. Studium zjawiska agresji językowej w Kodeksie Teodozjusza, Nowelach Postteodozjańskich i Konstytucjach Sirmondiańskich*, Kraków 2011, *passim*.

<sup>3</sup> *Constitutiones* were usually signed letters of the emperor, written in Latin (in the Western part) or Greek (in the Eastern part). Cf. G. VIDÉN, *The Roman Chancery Tradition. Studies in the Language of Codex Theodosianus and Cassiodorus' Variae*, Göteborg 1984; F. MILLAR, *A Greek-Roman Empire...*, p. 1–38.

constitutions played the role of an official channel of distribution of the emperor's views, despite the high level of illiteracy and the actual multilingualism in the late Roman empire<sup>4</sup>.

In the current study only one example of the emperor's enactment is discussed in detail.

In 392, on January 13<sup>th</sup>, in the city of Hadrumetum the Magnillius, vicar of the African diocese received a constitution issued almost half year before on behalf of Valentinian II, Theodosius I and Arcadius in Aquileia (June 19<sup>th</sup>, 391)<sup>5</sup>. The constitution, probably the emperor's rescript, concerned the control of the sale of property belonging to tax debtors by state auctioneer<sup>6</sup>. It emphasized that the price of property obtained by tax collectors (*exactores*) at a public auction (*subhastatio publica*) should be analogous to the interest of the owner, stating that it is thoroughly unjust that the property of others should be sold at an auction subject to favoritism, so that too little is added to the public account, while the debtor loses everything.<sup>7</sup>

<sup>4</sup> About illiteracy in Late Antiquity cf. W.V. HARRIS, *Ancient Literacy*, Cambridge Mass. 1991, esp. p. 285–322; A. KOMPA, *Edukacja w Konstantynopolu*, [in:] *Konstantynopol – Nowy Rzym. Miasto i ludzie w okresie wczesnobizantyńskim*, ed. M.J. LESZKA, T. WOLIŃSKA, Warszawa 2011, p. 583sq. About multilingualism in antiquity cf. e.g. J.N. ADAMS, *Bilingualism and the Latin language*, Cambridge 2003; M. PARCA, *Local languages and native cultures*, [in:] J. BODEL, *Epigraphic Evidence. Ancient History from Inscriptions*, London 2001 [Polish ed. et transl. A. BAZIÓR, Poznań 2008], p. 57–72.

<sup>5</sup> *Codex Theodosianus*, X, 17, 3 (a. 391/392), ed. Th. MOMMSEN, P.M. MEYER, [in:] *Theodosiani libri XVI cum Constitutionibus Sirmondianis et leges novellae ad Theodosianum pertinentes*, vol. I–II, Berolini 1954 (cetera: CTh):

*Imppp. Valentinianus, Theodosius et Arcadius aaa. ad Magnillum vicarium Africae. Si quos debitorum mole depressos necessitas publicae rationis adstringat proprias distrahere facultates, rei qualitas et redituum quantitas aestimetur, ne, sub nomine subhastationis publicae locus fraudibus relinquatur et, possessionibus vilioribus distractis, plus exactor ex gratia quam debitor ex pretio consequatur. Hi postremo, sub empti titulo, perpetuo dominii iure potiantur, qui tantum annumeraverint fisco, quantum exegerit utilitas privatorum. Etenim periniquum est, ut, alienis bonis sub gratiosa auctione distractis, parum accedat publico nomini, quum totum pereat debitori. Dat. XIII. kal. Aquileia, acc. id. ian. Hadrumeti, post cons. Tatiani et Symmachi vv. cc.*

Cf. J. GOTHOFREDUS, [in:] *Codex Theodosianus, cum perpetuis commentariis Jacobi Gothofredi* [...], vol. III, Lipsiae 1745, p. 482sq.

<sup>6</sup> Rescripts were the emperor's answers to queries and proposals from officials and private persons. Cf. e.g. B. SIRKS, *Making a Request to the Emperor: Rescripts in the Roman Empire*, [in:] *Administration, prosopography and appointment policies in the Roman empire: Proceedings of the First Workshop of the International Network, Impact of Empire (Roman Empire, 27 B.C. – A.D. 406)*, Leiden, June 28 – July 1, 2000, ed. L. DE BLOIS, Amsterdam 2001, p. 121–135, and about rescripts in *Codex Theodosianus*: E.V. SILVESTROVA, *Imperial rescripts and the Theodosian Code*, [in:] *Fides – Humanitas – Ius. Studii in onore di Luigi Labruna*, ed. C. CASCIONE, C.M. DORIA, vol. VII, Napoli 2007, p. 5157–5163.

<sup>7</sup> Translation according to *The Theodosian Code and Novels and the Sirmondian Constitutions*, ed. C. PHARR, Princeton 1952, p. 282sq. The buyer obtained the *perpetuo dominii iure*; it means that he possibly became *possessor ex iusta causa* and consequently after presentation of property (*traditio*), the owner. Cf. C.A. CANNATA, 'Possessio', 'possessor', 'possidere' nelle fonti giuridiche del Basso Impero romano, Milano 1962, p. 106–109.

The pagan Magnillus was an experienced state officer and the post of vicar was the last stage in his career<sup>8</sup>.

An excerpt from the constitution is known from the *Theodosian Code* (tenth book, title 17: *De fide et iure hastae* – ‘The validity and legal effect of state auctions’), issued in 438 A.D.<sup>9</sup> A similar version is preserved in *Codex Iustinianus*, issued in 534, where the enactment under discussion is placed in book 4, title 44: *De rescindenda venditione* (‘Concerning rescission of a sale’)<sup>10</sup>.

After the publication of *Codex Theodosianus* in 438 and *Codex Iustinianus* in 534, the constitution was surely valid in the entire Roman Empire, because it does not directly follow from the content that it had had such value earlier, i.e. before the issuing of the former of the two mentioned codes<sup>11</sup>.

<sup>8</sup> Cf. C. PALLU DE LESSERT, *Fastes des provinces africaines (Proconsulaire, Numidie, Maurétanies) sous la domination romaine*, vol. II, *Bas-Empire*, Paris 1901, p. 214sq; PLRE, vol. I (Magnillus); J. MATTHEWS, *Western Aristocracies and Imperial Court A.D. 364–425*, Oxford 1975, p. 191, 243; D. NELLEN, *Viri litterati. Gebildetes Beamtentum und spätrömisches Reich im Westen zwischen 284 und 395 nach Christus*, Bochum 1977, p. 78–80; W. KUHOFF, *Studien zur zivilien senatorischen Laufbahn im 4. Jahrhundert n. Chr. Ämter und Amtsinhabern in clarissimus und spektabilität*, Frankfurt am Main–Bern 1983, esp. p. 316, n. 68.

<sup>9</sup> Cf. further, an. 11. The constitution is a rare example of an imperial enactment preserved by this code, which gave information both about the place and date of publication and the place and date of its receiving. Cf. P. LEPORÉ, *Una problema ancora aperto: i rapporti legislativi tra oriente ed occidente nel impero tardo romano*, SDHI 66, 2000, p. 354.

<sup>10</sup> *Codex Iustinianus*, IV, 44, 16 (a. 392), ed. P. KRUEGER, [in:] *Corpus Iuris Civilis*, vol. II, Berolini 1954 (cetera: CJ):

*Imperatores Valentinianus, Theodosius, Arcadius AAA ad Magnilium vicarium Africae. Si quos debitorum mole depressos necessitas publicae rationis adstringat proprias distrahere facultates, rei qualitas et redituum quantitas aestimetur nec sub nomine subhastationis publicae locus fraudibus relinquatur et possessionibus vilioribus distractis plus exactor ex gratia quam debitor ex pretio consequatur. 1. Hi postremo sub empti titulo perpetuo dominii iure potiantur, qui tantum adnumeraverint fisco, quantum exegerit utilitas privatorum. Etenim periniquum est, ut alienis bonis sub gratiosa auctione distractis parum accedat publico nomini, cum totum pereat debitori. D. XIII k. Iul. Aquileiae. Acc. id. Ian. Hadrumenti post consulatum Tatiani et Symmachi vv. cc.*

<sup>11</sup> About the codification works under Theodosius II contemporary works only: S.-A. FUSCO, *Constitutiones principum und Kodifikation in der Spätantike. Ein Kaisererlaß aus dem Jahre 422 im „Codex Theodosianus“*, Chi 4, 1974, p. 609–628; G.G. ARCHI, *Teodosio II e la sua codificazione*, Napoli 1976; J. GAUDEMET, *Aspects politiques de la codification théodosienne*, [in:] *Instituzioni giuridiche e realtà politiche nel tardo impero (III–V sec. d.C.)*, Atti di un incontro tra storici e giuristi, Firenze, 2–4 Maggio 1974, ed. IDEM, Milano 1976, p. 261–279; S.-A. FUSCO, *Rechtspolitik in der Spätantike. Unterschiede zwischen dem Westen und dem Osten und ihre Bedingungen*, Sae 32, 1981, p. 255–272; D. MANFREDINI ARRIGO, *Il Codex Theodosianus e il Codex Magisterium vitae*, AARC 5, 1983, p. 177–208; W. TURPIN, *The Law Codes and Late Roman Law*, RIDA 32, 1985, p. 339–353; T. HONORÉ, *The Making of the Theodosian Code*, ZSSR.RA 116, 1986, p. 133–222; *The Theodosian Code. Studies in the Imperial Law of Late Antiquity*, ed. J. HARRIES, I. WOOD, London 1993; M. SARGENTI, *Il Codice Teodosiano fra mito e realtà*, SDHI 61, 1995, p. 373–398; K. ILSKI, W. MACIEJEWSKI, *Technika redagowania Kodeksu Teodozjusza na tle ustawodawstwa antynestoriańskiego*, CPH 48, 1996, p. 31–45; T. HONORÉ, *Law in the Crisis of Empire 379–455 A.D. The Theodosian Dynasty and Its Quaestors*, Oxford 1998; J. HARRIES, *Law and Empire...*, p. 59–64; J.F. MATTHEWS, *Lying Down the Law. a Study of the Theodosian Code*, New Heaven–London 2000; D. SCHLINKERT, *Between Emperor, Court and Senatorial Order: The Codification of the Codex Theodosianus*, AS 32, 2002, p. 283–294; B. SIRKS, *The Theodosian Code*.

*CTh*, X, 17, 3 was supplemented in the Latin West by an *interpretatio*, a paraphrase written possibly in the second half of the 5<sup>th</sup> century in Gaul, describing shortly its meaning<sup>12</sup>. The constitution and *interpretatio* were quoted by *Lex Romana Visigothorum* or *Breviary* of Alaric, issued in 506 for their Roman subjects, a compilation of *vulgar law* and the main source of Roman law in early medieval Western Europe<sup>13</sup>.

The control of state auctions was part of the vicar's administrative duties as the head of the dioecesan administration<sup>14</sup>. *CTh*, X, 17, 3 (= *CJ*, IV, 44, 16) concerned

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*a Study*, Friedrichsdorf 2007 – summarizing his former studies – but see the critical review: D. LIEBS [in:] *ZSSR.RA* 127, 2010, p. 517–539. Cf. about the *Codex Iustinianus* more detailed studies only: P. KRÜGER, *Kritik des justinianischen Codex*, Berlin 1867; P. JÖRS, *Codex Justinianus*, [in:] *RE*, vol. IV, pars 7, 1900, col. 170–173; L. WENGER, *Die Quellen des römischen Rechts*, Wien 1953, p. 562–679; 3.B. УДАЛЦОВА, *Законодательные реформы Юстиниана*, ВВ 26, 1965, p. 3–45 and ВВ 27, 1967, p. 3–38; G.G. ARCHI, *Giustiniano legislatore*, Bologna 1970; *L'imperatore Giustiniano, Storia e Mito. Giornate di studio a Ravenna 14–16 ottobre 1976*, ed. G.G. ARCHI, Milano 1978; R. GONZÁLEZ FERNÁNDEZ, *Las estructuras ideológicas del Código de Justiniano*, Murcia 1997; A.M. GIOMARO, *Il Codex repetitae praelectionis. Contributi allo studio dello schema delle raccolte normative da Teodosio a Giustiniano*, Milano–Murcia 2001; J.H.A. LOKIN, Th.E. VAN BOCHOVE, *Compilazione – educazione – purificazione. Dalla legislazione di Giustiniano ai Basilica cum scholiis*, [in:] *Introduzione al diritto bizantino. Da Giustiniano ai Basilici*, ed. J.H.A. LOKIN, B.H. STOLTE, Pavia 2011, p. 99–118. Cf. also about both codes: G.L. FALCHI, *Sulla codificazione del diritto Romano nel V e VI secolo*, Roma 1989; L. DE GIOVANNI, *Istituzioni, scienza giuridica, codici nel mondo tardoantico. Alle radici di una nuova storia*, Roma 2008.

<sup>12</sup> *Interpretatio. Si quicumque publici debiti enormitate constringitur, ut non possit hoc ipsum debitum nisi vendita propria facultate dissolvere, in eius modi debito hanc exactores formam servare debent, ut non ita rem praecipitent, ut res minore, quam valeat, pretio distrahatur, nec tales sub quolibet colludio provideant emptores, ut et debitor proprietatem perdat, et parum fiscus acquirat.*

Cf. about *interpretationes* esp. F. WIEACKER, *Lateinische Kommentare zum Codex Theodosianus*, [in:] *Symbolae Friburgensis in honorem Ottonis Lenel*, ed. F.R. PRINGSHEIM, Leipzig 1931, p. 259–356; J.F. MATTHEWS, *Interpreting the Interpretationes of the Breviarium*, [in:] *Law, Society, and Authority in Late Antiquity*, ed. R.W. MATHISEN, Oxford 2001, p. 11–32.

<sup>13</sup> *Breviarium Alarici (Lex Romana Visigothorum)*, X, 9, 1, ed. G. HÄNEL, Leipzig 1849 (cetera: *Breviarium*). Cf. the comparison of the tenth book according to *Breviarium* and *CTh* in J. GAUDEMET, *Code Theodosien et Breviaire d'Alaric*, [in:] *Studi in onore di Giuseppe Grosso*, vol. IV, Torino 1971, p. 360–376, esp. p. 366sq. About the great number of studies concerning *Breviarium Alaricianum* cf. H. NELSEN, *Alarich II. als Gesetzgeber – Zur Geschichte der Lex Romana Visigothorum*, [in:] *Studien zu den germanischen Volksrechten. Gedächtnisschrift für Wilhelm Ebel*, ed. G. LANDWEHR, Frankfurt am Main–Bern 1982, p. 143–203. There are plenty of contradictory options about its creation and validity; cf. D. LIEBS, *Zur Überlieferung und Entstehung des Breviarium Alaricianum*, *AARC* 15, 2003, p. 653–671. Till the middle of 11<sup>th</sup> century *Breviarium Alaricianum* was the main source of knowledge about the Roman law in the West and later it became one of the most important sources of law in southern France (*pays du droit écrit*). Cf. e.g. CH. M. RADDING, A. CIARALLI, *The Corpus Iuris Civilis in the Middle Ages: Manuscripts and Transmission from the Sixth Century to the Juristic Revival*, Leiden 2007. About the disputable question of *vulgar law* cf. recent: D. LIEBS, *Roman Vulgar Law in Late Antiquity*, [in:] *Aspects of law in late antiquity, dedicated to A.M. Honoré on the occasion of the sixtieth year of his teaching in Oxford*, ed. B. SIRKS, Oxford 2008, p. 35–53.

<sup>14</sup> Cf. modern detailed studies only: W. ENSSLIN, *Vicarius*, [in:] *RE*, vol. VIIIA, pars 16, Stuttgart 1958, col. 2015–2044; F. DE MARTINO, *Storia della costituzione romana*, vol. V, Napoli 1967, p. 270–275; A. PADOA SCHIOPPA, *Ricerche sull'appello nel diritto intermedio*, vol. I, Milano 1967, p. 15–33; M.T.W.

first of all the abuses of corrupted *exactores* committed during *subhastationes*<sup>15</sup>. Yet it is linked mainly with the development of the medieval doctrine of *laesio enormis*, which allows a seller of land to rescind the contract if the sale price was less than half of the just or true price, or gives the buyer the option of paying the difference<sup>16</sup>.

Hadrumetum/Hadrumentum (modern-day Sousse, Tunisia), the place where the constitution was accepted, was an important town in the dioecese of Africa, the capital of the province of *Byzacena*, but the seat of *officium vicarius Africae* was Carthago or Cirta<sup>17</sup>. Magnillus probably inspected Hadrumetum because tours around the dioecese were part of the vicar's duties; therefore it is hard to believe that the

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ARNHEIM, *Vicars of the Later Roman Empire*, Hi 19, 1970, p. 593–606; G. THÜR, P.E. PIELER, *Gerichtbarkeit*, [in:] RAC, vol. X, 1977, esp. col. 431sq, 435–437; K.L. NOETHLICH, *Zur Entstehung der Diözese als Mittelinstanz des spätantiken Verwaltungssystems*, Hi 31, 1982, p. 70–81; J. MIGL, *Die Ordnung der Ämter. Prätorianpräfektur und Vikariat in der Regionalverwaltung des Römischen Reiches von Konstantin bis zur Valentinianischen Dynastie*, Frankfurt am Main 1994; A. CHASTAGNOL, *Levolution politique, sociale et économique du monde romain de Dioclétien à Julien. Le mise en place du régime du Bas Empire (284–363)*, <sup>2</sup>Paris 1985, p. 237–249; B. SANTALUCIA, *Studi di diritto penale romano*, Roma 1994, p. 226–231; F. GORRIA, *La giustizia nell'impero romano d'oriente: organizzazione giudiziaria*, SSCISAM 42, 1995, p. 272–277; M. KASER, *Das römische Zivilprozessrecht. Zweite Auflage, neu bearbeitet von K. Hackl*, München 1996, §§ 78, II, 4; 79, II; F. PERGAMI, *Lappello nella legislazione del tardo impero*, Milano 2000, p. 409–412; W. KUHOFF, *Diocletian und die Epoche der Tetrarchie. Das römische Reich zwischen Krisenbewältigung und Neuaufbau (284–313 n.Chr.)*, Frankfurt 2001, p. 370–381; C. ZUCKERMAN, *Sur la Liste de Vêrone et la province de Grande Arménie, la division de l'Empire et la date de création des diocèses*, TM 14, 2002, esp. p. 49–55; P. PORENA, *La origini della prefettura del pretorio tardoantica*, Roma 2003, esp. p. 152–186; D.S. POTTER, *The Empire at Bay AD 180–395*, London–New York 2004, p. 370–374.

<sup>15</sup> The auctions were in general a popular way of buying goods by the Romans. Cf. e.g. LEIST, *Auction*, [in:] RE, vol. II, pars 4, Stuttgartiae 1896, col. 2269–2272; D. SCHANBACHER, *Auctiones*, [in:] NPa, vol. II, Stuttgart 1996, col. 264–265; M. GARCÍA MORCILLO, *Staging Power and Authority at Roman Auctions*, AS 38, 2008, p. 153–181, with previous studies concerning auctionary sale in Rome.

<sup>16</sup> Cf. C. DUPONT, *La vente et les conditions socio-économiques dans l'Empire romain de 312 à 535 après Jesus-Christ*, RIDA 19, 1972, p. 295sq; K. VISKY, *Appunti sul alcune norme di diritto privato nel IV secolo conseguenti alla precendete crisi economica*, AARC 3, 1979, esp. p. 440sq; B. SIRKS, *La laesio enormis en droit romain et byzantin*, TRe 53, 1985, p. 304; IDEM, *Laesio enormis und die Auflösung fiskalischer Verkäufe*, ZSSR.RA 112, 1995, p. 414. The development of *laesio enormis* is still disputable. Cf. K. VISKY, *Spuren der Wirtschaftskrise der Kaiserzeit in den römischen Rechtsquellen*, Bonn–Budapest 1983, p. 24–66; B. SIRKS, *La laesio enormis...*, p. 291sq; M. PENNITZ, *Zur Anfechtung wegen laesio enormis im römischen Recht*, [in:] *Iurisprudentia universalis. Festschrift für Theo Mayer-Maly zum 70. Geburtstag*, ed. M.J. SCHERMAIER et al., Köln–Weimar–Wien 2002, esp. p. 582–584; R. WESTBROOK, *The Origin of Laesio Enormis*, RIDA 55, 2008, p. 39–52; B. SIRKS, *Laesio enormis again*, RIDA 54, 2007, p. 461–469. Cf. in general about later developments in European legal tradition cf.: R. ZIMMERMANN, *The Law of Obligations. Roman Foundations of the Civilian Tradition*, Oxford 1996, p. 259–272. Cf. also about the later development in Byzantine law: B. SIRKS, *La laesio enormis...*, *passim*; A.E. LAIOU, *Economic Thought and Ideology*, [in:] *Economic History of Byzantium from Seventh through the Fifteenth Century*, ed. EADEM, vol. III, Washington 2002, p. 1133sq.

<sup>17</sup> Cf. J. GAUDEMET, *Les constitutions au vicaire Dracontius*, [in:] *Mélanges d'histoire ancienne offerts à William Seston*, ed. W. SESTON, Paris 1974, p. 200; C. LEPPELEY, *Quelques aspects de l'administration des provinces romaines d'Afrique avant la conquête vandale*, ATa 10, 2002, esp. p. 69–71. Cf. about Hadrumentum: L. FOUCHER, *Hadrumentum*, Tunis 1964 (the period after 238 A.D.: 311–369).

case resolved in the constitution under discussion happened directly there<sup>18</sup>. It should be underlined, however, that the quoted constitution is the only emperor's enactment concerning state auctions addressed to any vicar – preserved to our times – and it seems to be the trace of abuses which happened exactly in Africa<sup>19</sup>.

*CTh*, X, 17, 3, was written under the questorship (*sacri palatii*) of Aurelianus, an experienced imperial officer, later urban prefect of Constantinople and twice praetorian prefect of the East and consul 400 A.D.<sup>20</sup> A *suggestio* of a Roman official was usually the cause of issuing a constitution and the same could have happened this time<sup>21</sup>. Magnillus as *vicarius Africae* could adjudge appeals in tax cases or hear complaints from taxpayers who were victims of the public auctions conducted by a bribed *exactor*<sup>22</sup>. Maybe the vicar himself felt the impropriety of their consequences? In harmony with the general principle of classical and postclassical Roman law of sale the price did not need to be adequate for a sale to be valid<sup>23</sup>. Maybe, therefore, Magnillus asked emperor what to do in such an instance? The issuing of the *rescriptum* could be also the result of a taxpayer's petition addressed directly to the emperor; private citizens, envoys of city councils and other group of people travelled frequently across the empire to find justice or help from the princeps himself<sup>24</sup>.

The idea that *laesio enormis* is rooted in Roman law (although it contradicts one of its basic premises) is based on the remarkably slim foundations of two rescripts attributed to Diocletian<sup>25</sup>. There the annulment of common sale of property is discussed on the grounds that the price was less than the property was worth.

The law under discussion does not however, mention, the common sale of grounds or the cancellation of sale but only contains statements expressing a negative attitude toward bribing the exactores during public auctions of property and the

<sup>18</sup> J. GAUDEMET, *Les constitutions...*, p. 200, taking into consideration the case of Africa.

<sup>19</sup> Cf. *CTh*, X, 17, and *CJ*, X, 3.

<sup>20</sup> Cf. e.g. *PLRE*, vol. I (Aurelianus 3); T. HONORÉ, *Law in the Crisis of Empire...*, p. 70–73.

<sup>21</sup> Cf. apart from the studies quoted in an. 1, 2 and 11: J. GAUDEMET, *Quelques aspects de la politique législative au V<sup>e</sup> siècle*, [in:] *Studi in onore di Edoardo Volterra*, vol. I, Milano 1971, p. 228. Aurelianus was not lawyer and therefore a *suggestio* – of Madalinus or the governor of the province? – seems to have been the basis for the *CTh*, X, 17, 3. Cf. about the procedure of establishing the text of *constitutiones* in detail: W.E. VOSS, *Recht und Rhetorik...*, p. 26sq; D.A. GRAVES, *Consistorium Domini: imperial councils of state in the later Roman empire*, Ann Arbor 1985, p. 177sq; T. HONORÉ, *The Making...*, p. 135–145; J.F. MATHEWS, *Lying down...*, p. 67sq, and shortly S. OLSZANIEC, *Comites consistoriani w IV wieku. Studium prosopograficzne elity dworskiej Cesarstwa rzymskiego 320–395 n.e.*, Toruń 2007, p. 55sq.

<sup>22</sup> *CTh*, XI, 26, 1 = *CJ*, X, 30, 1 (a. 369). So already J. GOTHOFREDUS, *op. cit.*, p. 184–186.

<sup>23</sup> Cf. e.g. M. TALAMANCA, *Vendita (diritto romano)*, [in:] *Enciclopedia del Diritto*, ed. F. CALASSO et al., vol. XLVI, esp. p. 367–370; R. ZIMMERMANN, *op. cit.*, p. 255–259.

<sup>24</sup> Cf. F. MILLAR, *The Emperor...*, p. 375–385; A. GILLET, *Envoys and Political Communication in the Late Antique West, 411–533*, Cambridge 2003, p. 17–26. Cf. also about petitions in the Roman Empire and Byzantium: *La pétition à Byzance*, ed. D. FEISSEL, J. GASCOU, Paris 2004.

<sup>25</sup> *CJ*, IV, 44, 2 (a. 285); IV, 44, 8 (a. 293).

need for a just treatment of the indebted taxpayers<sup>26</sup>. Joining it with an idea similar to the medieval *laesio enormis* occurred for the first time in *Codex Iustinianus* when the constitution was placed in the title concerning the rescission of a sale, where both mentioned rescripts of Diocletian were included too (the latter, however, could also have been interpolated)<sup>27</sup>. Justinian could have followed in this way the provincial (Middle Eastern?)<sup>28</sup> tradition of a more collective, family based ownership of land, which was alien to Roman law even in the postclassical period<sup>29</sup>. On the contrary, the analysed constitution was originally caused by an African (i.e. Western) case and therefore it contains the wording *utilitas privatorum* (*the benefits of private persons*) and not *utilitas familiarum* (*the benefits of families*)<sup>30</sup>. Roman law in the end of the 4<sup>th</sup> century seems simply not to have shared an idea similar to the later *laesio enormis*. It is therefore correctly argued by the adherents of such opinion that the aforementioned Diocletianic rescripts were interpolated, quoting however other constitutions from the *Theodosian Code*, which follow the classical principle of free bargaining<sup>31</sup>.

The constitution expressed only the general expectations of justice expressed by many sources in late antiquity<sup>32</sup> – maybe also under the influence of Christianity – with *iustitia* almost at the top of Roman emperor's virtues<sup>33</sup>. The correlation between the value of property and the price of its sale during *subhastationis publicae* – underlined also by *interpretatio* – was in accord with the citizens' (and at the same

<sup>26</sup> B. SIRKS, *Laesio enormis und die Auflösung...*, p. 414. However, in his earlier work (IDEM, *Food for Rome: the Legal Structure of the Transportation and Processing of Supplies for the Imperial Distributions in Rome and Constantinople*, Amsterdam 1991, p. 185, an. 120) he quoted CJ, IV, 44, 16, as an example of the invalidity of sale *ipso iure*. Most certainly the auction sale played a role in the later developments of *laesio enormis*. Cf. the studies quoted in an. 16.

<sup>27</sup> Cf. already J. GOTHOFREDUS, *op. cit.*, p. 483, and the long discussion summarized by the studies mentioned in an. 16.

<sup>28</sup> Cf. R. WESTBROOK, *op. cit.*, *passim*.

<sup>29</sup> Cf. e.g. E. LEVY, *West Roman Vulgar Law. The Law of Property*, Philadelphia 1951, p. 19–83, 127sq, 149–152.

<sup>30</sup> According to CTh, X, 17, 3, there were no contradictions between *utilitas publica* and *utilitas singulorum*. Cf. M. NAVARRA, *Utilitas publica – utilitas singulorum tra IV e V sec. D.C.*, SDHI 63, 1997, esp. p. 278sq.

<sup>31</sup> Cf. the studies quoted in an. 16.

<sup>32</sup> Magnillus was also accused of some abuses after retirement. Cf. SYMMACHUS, *Epistulae*, 3, 34, and 9, 122; ed. A. PELLIZZARI, *Commento storico al libro III dell'epistolato di Q. Aurelio Simmaco. Introduzione, commento storico, testo, traduzione, indici*, Pisa–Roma 1998, p. 133–135.

<sup>33</sup> The phrase *expectations of justice* is borrowed from K. UHALDE, *Expectations of Justice in the Age of Augustine*, Cloth 2007. Cf. also J.F. MATTHEWS, *Lying...*, p. 10–30; P. KREUTZ, *Romidee und Rechtsbild in der Spätantike. Untersuchungen zur Ideen- und Mentalitätsgeschichte*, Berlin 2008, p. 201 (who even writes about *legalistische Mentalität*). It is not correct, however, to call the later Roman Empire a *Rechtstaat*. Cf. correctly CH. F. WETZLER, *Rechtsstaat und Absolutismus: Überlegungen zur Verfassung des spätantiken Kaiserreichs anhand von CJ 1.14.8*, Berlin 1997, p. 200–210; T. HONORÉ, *Roman Law ad 200–400. From Cosmopolis to Rechtsstaat?*, [in:] *Approaching Late Antiquity. The Transformation from Early to Late Empire*, ed. S. SWAIN, M.M. EDWARDS, Oxford 2004, p. 109–132.

time the debtors') expectations of a fair treatment. At the same time it was right from the point of view of state treasury, as the last sentence of the law shows<sup>34</sup>. It is worth remembering that North Africa was one of the most important sources of supplies for Rome and taking care of its inhabitants was therefore a vital issues for emperor himself<sup>35</sup>. Maybe that is why the fiscal questions were one of the main concerns of *vicarius Africae* in late the 4<sup>th</sup> century<sup>36</sup>.

Conclusions. Only under Justinian the *CTh*, X, 17 3 was included, together with Diocletian's (interpolated?) rescripts, in the title *De rescindenda venditione* of *Codex Iustinianus* (a. 534), where the three played a new role as the reasons for cancelling of unfair contracts (*emptiones-venditiones*). All of the mentioned emperor's enactments became the base for the development of the medieval *laesio enormis*. But chronologically latest *CTh*, X, 17, 3, was originally only a reaction directed against abuses in Africa, and was reused by Justinian contrary to its original, primary meaning. Therefore, the constitution under discussion can-not be treated as a step leading to *laesio enormis*; this opinion is rooted only in the *Justinian Code* and its later, medieval interpretation.

**Abstract.** The text discusses in detail the emperor's constitution concerning the abuses of tax collectors in Africa (*CTh*, X, 17, 3 = *CJ*, IV, 44, 16 – a. 391/392), arguing against associating it with the idea of *laesio enormis* developed in the Middle Ages.

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<sup>34</sup> *CTh*, X, 17, 3 (in fine): (...) *Et enim periniquum est, ut, alienis bonis sub gratiosa auctione distractis, parum accedat publico nomini, quum totum pereat debitori.*

<sup>35</sup> Cf. e.g. H. JAIDI, *L'Afrique et le blé de Rome au IV<sup>ème</sup> et V<sup>ème</sup> siècles*, Tunis 1990, esp. p. 95–153 (underlining that periods of instability in North Africa caused usually famine in Rome – 119–129); B. SIRKS, *Food for Rome...*, *passim*.

<sup>36</sup> Cf. J. GAUDEMET, *Les constitutions...*, p. 204sq, comparing constitutions addressed to *proconsul Africae* and *vicarius Africae* between 364–367 A.D. Most of them were dealing the taxes – (7) and *officium vicarii* – (2), *navicularii* and building activity (2). Cf. in chronological order according to S. SCHMIDT-HOFNER, *Die Regesten der Kaiser Valentinian und Valens in den Jahren 364 bis 375 n. Chr.*, ZSSR.RA 125, 2008, p. 498–600 – *CTh*: XI, 7, 9 (a. 364); XI, 30, 33 (a. 364); X, 1, 10 (a. 365); I, 15, 5 (a. 365); XV, 1, 15 (a. 365); VIII, 4, 10 (a. 365); XI, 1, 10 (a. 365); XI, 1, 11 (a. 365); XI, 10, 13 (a. 365); XII, 6, 9 (a. 365); XIII, 6, 4 (a. 367); XI, 1, 16 (a. 367); XII, 7, 3 (a. 367).