

## MOLESTING PRIESTS, CASTRATING SLAVES

### Justinianic Novels in the lexicon Ῥωμαϊκαὶ ἀγωγαί

In the Byzantine legal lexica,<sup>1</sup> most of the λέξεις Ῥωμαϊκαί<sup>2</sup> have simply been translated into Greek. Thus the Byzantine jurist is informed by the lexicon on the *Hexabiblos aucta*, for instance, that *venditor* (βενδίτωρ) stands for ὁ πρᾶτης, *vitium* (βίτιον) for πάθος, *vicarius* (βικάριος) for ὁ τοῦ δούλου δούλος etc.<sup>3</sup> He can find basic information such as this, in all sorts of likely and unlikely variations, in the legal lexica. This was without doubt of vital importance in making the text of his sources comprehensible to him, whether he was attempting to master an original Latin text from the *Corpus Iuris* or, more probably, one of its more accessible versions produced in the age of Justinian and later. Since exhellenisation did not become the rule until the Macedonian Renaissance and non-exhellenised texts remained in use even after that period, alphabetical lists of such glosses served a useful purpose till the end of the Byzantine age.<sup>4</sup>

However, some legal lexica offer more than just the Greek equivalents of technical terms. Many items were regularly dealt with in a more informative way, compilers having elaborated upon them in various degrees and manners. As an illustration I shall mention some explanations that we find on the *actio vi bonorum raptorum*. In Byzantine texts it is usually called (ἡ) βιβουόρουμ ραπτόρουμ, with all sorts of minor variations in the transliteration, but always appearing as a β lemma in the lexica. The lexicon ᾄδεται translates (B 19) ἀγωγή κατὰ τῶν βίαι τὰ ἀλλότρια ἀρπαζόντων, which seems straightforward enough. Similarly it is rendered in the lexicon of cod. Laurentianus 80.2, under B 21, as βία ἀρπαζόντων τὰ ἀλλότρια. In the latter lexicon however, lemma B 32, besides translating more literally ἀγωγή περὶ πραγμάτων βιαίως ἀρπαζομένων, provides additional information about the fines that the accused risks of incurring: ἥτις ἔχει τὴν ἀπαίτησιν ἔσω μὲν ἐνιαυτοῦ εἰς τὸ τετραπλοῦν, μετὰ <δὲ> τὸν ἐνιαυτὸν εἰς τὸ ἀπλοῦν. Lexicon HA B 3 combines two glosses, which both specify the goods (πράγματα) in question as being moveable property: (ἡγουσιν) ἡ περὶ τῶν κινητῶν πραγμάτων βιαίως ἀγωγή καὶ

- 1 In this short paper I cite from the following lexica: a. Ῥωμαϊκαὶ ἀγωγαί (Rhom.ag.), ed. Meijering, *FM VIII Abh. I*; b. Das Lexikon zur *Hexabiblos aucta* (Lex. HA), ed. Fögen, *FM VIII Abh. II*; c. Das Lexikon αὐσηθ ('Rezension L: Das Lexikon im Laurentianus 80.2' and 'Fassung u'), ed. Burgmann, *FM VIII Abh. IV*; d. Das Lexikon ᾄδεται, ed. Burgmann, *FM VI*, 1984.
- 2 As a synonym of Ῥωμαϊκαί we find λατινικαί in the heading of lex. HA, ἰταλικαί in lex. Αὐσηθ Fassung u.
- 3 Lex. HA B 46, B 18, B 16.
- 4 L. Burgmann, 'Λέξεις Ῥωμαϊκαί. Lateinische Wörter in byzantinischen Rechtstexten', forthcoming.

κατὰ τῶν ἀρπάζόντων πράγματα κινητὰ ἀλλότρια. As a matter of fact, this extra information is not correct.<sup>5</sup> It is contradicted a little further on in the same lexicon, B 44: ἡ κατὰ τῶν ἀρπάζόντων πράγματα κινητὰ ἢ ἀκίνητα. Finally, the lexicon 'Ρωμαϊκὰ ἀγωγὰί (7,4/6-8LP; cf. 2-5L) speaks both about the fines incurred and about the sort of goods. It says that the action κινεῖται κατὰ τῶν ἀρπασάντων κινητὰ ἢ αὐτοκίνητα πράγματα, ἐντὸς μὲν ἐνιαυτοῦ οὐτίλιου εἰς τὸ τετραπλοῦν καταδικάζουσα, μετὰ δὲ τὸν ἐνιαυτὸν εἰς τὸ ἄπλοῦν. Thus the compilers provide not only divergent, more or less precise translations of the Latin terms, but at times remark on one or two aspects of legal content as well.

That is not all; both lex. HA B 44 and Rhom.ag. 7,4 have quite a few things more to say on various aspects of this action, which makes the lemmata more encyclopaedic in nature than the simple glosses cited above. They tell us, for instance, that the action has been invented by the praetor, that it is *poenalis*, where it differs from related actions, and how the sentence may depend on specific circumstances, such as the accused's belief that he took his own property, whether he was a slave, whether the victim was a Jew or a pagan, whether the robbery occurred during a fire, etc. This more elaborate way of dealing with Latin legal concepts is characteristic of the 'Ρωμαϊκὰ ἀγωγὰί, which survives in two considerably divergent versions P (cod. Parisinus suppl. gr. 624) and L (cod. Laurentianus 80-2), and of large parts of the lexicon on the Hexabiblos aucta. The lemmata concerned are all names of actions, in the broadest sense of the word.

The nature of these 'Aktionenkommentare'<sup>6</sup> has been discussed by M.Th. Fögen in *FM VIII Abh. III*. Her analysis shows that the lex. HA and Rhom.ag. have a common basis of texts about actions, although they often widely differ in dealing with them. The source that the compilers of these now lost commentaries used was the Corpus Iuris itself, not the Basilica. Looking for relevant information to put under the respective headings, they searched this source in a quite systematic way. Their favourite procedure seems to have been to combine interesting details as found in Institutes, Digest, Codex, and Novels, in that order. However, in practice the Novels were but sparsely used, as can be seen from the cumulative index testimoniorum.<sup>7</sup> Nor need this surprise us. Quite apart from the well-known human tendency to start a job with more enthusiasm than can be sustained to the bitter end, the Novels have never been the most accessible of texts; that is, until 1964, when Nico van der Wal's *Manuale Novellarum Justiniani* was published. Nevertheless, they

5 It is not unparalleled: cf. Rhom.ag. 5,6/10L and the confusion in 7,4,2L, where an ἐτέρα action *vi bonorum raptorum*, ἐπὶ τοῖς κινητοῖς, οὐκ ἐπὶ τοῖς ἀκινήτοις ἀρμόζουσα is differentiated from the regular one mentioned in 7,4,1.

6 The above-cited lemma B 32 from the lexicon in Laur. 80.2 too is one of several taken from a λεξικὸν τῶν ἀγωγῶν: see Burgmann's introduction.

7 *FM VIII*.

were occasionally used as a source by the 'Ρωμαϊκὰ ἀγωγαί author, and I intend to discuss a couple of instances here. But first I will list the places where I have found traces from Justinianic Novels in this lexicon.

As I pointed out above, the 'Ρωμαϊκὰ ἀγωγαί exists in two versions. The one found in cod. Laurentianus 80-2 (L) is characterized by an attempt at systematization, the author classifying the actions according to the type of obligation from which they spring. The actions are found in an alphabetical order in cod. Parisinus suppl.gr. 624 (P), which remains closer to the archetype underlying both versions as well as the *Hexabiblos aucta lexicon*.<sup>8</sup> For the benefit of his ambitious project, the Laurentianus redactor considerably augmented the basic material. It is these additional texts, the 'Ρωμαϊκὰ ἀγωγαί which are unique to L, that are richest in legislation from the Novels. Such additions are:

- 2,20/71-78, which expands on the theme of *querela inofficiosi testamenti* on the basis of Nov. 155;
- 5,3,5-8 on emphyteusis, paragraphs in which the author uses Nov. 7 and cites from Nov. 120;
- 5,21,4-5; 5,22,9 and 11; 5,23,1 and 5,24, with Justinianic regulations on marriage and dowry laid down in Novels 117, 134, 97, 100 and 119 respectively;<sup>9</sup>
- 7.1 on adultery, containing in lines 39-40 a detail derived from Nov. 134.

On the other hand, I have identified Novels as (direct or indirect) sources in the following parts common to L and P:

- Nov. 117 is explicitly referred to in 7,1,7 as regulating another aspect of adultery;
- 2,18,2 on the *actio depositi* in lines 25-28 and 36 refers to a few rules laid down in Nov. 88<sup>10</sup> and Nov. 73 respectively;
- 2,18/125-128 on *hereditatis petitio* makes mention of a Justinianic change laid down in Nov. 118.

Finally, the Novels 123 and 142 left their traces in 7,43,3LP; these passages will be the subject of the present discussion. Rhom.ag. 7,43LP deals with ἡ ἰσουργαρούμ (the accentuation varies), the action that goes with the *lex Cornelia iniuriarum*. The text is found in both manuscript versions. It runs:<sup>11</sup>

<sup>8</sup> See Fögen, *FM VIII*, Abh. III.

<sup>9</sup> In fact the author did not go through the Novels themselves, but a source closely related to the Basilica books 28 and 29, as can be seen from the order in which the fragments are presented; cf. 5,15-20. See Fögen, *FM VIII* Abh. III.

<sup>10</sup> Nov. 88 also seems to be the one referred to in 2,18/42L.

<sup>11</sup> The opening phrases, where the redactions of L and P diverge, are presented separately: that of the L version on the left and P in the right-hand column.

ὁ ὕβριζων κατέχεται. πριβάτα δέ ἐστιν. ὕβρις δὲ γίνεται λόγῳ χειρὶ προθέσει φαμόσῳ πράγματι διαπράσει τῆς οὐσίας τοῦ μηδὲν χρεωστοῦντος. ἔχει δὲ αὐτὴν τις καὶ ὑπὲρ ἑαυτοῦ καὶ ὑπὲρ τῶν ὑπεξουσίων αὐτοῦ. ὀρίζεται δὲ ἡ καταδικὴ πρὸς τὸ πρόσωπον τοῦ ὕβριζομένου. οὐσουφρουκτουαρίῳ δὲ οὐ δίδοται ἀλλὰ τῷ δεσπότη. ἡ δὲ ἀπὸ τοῦ Κορνελίου νόμου κινεῖται κατὰ τοῦ ὠθήσαντος ἢ μαστιγώσαντος ἢ τύψαντος ἢ βία ὑπεισελθόντος εἰς οἶκον. τραχεῖα δὲ ὕβρις ἐκ τοῦ γεγονότος νοεῖται ἢ ἀπὸ δημοσίου τόπου ἢ ἀπὸ προσώπου ἢ ἀπὸ τόπου τῆς πληγῆς. κινεῖται δὲ καὶ χρηματικῶς καὶ ἐγκληματικῶς, ἐξτραορδιναρίως ἐπάγουσα τὴν ποινὴν ταύτην. οἱ ἴσπολλοῖτ´ και ἔαν ὦσι συγκλητικοὶ καὶ ὑπὲρ ἑαυτῶν καὶ γυναικῶν καὶ παίδων καὶ δι´ ἐντολέως κινουσι καὶ ὑποδέχονται. κατέχεται δὲ καὶ οὔτινος ἢ δόλῳ ἢ σπουδῇ γέγονεν ἡ ὕβρις.

7,43,2 Ποεναλία δέ ἐστι καὶ ἀνναλία. ἐπάγει δὲ καὶ ἀτιμίαν, ὡς ἐπὶ τοῦ ἐπὶ χρήμασι διαλυσαμένου. τὴν δὲ τιμωρίαν πρὸς τὰς αἰτίας ἐπάγει· δοῦλοι μὲν ὄντες φραγελοῦνται, ἐλεύθεροι δὲ εὐτελεῖς ῥοπάλοις τύπτονται, οἱ δὲ λοιποὶ προσκαίρως ἐξορίζονται ἢ συνηγορίας ἢ βουλῆς εἴργονται. ῥοπάλοις δὲ τύπτονται καὶ οἱ πωλοῦντες τὰς ἀρχικὰς ψήφους ὡς μέλλοντες διδόναι τῷ ἄρχοντι τὰ χρήματα ποιεῖ δὲ καὶ ἰντεστάβιλεμ τὸν ἔπος ἢ βιβλίον γράψαντα ἢ ἐπιγράψαντα ἢ καὶ ἕτερον τι ἐγγράφως εἰς ἀτιμίαν τινός, καὶ οὔτινος δόλῳ ἢ σπουδῇ γέγονεν ἢ ἐξεδόθη. ὁ δὲ καταμηνύων πρὸς τὴν ἐξέτασιν ἢ τοῖς κατάστασιν τοῦ κατηγορουμένου, ἐπάθλου ἀξιοῦται· εἰ δὲ δημόσιόν τι χρήσιμον γένηται, καὶ δοῦλος ὢν ἐλευθεροῦται. καταδικάζει δὲ καὶ εἰς τὸ διαφέρειν, σκοπομένου τοῦ διαφέροντος πρὸς τὸν καιρὸν τῆς παραστάσεως.

7,43,3 Δίδοται δὲ καὶ εἰς τὸ τετραπλάσιον, ὡς ἐπὶ τοῦ εὐνουχίσαντος τὸν ἀλλότριον οἰκέτην παρὰ γνώμην τοῦ δεσπότη διὰ τῆς ἀεδικίας ἀγωγῆς. εἰ δὲ εὐνουχισθῆ κατὰ γνώμην, ἀμφότεροι ἀπὸ τῆς Νεαρᾶς κεφαλικῶς τιμωροῦνται. τιμωρεῖται δὲ κεφαλικῶς καὶ ὁ ἐπελθὼν ἐν ἐκκλησίᾳ ἱερωμένῳ προσώπῳ καὶ ὕβριν ἐπαγαγών, καὶ ὁ ἐν λιτῇ τὸν ἐπίσκοπον ὕβρισας ἢ διασεΐσας. σβέννυται δὲ τῇ τοῦ ἐνιαυτοῦ παραδρομῇ καὶ τῇ παραπροσποίησει. ἀναίρεται δὲ καὶ δι´ ἀδόλων συμφώνων. σβέννυται δὲ τελευτῇ τοῦ ἡμαρτηκότος, ἐπακολουθεῖ δὲ τῷ προσώπῳ τοῦ ἡμαρτηκότος. εἰ δὲ καταδουλωθῆ ὁ ὕβρισας, κατὰ τοῦ δεσπότη κινεῖται. ἐκ μεταμέλου δὲ οὐ κινεῖται, ἀλλὰ καὶ ὄρκου ἐπαχθέντος σβέννυται.

7,43,4 Οὐδὲ κληρονόμοις οὐδὲ κατὰ κληρονόμων δίδοται ἐν ᾧ μὴ γέγονε προκάταρξις, εἰ μὴ μόνοις τοῖς κληρονόμοις τοῦ ὕβρισθέντος λειψάνου. συντρέχει δὲ αὐτῇ καὶ ὁ Ἄκουλιος, καὶ μία κινηθεῖσα τὴν ἑτέραν ἀναίρει. καὶ ἡ πριβάτα δὲ κινηθεῖσα τὴν ἀπὸ τοῦ Κορνελίου ἀναίρει καὶ ἔμπαλιν. καὶ ὑπεξούσιοι δὲ μὴ παρόντων τῶν πατέρων κινουσιν αὐτὴν. ὁ δὲ συκοφάντης φανεὶς κατηγορὸς ἢ ἐξορίζεται ἢ ἀποκινεῖται τοῦ βουλευτηρίου, κἂν ὁ ἄρχων βουλευεῖν αὐτὸν ψηφίσῃται. ὁ δὲ κατηγορῶν λέγειν ὠφέιλε τὸ εἶδος τῆς ὕβρεως. παρὰ τίνων δὲ καὶ κατὰ τίνων κινεῖται καὶ ἐφ´ ὧν θεμάτων ἐν τοῖς προσφῶροις τίτλοις καὶ ἐν παρατίτλοις εὐρήσομεν.

In the purely alphabetical order characteristic of P, where this passage has been given the number οα' in the margin, it follows a long list of interdicts. In L it is duly discussed in the section on those actions which spring from *delicta*; since within this section the lemmata have been ordered alphabetically, in L too *iniuriarum* comes after several interdicts and an item labelled *incendio ruina naufragio*. Incidentally, the L redactor seems to have forgotten that he has already spoken of the *actio iniuriarum* in 7,27, in the same section and also under ι. In 7,27L, however, he has only mentioned the various possible meanings of the word *iniuria*, information derived from a Greek version of D. 47,10,1 pr., which we are familiar with as BS 3544/6-12. As such 7,27L is a typical example of the Laurentianus additions to the older lexicon.

The information laid down in 7,43LP by contrast was compiled at an earlier stage and from more divergent sources. In the manuscripts themselves we are referred to the corresponding titles in the Digest (D. 48,9, corrupt for 47,10) and Codex (C. 10,35, an error for 9,35),<sup>12</sup> but these are not the only titles which have left their traces. In particular, the lexicon author clearly also used, in § 1, the introduction on *iniuria* laid down in the Institutes (I. 4,4). Then the action is said (§ 2) to be *poenalis*, *annalis*, and to result, in the case of a conviction, in ignominy: these facts are mentioned in I. 4,12,1 and 4,16,2 respectively.

Subsequently part of this basic information is worked out in more detail. For instance, whereas in § 1 we have merely been told that the consequences of a conviction depend on the status of the victim,<sup>13</sup> § 2 explains how they also depend on the person of the accused and on the specific act of *iniuria* that he is found guilty of. These are all rules laid down in D. 47,10 *de iniuriis et famosis libellis*. So here too the author derives his knowledge from one of the first sources that anyone writing on *iniuria* would search through. The same observation applies to most of the remaining text of this passage on the *actio iniuriarum*. In it mention is made of situations in which the action cannot be brought, of its conditional availability to persons *alieni iuris*, of the requirement for the plaintiff to specify the *iniuria* committed. All this information ultimately derives from D. 47,10 and I. 4,12,1.<sup>14</sup> This fact is not an indication of sheer indolence on the part of the lexicon author. Far from just picking out incidental fragments which happened to appeal to him, he seems to have selected those which clarify specific aspects, especially the various possible penalties and circumstances which may put an end to a case or may

12 In L the reference is found as a marginal gloss, whereas in P it has been incorporated into the main text.

13 ὁρίζεται δὲ ἡ καταδίκη πρὸς τὸ πρόσωπον τοῦ ὑβριζομένου, cf. I. 4,4,7 *secundum gradum dignitatis vitaeque honestatem crescit aut minuitur aestimatio iniuriae*. Theophilus adds examples.

14 I. 4,12,1 is the source of § 3 σβέννυται δὲ τελευτῇ τοῦ ἡμαρτηκότος, ἐπακολουθεῖ δὲ τῷ προσώπῳ τοῦ ἡμαρτηκότος. For the Digest fragments see my edition, *FM VIII*, pp. 103f.

mistakenly be expected to do so. This purpose can be deduced not only from the parts that he does not cite,<sup>15</sup> but also from the way in which he has regrouped the Digest fragments into a new order.

It is in this context that we must consider a seemingly foreign element among these fragments from D. 47,10. In § 2 we have been told that conviction in an action of *iniuria*, which is an *actio poenalis*, may, depending on the circumstances, result either in ignominy (ἐπάγει δὲ καὶ ἀτιμία, cf. ποιεῖ δὲ καὶ ἰντεστάβιλεμ), or in various corporal punishments (φραγελοῦνται ... ῥοπαλοῖς τύπτονται), or in temporary exile (προσκαίρως ἐξορίζονται), or in exclusion from advocacy or senate (συνηγορίας ἢ βουλῆς εἴργονται), or in compensating the plaintiff's interest (τὸ διαφέρων). Then the text continues as follows (§ 3):

On occasion it (the action) is also awarded for claiming the quadruplicate value, as in the case of someone who castrates someone else's slave without the owner's consent, by means of the *actio aedilicia*. If, on the other hand, the castration did happen with his consent, they are both awarded capital punishment, according to the Novel. Capital punishment is also imposed when someone assaults an ordained person in church and commits *iniuria* towards him, and when someone commits *iniuria* or intimidates the bishop during a procession.<sup>16</sup>

In other words, in addition to the possible sanctions referred to in § 2 committing the *delictum* of *iniuria* may also lead to an extra heavy fine (τὸ τετραπλάσιον) and even to capital punishment. Two clearly distinct cases are mentioned: that of castrating slaves and that of molesting priests or bishops in the execution of their religious duties. I will start with the latter. This type of criminal act was first dealt with by the emperors Arcadius and Honorius, in the year 398, in a constitution preserved in the Codex title *De episcopis et clericis*. The emperors laid down that (C. 1,3,10 pr.-1):

*Si quis in hoc genus sacrilegii proruperit, ut in ecclesias catholicas intruens, sacerdotibus et ministris vel ipso cultu locoque aliquid importet iniuriae, quod geritur, a provinciae rectoribus animadvertatur. Atque ita provinciae moderator sacerdotum et catholicae ecclesiae ministrorum, loci quoque ipsius et divini cultus iniuriam capitali in convictos sive confessos reos sententia noverit vindicandum nec expectet, ut episcopus iniuriae propriae ultionem deposcat, cui sanctitas ignoscendi gloriam dereliquit (...)*

At first sight this constitution seems to provide sufficient proof of what the lexicon author maintains. The words ὁ ἐπελθὼν ἐν ἐκκλησίᾳ beautifully<sup>17</sup> reflect in

15 In particular he is not interested in dogmatic discussions. See Fögen, *FM VIII Abh. III*.

16 On ἐν λιτῆ see below, note 19.

17 But see note 18.

*ecclesias ... inruens*; ἱερωμένῳ προσώπῳ may well render the words *sacerdotibus et ministris*; ὕβρις ἐπαγάγων is a correct translation of *aliquid importet iniuriae*. The assertion that a person guilty of doing such a thing τιμωρεῖται ... κεφαλικῶς is supported by the emperors' ordainment that the responsible provincial magistrate must know that those convicted and those who admit their guilt *capitali ... sententia ... vindicandum* (sc. *esse*). It is true that ὁ ἐν λιτῇ τὸν ἐπίσκοπον ὕβρισας ἢ διασείσας is not explicitly mentioned in this constitution. However, a bishop molested during a procession could reasonably count as an example of the *sacerdotes et ministri*. In any case we are told that it would not be up to the bishop to sue, although an *iniuria* case like this does concern himself (*iniuriae propriae ultionem*). The emperors probably meant to say that the above-mentioned instances of *iniuria* indirectly all concerned the bishop, because they were really committed against the Church, whether directed against its servants, its religious service or its holy places. Even realizing this, the modern legal historian might well be tempted to stop at this stage of his or her investigations. It would at least have been proved that the author of the Ῥωμαϊκὰ ἀγωγὰί (or, of course, of an underlying lexicon) did go out of his way to gather data on *iniuria* from less obvious titles.

However, prior to giving up the search for further sources he would be well advised to consult Van der Wal's *Manuale Novellarum*. This manual would guide him to the text that mentions our poor bishop who is bodily assaulted, the Justinianic Novel 123, Περὶ ἐκκλησιαστικῶν διαφορῶν κεφαλαίων, promulgated in 546. In Caput 31 of this Novel the emperor says:

Εἴ τις τῶν θείων μυστηρίων ἢ τῶν ἄλλων ἁγίων λειτουργιῶν ἐπιτελουμένων ἐν ἁγίᾳ ἐκκλησίᾳ ἢ τῷ ἐπισκόπῳ ἢ τοῖς ἄλλοις ὑπηρέταις τῆς ἐκκλησίας ὕβρεως τι ἐπαγάγοι, κελεύομεν τοῦτον βασάνους ὑπομείναι καὶ εἰς ἐξορίαν πεμφθῆναι· εἰ δὲ καὶ αὐτὰ τὰ θεῖα μυστήρια καὶ τὰς θείας λειτουργίας ταραξεί ἢ ἐπιτελεῖσθαι κωλύσει, κεφαλικῶς τιμωρεῖσθαι. τούτου αὐτοῦ καὶ ἐπὶ ταῖς λιταῖς ἐν αἷς ἢ ἐπίσκοποι ἢ κληρικοὶ εὐρίσκονται φυλαττομένοι, ἵνα εἰ μὲν ὕβριν μόνον ποιήσει, βασάνοις καὶ ἐξορία παραδοθῆ, εἰ δὲ καὶ τὴν λιτὴν διασκεδάσει, κεφαλικὸν κίνδυνον ὑπομένει (...)

Justinian here further develops the constitution of Arcadius and Honorius. The modification newly introduced in this part of the Novel is a differentiation between merely committing *iniuria* in church, henceforth to be punished by torture and exile, and interrupting a religious service and hindering its continuation, which remains a capital crime. Justinian's choice of words however clearly reflects that of C. 1,3,10. The phrases ἐν ἁγίᾳ εἰσελθῶν<sup>18</sup> ἐκκλησίᾳ and ὕβρεως τι ἐπαγάγοι echo the Latin

18 The verb εἰσελθῶν is more appropriate than Rhom.ag. 7,43/28 ἐπελθῶν, a reading which must yet be retained, for it there governs ἱερωμένῳ προσώπῳ rather than ἐν ἐκκλησίᾳ. See also Coll.Trip. I,3,10.

words of his predecessors in too close a way to be accidental. The former ‘priests and servants of the catholic church’, *sacerdotes et catholicae ecclesiae ministri*, are now called ‘the bishop and the clerics and the other servants of the church’: ὁ ἐπίσκοπος ἢ οἱ κληρικοὶ ἢ οἱ ἄλλοι ὑπηρέται τῆς ἐκκλησίας. These words cover the same category of persons, in fact: *all* clerics, from the bishop down to the lesser priests, as well as the ‘other’ servants, i.e. laymen. Yet the fact that Justinian, like the ‘Ρωμαϊκαὶ ἀγωγαί but unlike his predecessors, makes explicit mention of the bishop seems to hint that the lexicon author consulted this Novel as well.

More importantly, Justinian mentions several circumstances in which *iniuria* against the church may occur: ‘during the holy sacraments or the further holy liturgy’, or also ‘during processions<sup>19</sup> attended either by bishops or by clerics’. This difference has no consequences for the punishment; in the latter case too ὕβριον μόνον ποιῆσαι is punished with torture and exile, διασκεδάσαι with capital punishment. The relevance of the differentiation is that holding processions, λιτάς ποιεῖν, is allowed only in the presence of bishops and the clerics under him. This is explicitly laid down by Justinian in the next chapter of this Novel, 123,32:

Πᾶσι δὲ τοῖς λαϊκοῖς ἀπαγορεύομεν λιτάς ποιεῖν δίχα τῶν ὁσωτάτων τῶν τόπων ἐπισκόπων καὶ τῶν ὑπ’ αὐτοὺς εὐλαβεστάτων κληρικῶν.

It is in anticipation of this rule that Justinian in chapter 31 differentiates between the celebration of the μυστήρια or the ἄλλαι λειτουργαί, where the ‘other servants’ may be in charge, and the λιταί, which do not count as λιταί unless a clergyman is present to say prayers.<sup>20</sup> This differentiation, and consequently the consultation by the lexicon compiler of Novel 123 in any form,<sup>21</sup> is presupposed by Rhom.ag. 7,43,3 ὁ ἐπελθὼν ἐν ἐκκλησίᾳ ἱερωμένῳ προσώπῳ καὶ ὕβριον ἐπαγαγὼν, καὶ ὁ ἐν λιτῇ τὸν ἐπίσκοπον ὕβρισας ἢ διασεΐσας. However, adapting the circumstantial imperial style to the purpose of a lexicon has, it must be feared, not so much simplified matters as created confusion. Justinian did not speak of ὕβρις/*iniuria* committed against a bishop in a procession, but of that committed against, presumably, *any* servant of the Church in a procession, provided it is a proper procession, i.e. one attended by a bishop or clergyman.

In 558 AD Justinian devoted a special Novel to the subject of castration: Novel 142 Περὶ τῶν εὐνουχιζόντων. In the *prooemium* he explains that, although his predecessors have clearly forbidden and severely punished this horrible practice (τὸ

19 Λιτή means *processional* chant in this Novel (cf. Van der Wal, *Manuale* p. 20 note 7), as is shown by τὴν λιτὴν διασκεδάσαι and cap. 32 τοὺς τιμίους σταυρούς, μεθ’ ὧν ἐν ταῖς λιταῖς ἐξέρχονται.

20 Nov. 123,32 ποία γὰρ ἐστὶ λιτή, ἐν ἣ ἱερεῖς οὐχ εὐρίσκονται καὶ τὰς συνήθεις ποιῶσιν εὐχάς;

21 The text is also found B. 3,1,47-48, Eis. 9,17-18 and, incompletely, Nomoc. L tit. 20, p. 628 VJ, cf. Appendix Nomoc. L tit. cap. eccl. 9, p. 662 VJ.



τοιούτων μύσος), it has only escalated. Having actually been shown some of the rare (three out of ninety!) victims who survived, he came to the conclusion that εύνουχιζειν virtually amounted to murder, that it was opposed to God and the law, and that it must be put down by more drastic measures. He then went on to define severe penalties indeed against all men and women who should still dare to castrate anybody or who had done so in the past<sup>22</sup> and against all their accomplices,<sup>23</sup> as well as against those who should attempt to sell a victim or in any other way treat him as a slave:<sup>24</sup> from now on all victims were to be freed.

This constitution would seem to leave no legal room whatsoever to castration in any situation, and the Ῥωμαϊκαὶ ἀγωγαί author is clearly acquainted with it. He even refers to it, saying that in a case where the εύνουχιζων and the owner of the εύνουχισθεὶς agree about the act being performed, both of them shall suffer capital punishment ἀπὸ τῆς Νεαρῶς (7,43,3), i.e. in accordance with the Novel Περὶ τῶν εύνουχιζόντων cited above. So what induced him to add the provision εὶ δὲ εύνουχισθῆ κατὰ γνώμην, words which have no parallel in the Novel?

The question of course should be stated the other way round. The lexicographer only mentions the Novel as a parenthesis, because he has just spoken of the case where an owner has *not* consented to his slave's castration. According to the Novel, the castrator and his possible associates would at any rate suffer capital punishment and the castrated slave would be given his freedom. The former owner's position is not covered by Justinian's new law, except that if he has consented he is of course punished as an accomplice in the crime. But it is precisely the legal rights of an innocent former owner which caused the presence of this passage in the lexicon: it is he who 'is granted' an action for claiming 'the quadruple value' (§ 3). As I said above, the compiler mentions this as an exception to the rule that the action *iniuriarum* condemns εἰς τὸ διαφέρων (§ 2). So the question is, first: where did he find this peculiar case, which naturally prompted him to mention the Novel, and, second: supposing that the grammatical subject of δίδοται remains ἡ ἰνιουριαροῦμ, what has the ἀεδιλικία ἀγωγή to do with it?

The subject of slave castration is not dealt with in the Corpus Iuris titles on *iniuria*, I. 4,4, D. 47,10, and C. 9,35. Nor can the lexicographer have found this information in Novel 142. He may have had the disposal of a commentary on the Novel which referred him to this passage, although none of the present Basilica

22 Nov. 142,1 τοὺς ... εύνουχιζειν τολμώντας ἢ τολμήσαντας οἰουδήποτε πρόσωπον, εἰ μὲν ἄνδρες εἶεν ... εὶ δὲ γυναῖκες ὦσιw ...

23 Ibid. τοὺς ἐπιτάξαντας καὶ ἐπὶ τούτῳ πρόσωπα παραδεδωκότας, ἢ καὶ οἶκους ἢ τόπων τινὰ ἐπὶ τούτῳ παρασχομένους ἢ καὶ παρέχοντας, εἴτε ἄνδρες εἶεν εἴτε γυναῖκες ... ὡς συνίστορας γενομένους τῆς ἀδίκου ταύτης πράξεως.

24 Nov. 142,2 πάντας τοὺς τοιούτοις συναλλάγμασι ... ὑπουργοῦντας, sc. those who lend themselves to causing τοὺς εύνουχισθέντας ... κατὰ ... οἰουδήποτε εἶδος συναλλάγματος εἰς δουλείαν καθέλκεσθαι.

scholia (BS 3904/20-3906/5) refer to it. However, he had little reason to consult such a commentary in this stage of his investigations, before he had thought of bringing up the Novel itself.<sup>25</sup> What he would have profitably scrutinised for more information about *iniuria*, was texts dealing with the *lex Aquilia*. Even the very first fragment of the *iniuria*-title D. 47,10 points out:

(...) *interdum iniuriae appellatione damnum culpa datum significatur, ut in lege Aquilia dicere solemus.*<sup>26</sup>

Indeed our lexicographer is well aware of a certain relation between the action from the *lex Cornelia iniuriarum* and the *lex Aquilia*, as he will show in § 4. There he will say that συντρέχει δὲ αὐτῇ καὶ ὁ ἄκουϊλος, καὶ μία κινήθῃσα τὴν ἑτέραν ἀναίρει. καὶ ἡ πριβάτα δὲ κινήθῃσα τὴν ἀπὸ τοῦ Κορνελίου ἀναίρει καὶ ἔμπαλιν. However, he appears to think that castration is in some way connected with the *actio iniuriarum* as well as with the *actio aedilicia*, not with the *lex Aquilia*. Why should it not be? The Digest is quite clear that not only unlawfully killing someone else's slave falls under the *lex Aquilia*,<sup>27</sup> but also injuring one. This is because the law says *ruperit* and *vulneravisse* should be considered an instance of *rupisse*. As Ulpian puts it:<sup>28</sup>

*Inquit lex 'ruperit'... Rupisse eum utique accipiemus, qui vulneravit, vel virgis vel loris vel pugnīs cecidit, vel telo vel quo alio, ut scinderet alicui corpus, vel tumorem fecerit, sed ita demum, si damnum iniuria datum est.*

That would surely seem to cover our case? Yet it does not, and this is due to the fact that there is no question of *damnum* at all. In this respect the case of the castrated slave is not unlike that of the pollard willow. If someone pollards someone else's willows, the owner cannot sue him with the *actio Aquilia*, as, again, Ulpian points out, citing Octavenus (D. 9,2,27,27):

*Si salictum maturum ita, ne stirpes laederes, secueris (ita Mommsen cum BT et BS pro tuleris), cessare Aquiliam.*

That is because, provided that the trunks are not ruined and that it was the right moment to pollard them, having one's willows pollarded does not cause damage to

25 It is true that with a slight stretch of the imagination the Novel's wording could also account for the occurrence of castration under the heading of *iniuria*. Justinian refers to it as an ἄνοσῖα πράξις, a μύσος (142 pr.), or an ἀσεβεία (142,1), but also as an ἄδικος πράξις (142,1). The last expression might be rendered as *iniuria*, be it *iniuria* in the broadest sense. Cf. BS 3905/6 θεῖν δ' ἄν τις τὸν τοιοῦτον δικαίως καὶ τῆς δημιουργίας αὐτῆς ὑβριστήν, and 3905/14-15.

26 D. 47,10,1 pr. Ulpianus *libro quinquagesimo sexto ad edictum*. This text underlies Rhom.ag. 7,27L: see above.

27 E.g. D. 9,2,3 Ulpianus *libro octavo decimo ad edictum*: Si servus servaque iniuria occisus occisave fuerit, lex Aquilia locum habet.

28 *Libro octavo decimo ad edictum*, D. 9,2,27,13 and 27,17.

the owner. On the contrary, he has reason to be grateful for having the job done for him. Only if the person who did it should keep the osiers for himself, would the owner sue him, not however for *damnum iniuria* but for theft. The situation is explained more fully for olives and the like, D. 9,2,27,25.<sup>29</sup>

The analogue with castrating other people's slaves is clear. The *lex Aquilia*, as we saw above, applies to injuring (*rupisse*) slaves only *si damnum iniuria datum est*. Since the hapless slave's own opinion on whether or not he has been damaged and injured is not relevant from a legal point of view, the question is whether his economic value has diminished. In the words of Ulpian (D. 9,2,27,17):

*si nullo servum pretio viliores deterioresve fecerit, Aquilia cessat iniuriarumque erit agendum dumtaxat: Aquilia enim eas raptiones, quae damna dant, persequitur.*

Now our slave (provided he survives) has only increased in value as a eunuch. At any rate, that was what happened in the days of Ulpian, who wrote (D. 9,2,27,28):

*Et si puerum quis castravit et pretiosorem fecerit, Vivianus scribit cessare Aquiliam, sed iniuriarum erit agendum aut ex edicto aedilium aut in quadruplum.*

In the Basilica version (B. 60,3,27,28):

ἽΟ εὐνουχίας παῖδα καὶ ποιήσας τιμώτερον τῆ περι ὕβρεως ὑπόκειται καὶ τῷ παραγγέλματι τῶν ἀγορανόμων εἰς τὸ τετραπλοῦν.

The owner does not suffer an economic loss, but he may indeed feel offended: injuring a slave is committing *iniuria* against the owner, as we are told for instance in the Institutes, I. 4,4,3:

*Servis autem ipsis quidem nulla iniuria fieri intellegitur, sed domino per eos fieri videtur ... cum quid atrocius commissum fuerit et quod aperte ad contumeliam domini respicit. veluti si quis alienum servum verberaverit, et in hunc casum actio (sc. iniuriarum) proponitur.*

This argumentation is of course no longer valid once Justinian has ordained that castrated slaves should be free. The lexicographer appears not to have noticed that the Novel causes the innocent owner to lose a slave, rather than unexpectedly finding him made more valuable. The Basilica scholia too, although they do refer to the Novel,<sup>30</sup> comment on the high value of eunuchs, as in BS 3130/21-22 πάντων γὰρ τῶν δούλων οἱ εὐνοῦχοι πλείονος ἀποτιμῶνται. These sixth-century

29 Si olivam immaturam decerpserit vel segetem desecuerit immaturam vel vineas crudas, Aquilia tenebitur: quod si iam maturas, cessat Aquilia: nulla enim iniuria est, cum tibi etiam impensas donaverit, quae in collectionem huiusmodi fructuum impenduntur: sed si collecta haec interceperit, furti tenebitur.

30 BS 3130/4, 6-7, 13-14, 16-19; 3135/22-24, 26-28.

commentators still compare eunuchs to schooled slaves like teachers and doctors;<sup>31</sup> they ignore the implications of the new law for Ulpian's point of view. Only one of the more recent *Basilica scholia* confusingly points out that the castrated slave's value increases *because* of his freedom.<sup>32</sup> This hardly makes more sense than our 'Ρωμαϊκαὶ ἀγωγαί compiler citing an obsolete rule.

So far, we could at least reconstruct the lexicographer's method of finding material for his *iniuriarum* lemma. As for the *actio aedilicia*, we have seen that he found it in his source, D. 9,2,27,28. I do not know, however, what Ulpian or Vivianus thought that the aedilian edict should have to do with it. The ancient commentators do not offer much help on this point either. We are told by them that (BS 3131/3-4):

ἀπηγόρευσαν γὰρ οἱ ἀεδίλες τὸ εὐνουχίζειν, ὥσπερ καὶ σήμερον ταῖς διατάξεσιν ἀπηγόρευται.

Or, just frankly (BS 3131/1):

τοῦτο τὸ παράγγελμα οὐδαμῶς κατέχεται οὐδὲ εὐρίσκεται ἐν τῷ βc . . . . .

Apparently the edict provides an alternative to the *actio iniuriarum*, and it seems to be this alternative which can claim the quadruplicate value.

We can conclude then that whereas the Digest text contains a superfluous *aut*, before *quadruplum*, rightly deleted by Mommsen on the testimony of the *Basilica*, the confusion in the 'Ρωμαϊκαὶ ἀγωγαί text is due to the omission of ἢ after δεσπότην. Yet we would be wrong to supply it in the text, for the lexicon author did not quite understand the passage, as is clear from his belief that he had discovered an instance of the *actio iniuriarum* exacting the quadruple. But we would also be wrong to dismiss him as a muddle-head. He systematically scanned the sources at his disposal to find the sort of information he wanted, and arranged his at times surprising discoveries in a fairly sensible order.

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31 BS 3130/24-25. Cf. 3135/20-21: the value of a eunuch is seventy solidi.

32 BS 3135/22-23 Τιμώτερον εἶπε γίνεσθαι τὸν δούλον, ἐπειδὴ μέλλει ὁ εὐνουχισθεὶς ἀπὸ δουλείας εἰς ἐλευθερίαν ἀναρπάξεσθαι.

33 Cf. BS 3135/29-33 (τοῦ Ἀγιοθεοδωρίτου): Οἱ δὲ ἀεδίλες κουρούλες ἀγορανόμοι διδάσκει καὶ ἀγωγὴν εἰς τὸ τετραπλάσιον καὶ οἶμαι, ὅτι ὡς φονεὰ ἐξ ὀρθοῦ ἠγησάμενοι τὸν τοιοῦτον τοῦ εὐνουχισθέντος δούλου, κὰν μὴ τὸ πρᾶγμα οὕτως ἐξέβη, ἠθέλησαν ὡς ἤδη τάχα τοῦ εὐνουχισθέντος ἀποθανόντος δοῦναι τῷ δεσπότη τῷ τάχα ἀποθανόντος δούλου τὸ τετραπλάσιον τὸν εὐνουχισαῖνα.