

IZABELA LERACZYK*

NON ENIM CRIMEN DICITUR, QUOD MORTIS ADEGIT IMPULSUS – NOTES ON THE C. TH. 15,14,14

The relations with the barbaric peoples¹ brought about one of the more serious problems faced by the *Imperium Romanum* at the turn of the 4th and 5th century A.D. In addition to the threats faced by the inhabitants of the borderland, that is migrations of peoples and attacks of the invaders,² internal problems were also caused by the peoples inhabiting the provinces (*foederati*).

Roman historians perceived and wrote about their contemporary times with concern. “The Roman world is falling, yet we hold our heads erect instead of bowing our necks”³ Jerome of Stridon says with a note of hope while writing about the barbarian invaders. Orientius adds: “the whole

* Ph.D., Assistant Professor, the John Paul II Catholic University of Lublin; e-mail: izabela.leraczyk@kul.pl, ORCID ID: <https://orcid.org/0000-0003-4723-8545>.

¹ After the death of Theodosius the Great in A.D. 395 and after his assimilation policy had been abandoned, the increasing mutual antagonisms between the Roman society and the barbarian societies became one of the more serious problems of the western part of the empire. Anti-barbarian attitudes had appeared in the Roman society before, which may be well exemplified by the order of Emperor Valentinian I prohibiting mixed marriages issued in 370 or 373. Cf. C. Th. 3,14,1. Historians indicate that after the defeat at Adrianople in 378, phobia and aggression of the Roman society towards the barbarians rapidly escalated. A. Ziółkowski, *Historia Rzymu*, Poznań 2004, pp. 553–558.

² The invasion of the Gothic and Germanic tribes on Italy in 406 was stopped by Stilicho. However, it was with the remains of the army of Radagaisus that Alaric performed an effective invasion of Gaul. Their knowledge of the country and roads turned out to be an invaluable asset. The Suebi, the Vandals, the Alans and the Burgundians attacked the northern part of Gaul, where they met with no resistance. E. Gibbon, *Upadek Cesarstwa Rzymskiego na Zachodzie*, transl. I. Szymańska, M. Szymański, Warszawa 2017, pp. 168–169.

³ Hieron. Ep. 60,16: *Romanus orbit ruit et tamen cervix nostra erecta non flectitur*.

Gaul was on fire like one huge stake,"⁴ indicating that death was prevalent all around the world and various peoples had to bear the brunt of war. The emotional attitude of the writers, emphasising their personal experience, highlighted the suffering of individuals and their life tragedies caused by wars and military activities.⁵ Next to the literary sources, the stories concerning military activities and their influence on the lives of the Romans could also be found in the legal sources from the epoch. Among the legal norms concerning, for instance, prisoners of war, regaining freedom⁶ or regaining one's property plundered by the barbarians,⁷ one could find stories of people affected by the tragedies of military conflicts. The law also responded to the problems regarding the threats not only from the external adversary⁸ but also to the threats from the inhabitants of the empire who might have been supporting the enemy.

The state of threat in which people had to live at that time caused many of them to commit deeds which were morally ambiguous, or even directly forbidden by the law. At this stage it is worth analyzing the stipulations included in the constitution of 416 (C. Th. 15,14,14) governing the exclusion of liability in the case of acts committed under special circumstances:

⁴ Orient. Common. 2,184: *uno fumauit Gallia tota rogo*. Cf. Salv. de Gub. 6,15,83–84.

⁵ T. Skibiński, *Obraz barbarzyńców w Cesarstwie Rzymskim w źródłach łacińskich lat 376–476*, Warszawa 2018, pp. 199–202.

⁶ People captured by the enemy became slaves (*captivitas*). The prisoners were sold to private people or they became the property of the state. However, if a Roman citizen managed to return to his homeland, he would regain his former legal status, with the exception of the relations based on the factual state. M. Kaser, *Das römische Privatrecht, zweiter Abschnitt: Die nachklassischen Entwicklungen*, München 1975, pp. 129–130. On the subject of the *ius postliminii* in the 6th century, cf. e.g. J. Wiewiorowski, *Późnorzymskie "ius postliminii" świadectwem słabości "soft power" cesarstwa – studium przypadku*, *Res Historica* 2018, vol. 46, pp. 85–113, together with the cited literature.

⁷ The constitution of 23 March 409 addressed at Anthemius (*praefectus pretorio orientis*) laid down rules on, among others, the obligation to return slaves to their owners and to return free men to their home municipalities. C. Th. 5,6,2. What is interesting, in the *Theodosian Code* there is no information on the place of the publication of the constitution. The actual addressee suggests that it should have been Theodosius II, who in 409 was merely eight years old and in fact it was no other than Anthemius who ruled on his behalf. Cf. C. Th. 7,16,2. The constitution was issued on 24 April 410 in Constantinople and the form in which the author writes about imperial letters – Emperor Honorius is referred to in the act as uncle – also points to Theodosius II as the author. F. Millar, *A Greek Roman Empire: Power and Belief under Theodosius II (408–450)*, Berkeley–Los Angeles–London 2006, p. 12.

⁸ Cf. C. Th. 7,16,2.

Emperors Honorius and Theodosius Augustuses to Constantius, Count and Patrician. If during the disaster of barbarian devastation, anything unworthy or odious has been done, either during flight or during the concourse of the unfortunate people, such deeds shall not be called to account by the cunning prosecutions of litigants, to the odium of the laws that are hereby appeased. Persons shall have impunity for all crimes if they, perchance, were unable to escape, unless they had been assisted by such crimes. For nothing is called a crime if any person was impelled thereto by fear of death. Therefore, it is fitting that all litigants shall recognise that if they should learn that any of their property has been taken as plunder, they shall recover whatever was taken, provided that they have been able to prove that it still remains and is a part of the property of those persons whom they sue.⁹

This act, signed by Emperor Honorius in the West and the Eastern Emperor Theodosius II, was in fact issued by the western ruler. It is suggested by the *subscriptio*, informing that the constitution was published in Ravenna.¹⁰ While analysing specific regulations it should be remembered that late antique imperial acts were issued in reaction to specific events with the intention to extinguish local “fires”. It was not until they were included in the official collection that from the “incidental” normative acts they became the commonly established law.¹¹ The issuing of the above

⁹ C. Th. 15,14,14: *Impp. Honorius et Theodosius AA. Constantio comiti et patricio. Sub clade barbaricae depopulationis, si qua aut per fugam aut per congregationem infelicitum populorum indigne invidioseque commissa sunt, ad invidiam placatarum legum a callidis litigatorum obiectionibus non vocentur. Habeant omnium criminum impunitatem, qui evadendi forsitan non habuerant facultatem, nisi eos eadem crimina iuissent. Non enim crimen dicitur, quod mortis adegit impulsus. Ex quo animadvertere cunctos litigatores congruum est, si quid depraedationis agnoverint, se recepturos, si tamen, in eorum, quos pulsaverint, facultatibus abundare aut residere id, potuerint comprobare. Dat. Kal. Mart. Ravenna, d.n. Theodosius a. VII. et Palladio V. C. Coss. All translations of the constitutions by C. Pharr, *The Theodosian Code and Novels, and the Sirmondian Constitutions. A Translation with Commentary, Glossary, and Bibliography* by Clyde Pharr in Collaboration with Theresa Sherrer Davidson and Mary Brown Pharr, with an Introduction by C. Dickerman Williams, Princeton 1952.*

¹⁰ Ravenna was treated as the capital of the western part of the empire since 402 when Honorius issued one of the constitutions there – C. Th. 7,13,15. Cf. D. Mauskopf Deliyanis, *Ravenna in Late Antiquity*, Cambridge 2010, p. 46. However, this is not a stance taken by everyone, cf. A. Gillet, *Rome, Ravenna and the Last Western Emperors*, Papers of the British School at Rome 2001, vol. 69, p. 141.

¹¹ J. Wiewiorowski, *O pożytkach płynących z uważnej lektury: krótkie uwagi na temat C.Th. 5.7.1 (Brev. 5.5.1) = C.8.50.19 (a. 366)*, *Sapientia Iuris. Prawo Rzymskie i Kanoniczne. Historia Prawa* 2018, no. 1, pp. 86–87.

constitution was greatly influenced by the then contemporary political situation and recent events. Merely six years earlier Rome had been invaded by the Goths under the leadership of Alaric.¹² His successor, Athaulf, became entangled in fights with the usurpers and his armies left Italy and since 413 stationed in south-western Gaul.¹³ The situation improved with the activities of Constantius, the chief commander of the Roman army in the west. Already in 414, he effectively blocked Gothic ports, pushing them out, among others, from Narbonne.¹⁴ Due to his endeavours, the Goths joined the Roman army and supported them in the fights with barbarians in Spain,¹⁵ and Gaul also reached political stability on the grounds of the agreement with the Burgundians and the Alans.¹⁶

The addressee of the constitution was Constantius, who already at that time bore a distinct name *comes et magister utriusque militia*.¹⁷ However, this information makes it harder to determine which events inspired the discussed constitution. In response to the passivity and political weakness of Emperor Honorius, hidden in bog-surrounded Ravenna, the actual authority was administered by Constantius. It must have been his *suggestio* that lied behind the making of this law. His activity was not limited merely to Italy or to a chosen province but he was involved on various fronts of fighting the barbarians. As commander-in-chief, he was decisive in the events, among others, in Gaul or Spain.

¹² By refusing the demands of the Goths, Honorius provoked an attack of barbarians on Rome, cf. A. Ziółkowski, *Historia powszechna. Starożytność*, Warszawa 2009, p. 902.

¹³ After the ruler had been murdered in 415 by Sigeric, and after another murder had occurred the following week, the Visigothic throne was taken by Wallia. He also undertook to negotiate with the Romans after the failure of the invasion onto the north-western regions of Africa.

¹⁴ It was precisely in Narbonne that Athaulf married Honorius's sister Galla Placidia, abducted from Rome. Oros. 7,40. G.D. Dunn, *Flavius Constantius, Galla Placidia, and the Aquitanian Settlement of the Goths*, Phoenix 2015, vol. 69, no. 3/4, p. 378. After the conclusion of peace in 416, Honorius offered her hand to Constantius. The marriage resulted in the birth of Valentinian III, western Roman Emperor in the years 425–455. Due to the fact that he became emperor at the age of six, the actual governance was conducted by his mother. More on the subject of her governance cf. H. Sivan, *Galla Placidia: The Last Roman Empress*, Oxford–New York 2011.

¹⁵ Hydatius, *Chron.* 24,61(69).

¹⁶ A. Ziółkowski, *Historia powszechna...*, p. 904.

¹⁷ J.R. Martindale, *The Prosopography of the Later Roman Empire*, vol. 2. A.D. 395–527, Cambridge 1980, p. 322.

The constitution was issued in the year in which peace treaties were concluded with the Visigoths.¹⁸ As Orosius points out, not only Wallia took the decision of establishing peace.¹⁹ The kings of the Alans, the Vandals and the Suebi followed suit.²⁰ The words *sub clade barbaricae depopulationis* might, therefore, refer both to their presence in Italy until 413 and then to their march through Gaul, as well as to the activities of other tribes in Spain. Nevertheless, it is pointed out that this act was issued with the latter province in mind.²¹ In the juridical sources, the word *barbarius* always denoted an invader, a person who inevitably evoked negative attitudes.²² In a similar way, if an allied tribe (*foederati*) betrayed a treaty with Rome, it was considered barbarian. If another agreement was further concluded, they re-established their status of *foederati*.²³ The term *barbarius* was equivalent to the concept of the enemy of the empire (*hostis*) and could have been treated as a synonymous expression.²⁴

¹⁸ The sources do not specify the provisions of the treaty and their content is established on the basis of the interpretation of the behaviour of the Goths. In the treaty of 416 the Visigoths were guaranteed the possibility of settling in Aquitaine. Perhaps it was a part of the plan to strengthen the authority of Rome, which in Gaul was undermined. More on the subject cf. V. Burns, *The Visigothic Settlement in Aquitania: Imperial Motives*, *Historia: Zeitschrift für Alte Geschichte* 1992, vol. 41, no. 3, p. 366. More on the subject of the nature of the agreement cf. H. Sivan, *On Foederati, Hospitalitas, and the Settlement of the Goths in A.D. 418*, *The American Journal of Philology* 1987, vol. 108, no. 4, pp. 759–772.

¹⁹ The treaty on the side of Rome was concluded by Honorius or Constantius, acting on his behalf, cf. H. Sivan, *On Foederati, Hospitalitas...*, p. 764.

²⁰ Oros. 7,41,11.

²¹ R.W. Mathisen, *Roman Aristocrats in Barbarian Gaul: Strategies for Survival in an Age of Transition*, Austin 1993, p. 67. This thesis is also supported by, among others, T. Skibiński, *Obraz barbarzyńców w Cesarstwie Rzymskim...*, p. 59.

²² On the other hand, literary sources present a more ambiguous attitude towards barbarians, pointing out to their positive features. Sid. Epist. 7,14,10, Salv. De Gub. Originally, the Romans used term “barbari” for any foreign people. Cf. A. Berger, *Encyclopedic Dictionary of Roman Law*, Philadelphia 1953, p. 371, s.v. *barbari*; H.G. Heumann, E. Seckel, *Handlexikon zu den Quellen des römischen Rechts*, Jena 1891, p. 47, s.v. *barbari*.

²³ S. Rugullis, *Die Barbaren in spätrömischen Gesetzen. Eine Untersuchung de Terminus “barbarus”*, Frankfurt am Main–Bern–New York–Paris 1992, pp. 87–88. It is visible on the basis of the legal acts regarding Alaric’s armies, particularly the constitution of Emperor Honorius on the *postliminium* (C. Th. 5,7,2).

²⁴ Cf. C. Th. 5,6,2. M. Stachura, *Enemies of the Later Roman Order. A Study of the Phenomenon of Language Aggression in the Theodosian Code, Post-Theodosian Novels, and the Sirmundian Constitutions*, Kraków 2018, pp. 124–128.

The word escape (*fuga*) could have referred to all situations in which people were escaping from the approaching barbarian armies. Such a situation could have occurred in various provinces, among others in Italy, Gaul, Spain, as well as Africa or Britain.²⁵ On 10 December 408 Emperor Honorius declared: "when an incursion of the barbarians was expected throughout parts of Illyricum, a numerous band of the inhabitants sought homes elsewhere."²⁶ In similar circumstances numerous aristocratic families decided to abandon their homeland.²⁷ As Salvian of Marseilles points out, this solution was not available to the less affluent inhabitants of the empire: "they do not do it, because they cannot carry with them their little few possessions, households, and families."²⁸ It was them who were the greatest victims of the conflicts.

The deeds committed *per congregationem infelicitium populorum* were, on the other hand, acts which were perpetrated during the internal conflicts over the title of the emperor. Only in the years 411–416 in the Western Roman Empire as many as seven usurpers of the imperial authority (tyrants) were defeated.²⁹ It was not the first constitution of Honorius regarding the normalisation of the situation in the state after the fights with tyrants. Several years earlier the emperor had addressed a separate act to the Roman officials. He indicates in it that if they return to the Emperor still in

²⁵ E.A. Thompson, *Romans and Barbarians. The Decline of the Western Empire*, Madison 1982, pp. 208–217.

²⁶ C. Th. 10,10,25: *Cum per illyrici partes barbaricus speraretur incursus, numerosa incolarum manus sedes quaesivit externas ...* The imperial decree was intended to protect the people who were *en masse* escaping from the approaching barbarians. What constituted a threat for the inhabitants of the empire was not only the invaders but also the persons who took advantage of the difficult situation of the refugees and captured them into captivity. However, the act does not specify who was involved in that procedure. F. Lotter, *Völkerverschiebungen im Ostalpen-Mitteldonau-Raum zwischen Antike und Mittelalter: (375–600)*, Berlin–New York 2003, p. 162. Sirmium was kept in a similar vein. 16 = C. Th. 5,7,2.

²⁷ J.F. Matthews, *Westem Aristocracies and Imperial Court A.D. 364–425*, Oxford 1975, p. 300.

²⁸ Salv. de Gub. 5,8.

²⁹ E. Gibbon, *Upadek Cesarstwa Rzymskiego...*, pp. 209–211. Internal struggles were often connected with the changing sympathies of the barbaric invaders. For instance, thanks to the support of the Visigoths, Priscus Attalus became a usurper two times, in 410 and 414. He was named Emperor for the first time when Alaric successfully blocked the port in Ostia, forcing Roman Senators to surrender. Zos. 7.7. On the second occasion, he was made emperor-marionette by Athaulf. H. Wolfram, *History of the Goths*, Berkeley–Los Angeles–London 1988, pp. 157–159, 164.

the time of “the flames kindled by the usurpation of tyranny [they] shall not lose the rank.”³⁰ The *Theodosian Code* also contains an act issued by the ruler himself in which he states that “since the State has been freed from the outrages of the tyrant, We command that all persons guilty of any crime shall be set free.”³¹ This short statement might be understood as a guarantee of impunity, withholding from prosecuting perpetrators of crimes³² but also as a pardon granted to the convicted criminals. However, it is possible that the act of clemency did not include the so-called unforgivable crimes, which included treason.³³

Both the fighting with the barbarians as well as the actions of the pretenders had an impact on the life of “civilians”. The scale of the problems they had to struggle with is visible, for instance, in the poem *Eucharisticos* written by Paulinus of Pella, a Christian poet of the 5th century.³⁴ With regard to the invasion of the barbarians, he indicates that they entered the territory of Gaul in 406 as enemies (*hostes*), breaking peace (*temporibus ruptae pacis*).³⁵ His house in Bordeaux, as the only one, did not have to host the Goths, which eventually turned against him. In 414, when the Goths were leaving the city, they provided their hosts with protection, but his estate was plundered.³⁶ Paulus’s life was also influenced by the announcement that Priscus Attalus was to hold the title of Emperor of Rome. He

³⁰ C. Th. 9,38,11: ... *quos inter incendia tyrannidis adsumptae fidelis paenitudo revocavit, ordinem et fructum militiae non amittant* ... Only those who returned under the imperial authority at the moment when the balance of power turned in favour of the ruler were to be degraded and removed from the registers.

³¹ C. Th. 9,38,12: *liberata re publica tyrannidis iniuria omnium criminum reos relaxari praecipimus*.

³² The decree dates back to A.D. 410, which might imply that it was issued with the inhabitants of Rome and Italy in mind, where Attalus had been overthrown. Another interpretation suggests that it might date back to A.D. 413, which might suggest that the above-mentioned pretender was Jovinus, remaining in power since 411 over a part of the territory of Gaul. W. Waldstein, *Untersuchungen zum römischen Begnadigungsrecht. Abolition – indulgentia – venia*, Innsbruck 1964, p. 186.

³³ O.F. Robinson, *Unpardonable Crimes: Fourth Century Attitudes*, in: *Critical Studies in Ancient Law, Comparative Law and Legal History. Essays in Honour of Alan Watson*, ed. J.W. Cairns, O.F. Robinson, Oxford–Portland 2001, pp. 117–126.

³⁴ It is a poem he published at the age of 83, in which he reminisces about his life spent in Gaul. S. Koczwarą, *Paulin z Pelli*, in: *Encyklopedia katolicka*, vol. 15, ed. E. Gigilewicz, Lublin 2011, col. 81.

³⁵ Paul. Pell. Euch. 232–242.

³⁶ T. Skibiński, *Obraz barbarzyńców w Cesarstwie Rzymskim...*, pp. 312–313.

received from him some unspecified position, yet due to the lack of finances and the lack of the real possibility to rule, it was, in fact, useless. However, in its further part, the poem contains an important piece of information: "that is why I did not follow a completely helpless usurper, but, I confess, I took the side of the Gothic peace."³⁷ The people would often treat the barbarians favourably, provided they turned out to be "civilised".

The constitution in question states the following: "for nothing is called a crime if any person was impelled thereto by fear of death" (*non enim crimen dicitur, quod mortis adegit impulsus*). This fear might be caused by the conditions such as invading barbarians, escaping from the approaching barbaric armies or during domestic wars and conflicts over the right to the throne between the emperors and the usurpers. However, the exemption from criminal liability occurred only on condition that there existed a concern for one's life (*quod mortis adegit impulsus*), the strongest determinant.

It was determined that the committed deeds were to be *indigne invidioseque*. Both terms are especially inclusive concepts and therefore difficult to translate. *Indignitas* stood in opposition to *dignitas*, a feature of a good Roman citizen, testifying to the values he was supposed to abide by.³⁸ *Invidia* are strong negative emotions and this concept is often translated as "envy" or "hatred".³⁹ Nevertheless, it would be difficult to prove a statement that it was in this meaning that the term appeared in the constitution. The phrase *indigne invidioseque* denoted a disgraceful, detestable deed and the two terms put together were used for describing the same concept.⁴⁰

Other deeds committed in the times of turmoil, remained, indeed, unpunished: *habeant omnium criminum impunitatem*. The constitution did not exclude their litigation and even though the perpetrators of the crimes

³⁷ Paul. Pell. Euch. 302–307.

³⁸ From the time of the early empire the term *indignitas* was used in legal sources for describing the unworthiness of inheritance. Cf. M. Dyjakowska, *Indignitas*, in: *Leksykon tradycji rzymskiego prawa prywatnego. Podstawowe pojęcia*, ed. A. Dębiński, M. Jońca, Warszawa 2016, p. 181. In the context of the discussed constitution, the term denotes, together with *humanitas*, one of the Roman virtues.

³⁹ On the ambiguity of the term and problems with its translation, cf. M. Stachura, *Enemies of the Later Roman Order...*, pp. 148–149.

⁴⁰ The stylistic device applied here is hendiadys, which also appears in other imperial constitutions, included in the *Theodosian Code*. Cf. C. Th. 9,1,1. More on the subject cf. M. Jońca, *O "prawniczych" znaczeniach terminu "culpa" w "Kodeksie Teodozjusza"*, *Vox Patrum* 2014, vol. 62, no. 34, pp. 177–178.

were not punished by the state apparatus, the element of condemnation remained. It was believed that even in such special circumstances the *crimen* was committed, but this concept should be endowed here with a lesser legal meaning. It will be thus an offence, disreputable behaviour or mistake. This does not imply that the victims could not seek justice. The person whose property had been stolen and who had recognised his belongings was entitled to its restitution through seeking administrative and judicial redress. However, the initiation of legal proceedings was possible only when the property under dispute was part of the property owned by the defendant.

An anonymous interpretation of the constitution,⁴¹ most probably from the late 5th century,⁴² simplified certain issues:

If any man, compelled by the terror of the enemy, while he feared that he would meet his death, perchance joined with the enemy in depredations, he shall not on that account be prosecuted as a criminal for what he unwillingly did to preserve his life. Of course, if any booty that was taken remains in his possession and is found to be residual, he shall be compelled to restore to the owner, without any chicanery, only that property which is clearly identified.⁴³

It was pointed out that disreputable deeds might have been committed due to the terror from the enemy (*hostis*). Already in the times of

⁴¹ Interpretations consisted of explanatory paraphrases of the texts of the constitution. They functioned as a separate post-classical genre of juridical works. W. Litewski, *Interpretationes*, in: idem, *Słownik encyklopedyczny prawa rzymskiego*, Kraków 1998, p. 127. Quite often they were summaries of the constitution and their texts survived in the *Lex Romana Visigothorum*. A. Berger, *Encyclopedic Dictionary...*, p. 514, s.v. *Interpretationes ad Codicem Theodosianum*.

⁴² Such an idea was expressed by, among others, Ch. Lécivain, *Remarques sur l'interprétation de la "Lex Romana Visigothorum"*, *Annales du Midi: Revue Archéologique, Historique et Philologique de la France Méridionale* 1889, vol. 1, no. 2, pp. 145–146. The stance that the authors of the interpretations were the compilers of Alaric's Breviary was taken by G. Haenel, *Lex Romana Visigothorum ad LXXXVI librorum*, Leipzig 1849 (reprint Aalen 1962), pp. XL–XCIX. Similarly cf. M. Conrat, *Der westgothische Paulus. Eine rechtshistorische Untersuchung*, Amsterdam 1907, pp. 241–242.

⁴³ C. Th. 15,14,14 *interpretatio: Quicumque* hostium terrore compulsus, dum mortem timet excipere, ad depraedandum se cum hostibus fortasse coniunxerit, non propter hoc vocetur ad crimen, quod pro conservanda vita fecit invitus. Sane si quid apud eum de praeda resederit et residuum invenitur, quod evidenter agnoscitur, hoc solum reddere domino sine calumnia compellatur.*

the Republic, the Romans would use the term *hostes* with regard to those people whom they believed to have threatened the security of the state. External enemies were those with whom Rome was in a state of war. Gaius explains: “those whom we call enemies (*hostes*), men of old call *perduelles*, showing by that preposition with whom they were at war.”⁴⁴ Ulpian expressed a similar opinion: “the enemy are those on whom Roman people have publicly declared war, or themselves [declare war] on the Roman people.”⁴⁵ The term *hostis* was an abstract concept and could denote any type of enemy, therefore its use by the authors of the interpretation might be viewed as an attempt to generalise the legal norm and separate it from the historical context.⁴⁶

The deeds exempt from penalisation should have been committed reluctantly, against one’s will. The interpretation refers to the stolen property as *praedia*. This term was usually used for denoting the spoils plundered from the enemy during a war.⁴⁷ However, Salvian of Marseilles used it for denoting special, illegal profits (*peculiaris praeda*) which were obtained by the officials in charge of collecting taxes.⁴⁸ Its use in the context of appropriating the property of fellow-citizens does not seem like adjusting the concepts to the terms reserved for use regarding wars and enemies. It could have been another scheme used for underscoring the depravity and disgracefulness of similar acts.

The looted goods were to be returned to the proper owner *sine calumnia*. However, this phrase should not be associated with the issue of false

⁴⁴ D. 50,16,234 pr.: *Quos nos hostes appellamus, eos veteres “perduelles” appellabant, per eam adiectionem indicantes cum quibus bellum esset.*

⁴⁵ D. 49,15,24: *Hostes sunt, quibus bellum publice populus romanus decrevit vel ipse populo Romano.* Cf. D. 50,16,118.

⁴⁶ M. Stachura, *Enemies of the Later Roman Order...*, p. 119. See also A. Berger, *Encyclopedic Dictionary...*, p. 489, s.v. *hostis*; H.G. Heumann, E. Seckel, *Handlexikon zu den Quellen...*, s. 228, s.v. *hostis II*.

⁴⁷ Aulus Gellius indicated that *praeda dicitur corpora ipsa rerum, quae capta sunt* (Noct. Att. 13,25,26). On the subject of the usage of the term in the times of the Republic and during the principate cf. R. Ortu, *Praeda bellica: La guerra tra economia e diritto nell’antica Roma* [online], *Diritto@Storia. Rivista Internazionale di Scienze Giuridiche e Tradizione Romana* 2005, no. 4, <http://www.dirittoestoria.it/4/Memorie/Ortu-Praeda-bellica.htm> [access: 26.06.2020].

⁴⁸ Salv. de Gub. 5,17. For similar situations cf. H. Brandt, “*All the King’s Horses...*”: *Imperial Legislation Concerning the “Collatio Equorum” in Late Antiquity*, *Bulletin of the Institute of Classical Studies* 2006, vol. 49, p. 226.

accusation (*calumnia*).⁴⁹ In the *Theodosian Code* this term also appears in its broader meaning, as a description of punishment or a judgement,⁵⁰ that is condemnation of the convict.⁵¹ The interpretation thus underscores the element of withdrawal from punishing the perpetrators of similar deeds but does not exempt them from responsibility. Therefore, there cannot be situations in which a deed is not qualified as *crimen* on the grounds of one's fear for one's life. This simplification is another generalisation of the legal norm.

The constitution, together with its interpretation, has been preserved in the shape in which it was included in the *Theodosian Code*.⁵² It was placed in the title: *De infirmandis his, quae sub tyrannis aut barbaris gesta sunt*.⁵³ It concerned the validation of the deeds committed in the times of the tyrants and barbarians. The title contains fourteen constitutions issued in the years 313–416 and only the last one concerns the issues directly related to the invasions of the barbarians that plagued the Western empire at the beginning of the 5th century.⁵⁴ The remaining constitutions under the title refer to, among others, repealing of or maintaining in force legal acts issued by the tyrants, solutions regarding the issued judgements or the solutions regarding the status of certain persons, their dignity and property. Only the last constitution includes a direct reference *explicite* to the barbarians.

Against the backdrop of other regulations regarding collaboration with the enemy and included in the *Theodosian Code* or in the *Justinian Code*, the above regulation is an exception. It was usually emphasised that the collaboration with the enemy (*hostis*) was a disgrace. As Marcianus pointed out, even the Law of the Twelve Tables stated that the person

⁴⁹ *Calumnia* was defined by Gaius as a deceitful action as well as an intention to use the law for achieving one's own purposes or for harassing the opponent. G. 4,178. Cf. S. Serangeli, *C. 7.16.31 e le azioni contro il litigante temerario*, *Bullettino dell'Istituto di Diritto Romano* 1968, vol. 71; S. Pulliati, *Per una storia del crimen calumniae*, *Index. International Survey of Roman Law* 2002, vol. 30, pp. 383–393.

⁵⁰ C. Th. 9,34,1.

⁵¹ More on the topic cf. S. Sciortino, *Intorno a Interpretatio Theodosiani 9.39 "De calumniatoribus"*, *Annali del Seminario Giuridico* 2007/2008, vol. 52, pp. 249–250.

⁵² On the subject of the structure of the *Theodosian Code* cf. e.g. G.G. Archi, *Teodosio II e la sua codificazione*, Napoli 1976.

⁵³ C. Th. 15,14.

⁵⁴ J.L. Cañizar Palacios, *El uso propagandístico del "hostis publicus" en el "Codex Theodosianus"*, *Latomus* 2006, vol. 65, no. 1, p. 146.

who incited the enemy was to be punished with death.⁵⁵ Commenting on the norms *lex Iulia de maiestatis*,⁵⁶ the Justinian compilers included in the *Digests* fragments of Scaevola's *Principles of Law*, where he states, for instance: "or by whose agency maleficious intent the enemies of the Roman people have been assisted with provisions, arms, weapons,⁵⁷ horses, money, or any other thing,"⁵⁸ he is to be held accountable for *crimen maiestatis*.⁵⁹ A similar treatment awaited a person who "in ill will caused that

⁵⁵ Tab. 9,5; D. 48,4,3.

⁵⁶ The edition *lex Iulia de maiestatis* is attributed to Augustus. B. Santalucia, *Diritto e processo penale nell'antica Roma*, Milano 1989, pp. 91–97.

⁵⁷ It is problematic to determine, whether trade in arms was considered treason and as collaborating with the enemy. Some scholars perceive the above words of Scaevola to denote a general prohibition of trading arms to the enemy or to the barbarians while on the grounds of archaeological findings they create a theory of a perfectly functioning illicit arms market. G. Vismara, *Limitazione al commercio internazionale nell'impero romano e nella comunità cristiana medioevale*, in: *Scritti in onore di Contardo Ferrini pubblicati in occasione della sua beatificazione*, vol. 1, ed. A. Gemelli, Milano 1947; H. Elton, *Warfare in Roman Europe AD 350–425*, Oxford 1996. In the constitution of the Eastern Roman Emperor Marcian, the act of providing arms and weapons to the barbarian ambassadors arriving in Rome was considered an act posing a threat to the empire (*perniciosum namque romano imperio*), "close to treason." The ruler enumerates various types of weapons, prohibiting at the same time the sale of defensive accessories (breastplates, shields), as well as all types of weapons, including raw iron. He indicated that the property of a person selling such items to the barbarians would be confiscated for the benefit of the state treasury, and the person himself would be subject to death penalty. CJ. 4,41,2. A different opinion is voiced by B. Rankov, *The Roman Ban on the Export of Weapons to the Barbaricum: A Misunderstanding*, *Journal of Roman Military Equipment Studies* 1999, no. 10, pp. 115–120 who claims that both the scale of the arms trade as well as the alleged reaction of the authorities to that activity have been definitely exaggerated.

⁵⁸ D. 48,4,4: ... cuiusve opera dolo malo hostes populi romani commeatu armis telis equis pecunia aliave qua re adiuti erunt.

⁵⁹ The term *crimen maiestatis* was very inclusive in its content and it is hard to offer its precise definition. Indeed, since the very beginning, it was a crime threatening the independence and security of the Roman state. K. Amielańczyk, *Z historii ustawodawstwa rzymskiego w sprawach karnych. Próba periodyzacji*, *Acta Universitatis Wratislaviensis. Prawo* 2008, vol. 305, p. 17. In the period of the principate, alongside with the identification of the person of the emperor with the state, the crime of *lèse majesté* also included any acts aimed against the emperor. However, it was still emphasised that punishable acts included those perpetrated together with the enemy and external adversaries to the detriment of the Roman state as well as all other deeds inciting internal unrest and destabilisation. D. 48,4,1–11. Cf. A. Pesch, *De perduellione, crimine maiestatis et memoria damnata*, Aachen 1995, pp. 198 ff.

the enemies of the Roman people received assistance against the Roman state.”⁶⁰ The above fragments may be related to the activities of average citizens. However, in both cases it is emphasised that there was a need for the presence of ill will (*dolo malo*).

Another type of collaboration was condemned in the constitution of Arcadius and Honorius of 4 September 397:

If any person should enter into a criminal conspiracy with soldiers or civilians, or even with barbarians, or should take or give the oaths of a conspiracy, and should plan for the death of men [Roman official, Senator etc. – I.L.] he shall be struck down with the sword as one guilty of high treason, and all his goods shall be assigned to Our fisc.⁶¹

It was also emphasised that the very intention of committing a crime should be punished with equal severity as the act itself. The repressions also affected the children and the wife of the convict⁶² and especially his sons, who were to be hence on accompanied by their father’s disgrace (*infamy*) to such an extent that “they shall be in such sordidness of perpetual want that death shall be to them a solace and life a punishment.”⁶³ What is interesting, this constitution was included in the *Theodosian Code* under the title *ad legem Corneliam de sicariis*,⁶⁴ whereas in the *Justinian*

⁶⁰ D. 48,4,1: ... quo hostes populi romani consilio iuventur adversus rem publicam.

⁶¹ C. Th. 9,14,3 pr.: Quisquis cum militibus vel privatis, barbaris etiam scelestam inierit factionem aut factionis ipsius susceperit sacramenta vel dederit, de nece etiam virorum illustrium, qui consiliis et consistorio nostro intersunt, senatorum etiam, nam et ipsi pars corporis nostri sunt, cuiuslibet postremo qui nobis militat cogitarit, eadem enim severitate voluntatem sceleris qua effectum puniri iura voluerunt: ipse quidem utpote maiestatis reus gladio feriatur bonis eius omnibus fisco nostro addictis.

⁶² C. Th. 9,14,3,2–6.

⁶³ C. Th. 9,14,3 pr in fine: ut is perpetua egestate sordentibus sit et mors solacio et vita supplicio. C. Pharr, *The Theodosian Code...*, p. 236, footnote 8, saw in this a reflection of the words of St. Paul from his *Epistle to the Philippians*, where he states: “to live is Christ and to die is gain.” (Paul, *Philipp.* 1,21).

⁶⁴ *Lex Cornelia de sicariis et veneficis* was issued by Cornellius Sulla in 81 B.C. and its issuing was to restore public order and to defend the dictator against his political opponents. It is assumed that it was not directed at persons who committed manslaughter, as this deed did not constitute a crime (*crimen*) in the Republican Rome. J.E. Gaughan, *Murder Was Not a Crime. Homicide and Power in the Roman Republic*, Austin 2010, pp. 2 ff. The law was aimed against murderers or dagger-men (*sicarius*), acting in armed criminal groups, and also against makers of spells and poisoners (*veneficus*). D. 48,8,3 pr. The crime of purposeful arson (*incendium*) was also related to organized crime. Cf. D. 48,8,1 pr. More on

Code it was brought up, with minor changes,⁶⁵ in reference to the *lex Iulia maiestatis*.⁶⁶

Collaboration with the enemy is thus described as active support of the enemy and activities to the detriment of the Roman state. From the above regulations, there emerges an image of a conspirator, a person well-aware of his wrongdoing. Hence, the perpetrator of a deed deemed as state treason could not hope to be forgiven. It is stated, for instance, in the fragment of the constitution of Valentinian, Valens and Gratian of 14 October 369 that “annulment must not be granted even if the parties consent, as in those crimes in which the Imperial Majesty has been violated or the fatherland attacked or betrayed.”⁶⁷ It is a reference to the institution described in the doctrine as *abolitio privata*, that is the abandoning of prosecution, resulting in the end of the procedure without issuing a judgment.⁶⁸ Nevertheless, similar norms concerned collaboration with the enemy based on the intention to co-operate. The gap concerning acting under duress, related to the existence of real threats to life, was filled precisely by the constitution of 416.

Honorius issued the discussed act in specific circumstances, dedicating it to the victims of recent events. He described the addressee in noble terms. The victims were not only those who had lost their property through disgraceful actions of fellow-citizens, but also the perpetrators,

the subject cf. K. Amielańczyk, *Lex Cornelia de sicariis et veneficis. Ustawa Korneliusza Sulli przeciwko nożownikom i trucicielom 81 r. p.n.e.*, Lublin 2011, pp. 29–36.

⁶⁵ C. J. 9,8,5,3.

⁶⁶ Cf. CJ. 9,8.

⁶⁷ C. Th. 9,37,2: ...*Prius tamen quam aliquis de quaestione liberetur, sequitur illud, ut plerisque criminibus ne consentientibus quidem partibus praestetur abolitio, ut sunt illa, in quibus aut violata maiestas, aut patria oppugnata vel prodita, aut peculatus admissus, aut sacramenta deserta sunt, omniaque ea, quae iure veteri continentur. In quibus iudex non minus accusatorem ad docenda, quae detulit, quam reum ad purganda, quae negat, debet urgere.*

⁶⁸ The regulations concerning this issue were located under title 37 (*de abolitionibus*) and also under title 38 (*de indulgentiis criminum*) of the *Theodosian Code*, which include the cases of the so-called general abolition, ordered, for example, by the emperor at various happy events, such as Easter festivities or the birth of Constantine’s grandson (C. Th. 9,38,2) when abolition extended to all, except for those who had committed crimes under the death penalty. G. Kleinfeller, *Indulgentia*, in: *Paulys Realencyclopädie der classischen Altertumswissenschaft*, vol. 9.2, ed. G. Wissowa, A. Pauly, Stuttgart 1916, col. 1378–1318. More on the subject cf. W. Waldstein, *Untersuchungen zum römischen Begnadigungsrecht...*, pp. 175–195.

induced to such actions by the enemy. The reasoning of the legislator must have thus included the intention to restore normality, the sense of relative justice and security. The situations in which people actively, and with some enthusiasm and involvement, participated in such criminal activities, were the only exclusions from the application of this legal act. In such situations, the perpetrators were to be treated as traitors to their homeland.

The constitution in question found its place in the Breviary of Alaric II,⁶⁹ grandson of the conqueror of Rome. History had turned full circle as a descendant of the invader adopted a law protecting people against other calamities. What is interesting, the Breviary retained the title *De infirmandis his, quae sub tyrannis aut barbaris gesta sunt*, but of all the constitutions included in the *Theodosian Code*, only the constitution 15,14,14⁷⁰ was left. The interpretation added to the imperial act, generalising the legal norms, was most probably a combination of several factors resulting from the situation, which people inhabiting the Western Roman Empire, and also its ruins, found themselves in. The regulation in question should be perceived through the optics of the less affluent inhabitants of the former empire, who in the face of a threat to their family and property oftentimes had to take morally difficult decisions. Their predicament was also noticed by the barbarian rulers, which must have had an impact on the attempts to stabilise the situation in the realities of a new state.

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⁶⁹ *Lex Romana Visigothorum* was issued for the Roman people in the Visigothic Kingdom. D. Liebs, *Lex Romana Visigothorum*, in: *Reallexikon der Germanischen Altertumskunde*, vol. 18, ed. H. Beck et al., Berlin 2001, pp. 322–326.

⁷⁰ Brev. 15,3,1.

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Summary

The article analyses the constitution issued by Emperor Honorius in the year 416, concerning the perpetrators of offences qualified as *crimen* as the exemption from criminal liability, in a situation when such actions were undertaken during the barbaric invasions, escape from such invasions or the rule of the usurpers. The act governs that an action perpetrated for fear of one's life cannot be seen as crime. The article analyses specific terms used in the above-mentioned legal act, especially in the context of the contemporary legal terminology of the epoch. Moreover, it presents the historical backdrop behind the issuing of the constitution, together with other regulations regarding collaboration with the enemy, both volitional and under coercion.

Key words: decriminalisation, exemption of criminal liability, enemy, barbarians, Roman law

NON ENIM CRIMEN DICITUR, QUOD MORTIS ADEGIT IMPULSUS – UWAGI NA TLE C. TH. 15,14,14

Streszczenie

Artykuł omawia konstytucję wydaną przez cesarza Honoriusza w 416 r., dotyczącą wyłączenia odpowiedzialności karnej sprawców czynów kwalifikowanych jako *crimen* w sytuacji, gdy działania te podjęte zostały w czasie najazdu barbarzyńców, ucieczki przed najeźdźcami czy rządów uzurpatorów. Akt ten stanowi, że nie ma mowy o przestępstwie, jeśli czyn popełniono w obawie o życie. W artykule analizowane są poszczególne wyrażenia użyte w akcie prawnym, zwłaszcza w odniesieniu do języka prawnego epoki, jak również przedstawiono

tło wydania konstytucji, a także wspomniano inne regulacje, odnoszące się do współdziałania – dobrowolnego lub pod przymusem – z wrogiem.

Słowa kluczowe: depenalizacja, wyłączenie odpowiedzialności karnej, wróg, barbarzyńcy, prawo rzymskie

**NON ENIM CRIMEN DICITUR, QUOD MORTIS ADEGIT IMPULSUS –
ЗАМЕЧАНИЯ НА ФОНЕ С. ТН. 15,14,14**

Резюме

В статье обсуждается конституция, изданная императором Гонорием в 416 году, касающаяся исключения уголовной ответственности лиц, совершивших деяния, квалифицированные как *crimen*, в ситуации, когда эти действия были предприняты во время вторжения варваров, побега от захватчиков или правления узурпаторов. Этот акт гласит, что преступление не имеет места, если деяние было совершено из-за страха за свою жизнь. В статье анализируются отдельные выражения, используемые в правовом акте, особенно в отношении юридического языка эпохи, представлен исторический фон издания конституции, а также упоминаются другие нормативные акты, касающиеся сотрудничества – добровольного или под принуждением – с врагом.

Ключевые слова: декриминализация, исключение уголовной ответственности, враг, варвары, римское право

