

# Church Asylum in Late Antiquity

## Concession by the Emperor or Competence of the Church?<sup>1</sup>

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### *Introduction*

The fact that the Faculty of Law of the Radboud University Nijmegen has decided to offer Paul Nève a *Festschrift* to commemorate that on his initiative 25 years ago an extraordinary chair for History of Canon Law was established, demonstrates that the former holder of the chair of Roman law is still very much esteemed - as scholar and as friend - by many of his colleagues. It is with great pleasure that I comply with the invitation to contribute to this volume "*Secundum Ius*" and will try, in conformity with the title chosen, to deal with a "second law". For the purpose of my paper this second law is ecclesiastical law.

From the time that the Christian Church came into existence, within the Roman empire with its secular law, there has been the Catholic Church governed by a law of its own. In the course of history the mutual relationship between these two laws, secular and ecclesiastical, has frequently been subjected to a scholarly debate with important significances for legal practice. In this paper I would like to pay attention to one such a debate, viz. the question as regards the character and origin of Church asylum in late Antiquity. In early-modern times, it was disputed whether such asylum was a privilege

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<sup>1</sup> This article contains the elaborated version of a paper presented on 18 September 2003 at Clermont-Ferrand during the 57th session of the *Société Internationale Fernand de Visscher pour l'Histoire des Droits de l'Antiquité* on the theme *Les sources juridiques dans le monde antique: leur contribution à la connaissance de l'Etat et de la société*. I would like to thank Boudewijn Sirks (Johann Wolfgang Goethe-Universität, Frankfurt/M) for reading critically the draft version of this paper and Margaret Hewett (University of Cape Town) for further advice and for correcting the English of my text.

conceded by the Roman Emperor or a competence of the Church<sup>2</sup>. Evidence suggests that, by the fourth century, debtors, offenders and criminals could take refuge in Christian churches in order to avoid capital or other severe punishment. The sacred building protected the fugitive against his pursuer, since the latter was not allowed to continue the chase into the building or to drag his victim out. At the same time the ecclesiastical authorities could take the asylum-seeker under their protection and intercede for him with the secular authorities<sup>3</sup>.

The principle underlying intercession for debtors and other offenders was certainly not to obstruct justice. Neither was Church asylum intended to promote immunity from punishment. Intercession was essentially a pastoral activity. The Church did not want the death of the sinner but his reformation. For this reason the bishops saw it as their task to save criminals from physical death in order to enable them to repent, to do penance, and thus to turn over a new leaf and eventually gain eternal salvation.

During the sixteenth and seventeenth centuries a number of canonists and historians were concerned with the question whether this practice of asylum in the Early Church should be regarded a concession by the Roman Emperors, i.e. a privilege granted by the State to the Church, or whether asylum had resulted from the sacred character of Church buildings and could, as a consequence, only be acknowledged and protected by the Emperor, not conceded.

This debate had important consequences for the contemporary, i.e. the early-modern view on the relation between Church and State. A certain view prevailing during Antiquity concerning the question regarding to whose competence the above issue belonged, was considered determinative as to the tradition of the Primitive Church and it is to this tradition that a normative value was ascribed. Thus, the ancient sources of law were important, but they were, as we will see, scarce and they still are. Everything depended on the interpretation of a handful of imperial constitutions dating back to the late fourth and early fifth centuries. Those were the sources of law which were available to clarify the character and origin of Church asylum, and tell us

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<sup>2</sup> Literature: C. Latini, *Il diritto d'asilo*; Prime note sull' *immunitas loci* nell' esperienza di diritto comune, in: A. Schmidt-Recla e.a. (eds), *Sachsen im Spiegel des Rechts; Ius Commune Propriumque*, Köln etc. 2001, 157-183; C. Latini, *Il privilegio dell'immunità; diritto d'asilo e giurisdizione nell'ordine giuridico dell'età moderna* [Pubblicazioni della Facoltà di giurisprudenza/Università di Macerata. 2. ser], Milano 2002.

<sup>3</sup> We are dealing here with two different kinds of Church protection, asylum and intercession. However, from the fifth century onwards, these were to be bracketed together in the canons of a number of local councils.

something about the relationship in the society of late Antiquity between secular and ecclesiastical authorities.

### *Early literary sources and the Council of Sardica*

The idea of Church asylum is of long-standing and may well derive from pre-Christian sacred refuges, such as temples and statues<sup>4</sup>, although there is no proof for a direct adoption of the pagan custom. From the first centuries of our era there is little, if any, written documentation. The oldest literary statements date from the fourth century, i.e. after Christianity was permitted by the Edict of Milan of the year 313. Gregory of Nazianze (330-390) tells of an aristocratic lady, who had just become a widow. Put under pressure to conclude a new marriage, she sought refuge in a Church and Basil the Great (c. 329-379) took her under his protection<sup>5</sup>. The historian Ammianus Marcellinus (c. 335- c. 400) relates in his *Rerum gestarum libri* two instances where someone fled into a Christian Church, but in both cases he was immediately dragged out<sup>6</sup>. Similar examples can be found in the Byzantine historiographer, Zosimus<sup>7</sup>.

In 343 the Council of Sardica pronounced upon the help to be offered to those who, suffering injustice or being condemned to exile or another penalty, appealed to the Church for help. Canon 8 (in the Greek numbering canon 7) prescribed that help should not be refused and that intercession should be made<sup>8</sup>. It is questionable whether the text of canon 8 only deals with intercession by the bishop or also refers to the protective effects of the Church building, for the Latin text reads 'to flee to the compassion of the Church' (*ad misericordiam Ecclesiae confugere*), which can only be understood as referring to the Church as an ecclesiastical organization, not in the sense of a building. The Greek version speaks about 'to flee to the Church' (καταφυγειν ἐπι την ἐκκλησίαν) and is sometimes interpreted as referring to the

<sup>4</sup> Literature: R. Gamauf, *Ad statuum licet confugere; Untersuchungen zum Asylrecht im römischen Prinzipat* [Wiener Studien zu Geschichte, Recht und Gesellschaft, 1], Frankfurt etc. 1999. For the Jewish roots see *Bijbelse Encyclopedie*, part I, Kampen 1975<sup>2</sup>, 82-83.

<sup>5</sup> Oratio 43 on Basil the Great, n. 56, in Grégoire de Nazianze, *Discours 42-43* [SC 384], Paris 1992, 242-244.

<sup>6</sup> Ammianus Marcellinus, *Rerum gestarum libri qui supersunt*, 15.5.31 [ed. Loeb, vol. I, p. 152] and 26.3.3 [ed. Loeb, vol. II, p. 582].

<sup>7</sup> Zosimus' *New History* 4.40.5, 5.8.2, 5.18.1 and 5.19.4, in: Zosime, *Histoire Nouvelle*, Tome II, 2<sup>e</sup> partie (Livre IV), Paris 1979, 307 and Tom. III, 1<sup>re</sup> partie (Livre V), Paris 1986, 15, 26 and 29. The fragment of 5.18.1 refers to the case of Eutropius which will be dealt with below.

<sup>8</sup> C.H. Turner, *Ecclesiae occidentalis monumenta iuris antiquissima*, Part I, Oxford 1899, 462-465 and 502-505. The second part of canon 8 was included in the *Decretum Gratiani* as C.23 q.8 c.28.

actual building<sup>9</sup>. However, the Latin text is, by many, considered as preferable<sup>10</sup>, the entire context points to intercession, and the use of 'Church building' for the Greek ἐκκλησία is only a derived meaning. Moreover, canon 8 of the Council of Sardica contains no concrete prescriptions to be observed regarding the sacred character of Church buildings, such as we find in later constitutions and canons<sup>11</sup>.

### *The first imperial constitutions dealing with Church asylum<sup>12</sup>*

The earliest legal text dealing with Church asylum is an imperial constitution of 18 October 392 (CTh 9.45.1), issued more than a decade after the Emperor Theodosius I (346-395) promulgated his famous edict *Cunctos populos* (380)<sup>13</sup>, prescribing the Christian faith as the one and only religion for the Empire. The constitution on Church asylum of 392 suggests that not only offenders but also those who did not pay their taxes used to take refuge in Churches. Apparently the Emperor Theodosius wanted to put an end to this practice,

<sup>9</sup> Cf. J. Gröll, *Die Elemente des Kirchlichen Freiungsrechtes*, Stuttgart 1911 (reprint Amsterdam 1965), 130-131 [Kirchenrechtliche Abhandlungen, 75-76]; H. Hess, *The canons of the council of Sardica A.D. 343; A landmark in the early development of canon law*, Oxford 1958, 131 [Oxford Theological Monographs, I].

<sup>10</sup> For a survey of the various opinions, see Hess, *The canons*, 41 ff.

<sup>11</sup> According to Leopold Wenger (1874-1953) the provision of Sardica does not pronounce upon Church asylum, see L. Wenger, ΟΡΟΙ ΑΣΥΛΙΑΣ, in: *Philologus; Zeitschrift für das klassische Altertum* 86 (1931), 427-454, especially 435-436; cf. also A. Ducloux, *Ad ecclesiam confugere; Naissance du droit d'asile dans les églises (IVe-milieu du Ve s.)*, Paris 1994, 33-34. However, according to Peter Landau the provision of Sardica does refer to Church asylum, since he thinks that from the earliest times there was a strong connection between intercession by the bishop and protection by the sacred place. See P. Landau, Traditionen des Kirchenasyls, in: K. Barwig-D.R. Bauer (eds), *Asyl am Heiligen Ort; Sanctuary und Kirchenasyl; Vom Rechtsanspruch zur ethischen Verpflichtung*, Ostfildern 1994, 47-61, especially 52.

<sup>12</sup> Literature: A. Bulmerincq, *Das Asylrecht in seiner geschichtlichen Entwicklung beurtheilt vom Standpunkte des Rechts und dessen völkerrechtliche Bedeutung für die Auslieferung flüchtiger Verbrecher*, 1853 (reprint 1983), 84 ff.; Ch. de Beaurepaire, *Essai sur l'asile religieux dans l'empire romain et la monarchie française; II. Asile sous les empereurs chrétiens*, in: *Bibliothèque de l'École des Chartes* 14 (1853, reprint 1965), 362-375; E. Herman, *Zum Asylrecht im Byzantinischen Reich*, in: *Orientalia Christiana Periodica* 1 (1935), 204-238; J. Herrmann, *Cod. Theod. 9,45: De his, qui ad ecclesias confugiunt*, in: G. Kleinheyser-P. Mikat (eds), *Beiträge zur Rechtsgeschichte, Gedächtnisschrift für Hermann Conrad*, Paderborn etc. 1979, 271-282; H. Siems, *Zur Entwicklung des Kirchenasyls zwischen Spätantike und Mittelalter*, in: O. Behrends-M. Diesselhorst (eds), *Libertas; Grundrechtliche und rechtsstaatliche Gewährungen in Antike und Gegenwart*, Ebelsbach 1991, 139-186; Ducloux, *Ad ecclesiam confugere*, 56-64; E. Tiessler-Marenda, *Einwanderung und Asyl bei Hugo Grotius*, Berlin 2002, 49-58. [Schriften zur Europäische Rechts- und Verfassungsgeschichte, 42]; Chr. Traulsen, *Das sakrale Asyl in der Alten Welt*, Tübingen 2004 [Jus Ecclesiasticum, 72].

<sup>13</sup> CTh 16.1.2; Justinian adopted the text in the first title of his *Codex* (CJ 1.1.1).

since his constitution, i.e. CTh 9.45.1, contains a prohibition against Church asylum for *debitores publici*, i.e. debtors of the Treasury. Such persons should forthwith be expelled from their hiding-places, or payment could be claimed on their behalf from the bishops who were shown to harbour them<sup>14</sup>.

Although the wording of CTh 9.45.1 by no means grants a right of asylum, it could be understood to acknowledge the existence of a right of asylum for categories other than debtors of the Treasury. Certainly, the existence of such a right is not denied. Some years later, on 17 June 397, the Emperors Arcadius (377-408) and Honorius (384-423) issued a constitution (CTh 9.45.2), which again refused certain categories of persons the right of asylum. The text deals with Jews, who, when prosecuted or sued, took refuge in the Church, feigning that they wanted to convert to Christianity. These Jews should be expelled and only accepted into the Church after they had paid all their debts or when their innocence was proved<sup>15</sup>. Obviously this explicit denial of Church asylum for Jews can be interpreted as implying that such a right indeed existed for others.

There is only one single literary source, Zosimus' *New History*, which suggests that even before 399 there was an edict explicitly acknowledging the right of asylum<sup>16</sup>. It is possible that such an edict indeed existed but had been lost. The statement of Zosimus may also refer to a certain interpretation of CTh 9.45.1, CTh 9.45.2, or to CTh 9.45.3, Arcadius' constitution of 398 which, as will be explained below, can be interpreted in various ways, viz. as part of more comprehensive legislation which abrogated the existing practice of asylum entirely, or as a provision which again restricted the existing practice, i.e. providing that asylum did not have to be observed in cases where, on the presentation of a summons, expulsion should have had taken place immediately.

The literary sources make it clear that, whether Church asylum in the Roman Empire was acknowledged by law or not, it was not always observed. This

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<sup>14</sup> CTh 9.45.1: *Publicos debitores, si confugiendum ad ecclesias crediderint, aut ilico extrahi de latebris oportebit aut pro his ipsos, qui eos occultare probantur, episcopos exigi. (...)*. Augustine referred to this provision, when he wrote that a certain Fascius had taken refuge in the Church because of a tax arrears of 17 *solidi*. Augustine took him under his protection in order to preserve him from corporal punishment; cf. *Epistula 268* in: A. Goldbacher (ed), *Augustini ... Epistulae*, Pars IV, Wien etc. 1911, 652 [CSEL 57].

<sup>15</sup> CTh 9.45.2: *Iudaei, qui reatu aliquo vel debitis fatigati simulant se Christianae legi velle coniungi, ut ad ecclesias confugientes vitare possint crimina vel pondera debitorum, arceantur nec ante suscipiantur, quam debita universa reddiderint vel fuerint innocentia demonstrata purgati*. This text was later included in the *Codex Justinianus* as CJ 1.12.1.

<sup>16</sup> Zosime, *Histoire Nouvelle* 5.18.1, Tome III, 1<sup>re</sup> partie (Livre V), 26: Eutropius (more about him anon) is dragged out from the Church where he took refuge, which act violated the enactment securing the right of asylum.

can be concluded from the two examples by Ammianus Marcellinus, mentioned above. Further, in 396, i.e. two years before Arcadius' constitution was promulgated, St Ambrose (339-397) took a certain Cresconius under his protection in the Church of Milan, but Cresconius, who had been sentenced to the beasts, was dragged out of the Church by Arian soldiers<sup>17</sup>.

### *The role of Eutropius in framing CTh 9.45.3*

It was in 398, that a constitution under the inscription of Arcadius and Honorius against certain forms of asylum (CTh 9.45.3) was issued. Thus, if Church asylum had been legally acknowledged, it was again restricted for the third time. If it only existed *de facto*, the Emperors again tried to discourage certain forms of it. Historians from Roman Antiquity, such as Sozomenos († 447/448) and Socrates Scholasticus (c. 380-450), have connected this constitution with the Emperor Arcadius' minister Eutropius († 399)<sup>18</sup>.

It is perhaps desirable to preface the discussion of this constitution with a brief historical resumé which may well throw light on the motives behind the constitution. Arcadius became Emperor of the East in 395, on the death of his father Theodosius I, while his younger brother, Honorius became Emperor of the West. Arcadius was not a strong character and was like clay in the hands of Flavius Rufinus († 395), prefect of the East, who had been appointed his guardian by Theodosius. Rufinus planned to marry his daughter to Arcadius but this scheme was frustrated by the eunuch and ex-slave, Eutropius, then the chamberlain in charge of the imperial household (*praepositus sacri cubiculi*). Eutropius contrived a marriage between the Emperor and Aelia Eudoxia († 404), a strong minded woman who readily exploited her position and dominated her docile husband. Eutropius was ambitious, avaricious and unscrupulous and Rufinus did not survive for long. He was murdered in 395 by order of the Gothic general Gainas († 400), and Eutropius succeeded to his position. He soon became consul (the first eunuch to hold this honourable rank), a patrician and general-in-chief. But these ill-deserved honours did not

<sup>17</sup> See the biography of St Ambrose by Paulinus Mediolanensis († c. 418); Paulinus, *Vita S. Ambrosii* nr. 34 in PL 14, column 66-114, especially column 110 and Ducloux, *Ad ecclesiam confugere*, 85ff.

<sup>18</sup> J. Bidez-G.C. Hansen (eds), *Sozomenus: Kirchengeschichte*, Berlin 1995<sup>2</sup>, VIII.7, 359-360 [GCS, N.F., 4]; G.C. Hansen (ed), *Sokrates <Scholasticus>: Kirchengeschichte*, Berlin 1995, VI.5, 316-317 [GCS, N.F., 1]. Cf. also the satire *In Eutropium* by Claudius Claudianus († 404), in: M. Platnauer (ed), *Claudian I*, London etc. 1922, 138-228. Eutropius' activities are, on the basis of the ancient sources, in later times described by - amongst others - Claude Fleury. Cf. Cl. Fleury, *Histoire Ecclesiastique*, Tom. V, Paris 1720, Livre XX § 36, 86-87; modern literature: R.S. Bagnall e.a., *Consuls of the Later Roman Empire*, Atlanta 1987, 399 and Ducloux, *Ad ecclesiam confugere*, 64-70.

protect him from the rivalry of the Gothic commander, Gainas. Gainas exploited the rebellion of Tribigild, a Gothic chief in Phrygia, to present the Emperor with an ultimatum. Peace could be arranged with the Goths but at the price of Eutropius' head. Unfortunately for him, Eutropius had insulted the Empress Eudoxia and largely at her instigation he was dismissed and left to the mercy of his enemies. It is ironic that the man who did so much to deny others the sanctuary of the Church and to circumscribe its privileges, in his hour of great need fled to the asylum of *Sancta Sophia* in Constantinople. There he fell to the ground before the Archbishop, St John Chrysostomos (344-407), and begged for protection. Chrysostomos extended his protection over the fallen minister, despite strong popular hostility. He did, however, give Eutropius a sound lecture: "The Church you have combated has opened its bosom for you, while the theatres you supported, for which you were so often enraged at us, have betrayed you and brought you to ruin"<sup>19</sup>. Chrysostomos succeeded in temporarily averting the anger of the crowd and at the same time pointed out the moral of the situation to the unhappy Eutropius. However, the respite was purely temporary. An edict was issued, declaring Eutropius to have disgraced the rank of consul and patrician. His wealth was confiscated<sup>20</sup>, he was banished to Cyprus and shortly thereafter he was tried, sentenced to death and decapitated (no later than 1 October 399)<sup>21</sup>.

The rest of Arcadius' reign was a continuation of palace intrigue, female domination and religious conflict between the Arians and the Orthodox. This need not concern us here. It appears that Eutropius was the instigator of the constitution of 27 July, 398, which restricted, even if it did not entirely prohibit the taking of asylum in a Church. The occasion for this constitution is attributed to the jealousy of Eutropius. He was determined to ruin all men of influence who had held positions of importance during Theodosius' I reign. One such was Flavius Timasius, a famous general, whom Eutropius had banished to the Oasis in Africa (396). Timasius' wife, Pentadia, had sought asylum in a Church. Eutropius retaliated by instigating the constitution, issued by the Eastern Chancery, which not only restricted the possibility of seeking asylum but also prescribed certain categories of persons whom it was lawful

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<sup>19</sup> Johannes Chrysostomos, *Homilia in Eutropium*, in PG 52, col. 391-396; see for this text Ducloux, *Ad ecclesiam confugere*, 93-103.

<sup>20</sup> See CTh 9.40.17.

<sup>21</sup> Bidez-Hansen (eds), *Sozomenus: Kirchengeschichte VIII.7*, 359-360; Hansen (ed), *Sokrates <Scholasticus>: Kirchengeschichte VI.5*, 316-317; Fleury, *Histoire Ecclesiastique*, Tom. V, Paris 1720, Livre XX § 37, 87-90; J.H.W.G. Liebeschuetz, *Barbarians and bishops; Army, Church, and Stage in the Age of Arcadius and Chrysostom*, Oxford 1990, 104-110 and A. Cameron-J. Long, *Barbarians and Politics at the Court of Arcadius*, Berkeley etc. 1993, 163 and 325.

to pursue into a Church building and drag out by force<sup>22</sup>. Further, as said above, Eutropius appears to have been instrumental in framing the constitution of 27 July 398 (CTh 9.45.3). This constitution is note-worthy because of the number and type of categories listed.

### *The constitution of CTh 9.45.3 (398)*

The constitution of Arcadius and Honorius, included in the *Codex Theodosianus* as CTh 9.45.3, restricted Church asylum by stating the following<sup>23</sup>.

*The Emperors Arcadius and Honorius Augustuses to the praetorian prefect Eutychanus.*

*Hereafter, if any male or female slave, any curial, debtor to the state, procurator or collector of murex shells<sup>24</sup>, or in conclusion, anyone who is employed in public or private accounting (if any of these) flees to a Church or is ordained a cleric, or has, in any way, been defended by the clergy, and is not, on the presentation of a summons, immediately returned to his previous position, he shall be treated as follows. Decurions indeed and all whom their accustomed official duties require to perform a service shall be returned, firmly and speedily by the courts, to their former position as if they were about to be taken to court. We do not allow the law which does not forbid decurions to become clerics after abandoning their property, to benefit these persons, any longer. But also those whom they call *oekonomoi* (stewards), that is those who usually administer Church accounts, shall be constrained to repay the public or private debts, without any postponement being allowed, which are owed by these whom the clergy received under their protection and did not consider that they would be immediately summoned.*

<sup>22</sup> Literature: C. Cantu, *Histoire universelle*, Livre VII (Septième époque) Chapitre XIV, Tom. III, Bruxelles 1845, 444-455; J.B. Martindale, *The Prosopography of the later Roman Empire* Vol. II, Cambridge etc. 1980, 440-444; Liebeschuetz, *Barbarians and bishops*, 93-110; Cameron-Long, *Barbarians and Politics at the Court of Arcadius*; and Ducloux, *Ad ecclesiam confugere*, 71-80.

<sup>23</sup> IMPP. ARCAD(IVS) ET HONOR(IVS) AA. EVTYCHIANO P(RAEFECTO) P(RAETORI)O. *Si quis in posterum servus ancilla, curialis, debitor publicus, procurator, murilegulus, quilibet postremo publicis privatisve rationibus involutus ad ecclesiam confugiens vel clericus ordinatus vel quocumque modo a clericis fuerit defensatus nec statim conventionione praemissa pristinae conditioni reddatur, decuriones quidem et omnes, quos solita ad debitum munus functio vocat, vigore et sollertia iudicantium ad pristinam sortem velut manu mox iniecta revocentur: quibus ulterius legem prodesse non patimur, quae cessione patrimonii subsequuta decuriones esse clericos non vetabat. Sed etiam hi, quos oekonomos vocant, hoc est qui ecclesiasticas consuerunt tractare rationes, ad eam debiti vel publici vel privati redhibitionem amota dilatione cogantur, in qua eos obnoxios esse constiterit, quos clerici defensandos receperint nec mox crediderint exhibendos. ET CETERA. DAT. VI KAL. AVG. MNIZO HONORIO A. IIII ET EVTYCHIANO CONSS.*

<sup>24</sup> See for the *murilegulus*: CTh 10.20. There were many public duties resting upon the *murilegulus* since collecting murex shells was an imperial privilege.

*Given 27 July 398 in Mnizus in the year of the fourth consulship of Honorius Augustus and the consulship of Eutychianus.*

This text does not seem to abrogate asylum entirely, but to exclude certain categories of persons, especially decurions who neglected specific public duties. Moreover, the constitution refers to cases where surrender of the asylum-seeker has not taken place immediately on the presentation of a summons (*conventionem praemissa*). However, Gothofredus (Jacques Godefroy, 1587-1652) was of the opinion that Arcadius had abrogated the right of asylum entirely. He considered that CTh 9.45.3 was only part of a much more comprehensive edict. Its parts were divided among the various titles of the *Codex Theodosianus*, and are not only to be traced in CTh 9.45.3, but also in CTh 9.40.16, CTh 11.30.57<sup>25</sup> and in CTh 16.2.33<sup>26</sup>. CTh 9.40.16, however, mentioned criminals as being excluded from the right of asylum<sup>27</sup>. As a consequence Arcadius' original constitution would not only have applied to debtors of the Treasury or private debtors, but to many more categories. For this reason Gothofredus, followed by the French historian Claude Fleury (1640-1723), thought that this edict had put a definite end to Church asylum<sup>28</sup>. In April 399 the Council of Carthage decided to take action. The bishops, Epigonius and Vincentius, undertook a mission to the Emperor Arcadius in order to request a new provision, prescribing that nobody should be expelled from a Church, no matter what sin or offence he had committed<sup>29</sup>. The reason for this mission has not been disclosed, but probably the immediate cause was Arcadius' constitution of 398. Be that as it may, from the sixteenth century onwards scholars have found a connection between CTh 9.45.3 and the mission from the Council of Carthage of 399<sup>30</sup>.

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<sup>25</sup> This constitution is identical to CTh 9.40.16 (*leges geminae*).

<sup>26</sup> *Codex Theodosianus cum perpetuis commentariis Jacobi Gothofredi*, Tome III, Leipzig 1738, 390 note (a).

<sup>27</sup> It may be noted here that the constitution speaks about criminals which were definitively sentenced to capital punishment, not just any criminals.

<sup>28</sup> *Codex Theodosianus cum perpetuis commentariis Jacobi Gothofredi*, 391 and Fleury, *Histoire Ecclesiastique*, Livre XX § 36, 86-87.

<sup>29</sup> See *Notitia concilii Carthaginensis 27 aprilis 399*, in: C. Munier (ed), *Concilia Africae A. 345 - A. 525*, Turnhout 1974, 194 [CCSL 149]: In hoc concilio legationem susceperunt Epigonius et Vincentius episcopi, ut pro confugientibus ad ecclesiam, quocumque reatu inuolutis, legem de gloriosissimis principibus mereantur, ne quis audeat eos abstrahere.

<sup>30</sup> See *Codex Theodosianus cum perpetuis commentariis Jacobi Gothofredi*, 391-392; P. Sarpi, *De iure asylorum*, Leiden 1622, 10 and Fleury, *Histoire Ecclesiastique*, Livre XX § 36, 87; modern literature: Ducloux, *Ad ecclesiam confugere*, 89-90.

*The right of asylum 'restored'*

At first sight it seems as if a constitution of Honorius and Theodosius II (401-450), dated 1 April 409, restored the right of asylum in its full extent by stating that whoever expels someone from a Church is guilty of *laesio majestatis*. At any rate, this is the wording as it appears in Justinian's Codex (CJ 1.12.2). However, this is misleading. It is generally accepted that the text had been interpolated by the compilers<sup>31</sup>. Moreover, there is a constitution of Honorius and Theodosius II, dated 21 December 419, which was probably only in force for the Western Empire and was not to be adopted in the *Codex Theodosianus*. This constitution, handed down through the *Constitutiones Sirmondianae*, maintains that the sanctity of the Church covers a space of 50 paces from the doors of the building and that whoever seizes someone leaving this place, commits sacrilege (*crimen sacrilegii*)<sup>32</sup>. This constitution seems already to acknowledge the existence of Church asylum, but the restrictions of CTh 9.45.3 were not removed.

The right of Church asylum was phrased generally in a constitution of the Emperors Theodosius II and Valentinianus (419-455) of 23 March 431. Initially this constitution was merely in force in the Eastern Empire, but it gained validity for the entire Roman Empire after the *Codex Theodosianus*, promulgated in 438 for the East, was gradually received in the Western Empire during the following decades. The text of this constitution grants the right of asylum in general terms to "persons in fear" (*timentibus*) and "those who take refuge" (*qui confugiunt*) without pronouncing upon more specified categories, although this does not exclude the possibility that the previous constitutions retained their force of law for exceptional categories as debtors of the Treasury, Jews, public officers, etc. First, the constitution lays down the area where the right of asylum has to be observed, which includes not only the Church itself, but also the immediate surroundings<sup>33</sup>. Moreover, it prohibits the carrying of weapons within this area. Furthermore, no-one is to

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<sup>31</sup> The original version contains a prohibition against the superstition or sect of the Caelicolists and declares every resistance against this prohibition to imply *crimen majestatis*; cf. CTh 16.8.19.

<sup>32</sup> Sirm. 13: " (...) Adque ideo quinquaginta passibus ultra basilicae fores ecclesiasticae venerationis sanctitas inhaerebit. Ex quo loco quisque tenuerit exeuntem, sacrilegii crimen incurrat. (...). It may not have been adopted in the *Codex Theodosianus* because it became redundant through the constitution of 431 (CTh 9.45.4pr).

<sup>33</sup> CTh 9.45.4pr: Pateant summi dei templa timentibus; nec sola altaria et oratorium templi circumiectum, qui ecclesias quadripertito intrinsecus parietum saeptu concludit, ad tuitionem confugientium sancimus esse proposita, sed usque ad extremas fores ecclesiae, quas oratum gestiens populus primas ingreditur, confugientibus aram salutis esse praecipimus, (...).

sleep or eat inside the actual Church on the penalty of being expelled<sup>34</sup>. Fugitives who do not lay down their weapons will be expelled by force, albeit not without first consulting the bishop and only on command of the Emperor or the court<sup>35</sup>. For the Eastern Churches this constitution provided fundamental gains. The Emperor not only acknowledged the institution of Church asylum, but also extended this privilege to the adjacent houses, gardens, baths, squares and porches, belonging to the Church<sup>36</sup>.

### *Later constitutions*

As regards the acknowledgement of Church asylum, the legislative activities of the Emperors are inconsistent. From 431 onwards we note restrictions which diminish the generally phrased provisions of CTh 9.45.4 (CJ 1.12.3), as did the earlier constitutions. It was Theodosius II himself who on 28 March 432 prescribed that an unarmed slave who took refuge in a Church, could stay there no longer than one day and that his master could take him out after granting forgiveness. An armed slave entering the Church could be handed over to his master right away<sup>37</sup>. A further regulation was issued in a constitution of Emperor Leo (c. 400-474) of 466<sup>38</sup>. This constitution prescribed that slaves who took refuge in a Church should be punished according to ecclesiastical standards and by the ecclesiastical authorities. Subsequently they could be handed over to their master if the latter was prepared to take an oath to refrain from further punishment. Also private debtors could seek asylum, although this did not exempt them from paying their creditors. The ecclesiastical authorities, however, could no longer be held liable. Anyone who did not observe the right of asylum, was guilty of high treason (*laesio majestatis*) and threatened with capital punishment.

Eventually Justinian (c. 483-565) effected additional settlements in the Novels in order to restrict appeal to Church asylum. In Nov. 17 of 1 May 535 a number of categories of fugitives were excluded, such as murderers, adulterers and abductors (Nov. 17.7pr), as well as debtors of the Treasury (Nov. 17.7.1). Later in the same year, on 1 August 535, Justinian prescribed for the African

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<sup>34</sup> CTh 9.45.4.1-2.

<sup>35</sup> CTh 9.45.4.3: (...) *Sed neque episcopo inconsulto nec sine nostra sive iudicum in hac alma urbe vel ubicumque iussione armatum quemquam ab ecclesiis abstrahi oportebit* (...).

<sup>36</sup> The Greek version of this constitution was included in the *Codex Justinianus* as CJ 1.12.3.

<sup>37</sup> CTh 9.45.5 (CJ 1.12.4).

<sup>38</sup> Included in the *Codex Justinianus* as CJ 1.12.6.

Churches that neither infidels, heretics and Jews could seek Church asylum (Nov. 37)<sup>39</sup>.

### *Ecclesiastical provisions*

There is a limited number of (official) ecclesiastical texts, dating back to the first centuries, which deal with Church asylum. In a few scattered texts we read about the excommunication of those who violated the immunity of the Church building. One of these text, ascribed to St Augustine (354-430), was adopted in later times in Gratian's Decree (1140/45) as C.17 q.4 c.8. However, it belonged to a collection of 16 short letters of which the authenticity was seriously queried from the time of Desiderius Erasmus (1469-1536) and nowadays it is held to be spurious<sup>40</sup>. According to another text, adopted in the *Decretum Gratiani* as C.17 q.4 c.10, Pope Gelasius I († 496) referred to a case, dealing with the violation of ecclesiastical immunity. The wrongdoers were subsequently considered to be unworthy to receive the sacraments, which judgement was confirmed by Pope Gelasius, *nostra auctoritate*<sup>41</sup>.

However, the only conclusion we can draw, is that apparently pseudo-Augustine and Gelasius considered the act of those who dragged another out of a Church as reprehensible. There are no indications in the fragments that they claimed for themselves as bishops or for the Church the right to grant asylum to sacred places.

From the fifth century onwards several local councils pronounced upon Church asylum. The fact that imperial legislation on the issue was already in existence, at least in the East, was apparently not seen as a serious obstacle. In later times some canons of these councils found their way into the *Decretum Gratiani*. Canon 5 of the Council of Orange from 441, adopted in the *Decretum* as D.87 c.6, for the first time connected Church asylum with intercession. Without mentioning any secular legislation, it ruled - amongst other things - that fugitives were protected in two ways, i.e. out of respect for the sacred place (*loci sancti reuerentia*) and by intercession<sup>42</sup>. This is, in fact, the

<sup>39</sup> For the further developments in the Eastern Empire see R.J. Macrides, Killing, asylum and the law in Byzantium, in: *Speculum, A Journal of Medieval Studies* 63 (1988), 509-538.

<sup>40</sup> PL 33, column 1096; see Z.B. van Espen, *Dissertatio canonica ... de asylo templorum*, in: Id., *Opera omnia* Tom. IX, Leuven 1766, 121, Caput III § III in fine; and I. Machielsen (ed), *Clavis Patristica Pseudepigraphorum Medii Aevi*, Part IIA, Turnhout 1994, 68, nr. 145 (6).

<sup>41</sup> See A. Thiel, *Epistolae Romanorum Pontificum Genuinae*, Part I, Braunsberg 1868, 504, fragment 40. Van Espen again doubted the authenticity of the letter; cf. Van Espen, *De asylo templorum*, 122, Caput III § IV.

<sup>42</sup> D.87 c.6: *Confugientes ad ecclesiam extrahere non licet. Item ex Concilio Aurasico [l.c.5. et seqq.] Eos, qui ad ecclesiam confugerint, tradi non oportet, sed loci sancti reuerentia et intercessione defendi (...)*; cf. C. Munier, *Concilia Galliae A. 314 - A. 506*, Turnhout 1963, 79 [CCSL 148].

first provision of canon law on the issue. It suggests that the right of asylum results from the sacred character of the building. It does not state, however, that it is the Church which has the exclusive competence to grant such a right or to rule on the matter.

The Council of Orléans from 511 even stated in the opening line of canon 1, adopted at the beginning of C.17 q.4 c.36, that what the Council ruled on Church asylum is in conformity with both canon law prescriptions and the Roman law<sup>43</sup>. This Roman law, mentioned in the text (*lex Romana*), is, in all probability, the *lex Romana Visigothorum*, promulgated in 506 by King Alaric II (c. 455-507) for the catholic citizens of the Visigoth realm, which at that period included the South of Gaul. The constitution of CTh 9.45.4 was incorporated in this legislation<sup>44</sup>.

Canon 8 of the Council of Lérida from 546 (in the *Decretum* C.17 q.4 c.19) speaks about expulsion of persons from the place dishonoured by them (*a loco, cui honorem non dederit, segregetur*), which again could indicate that according to canon law the right of asylum is related to the sacred character of the building<sup>45</sup>. Canon 12 of the sixth Council of Toledo from 638 adopted the wording of the Council of Orange (441) by speaking about defending someone through intercession by bishops and out of respect for the place (*intercessu sacerdotum et reverentia loci*)<sup>46</sup>.

### *The early-modern debate*

The sixteenth century debate amongst the canonists concerning the origin and character of asylum has its roots in the medieval commentaries on the title *De immunitate ecclesiarum, caemiterii, et rerum ad eas pertinentium* (X 3.49) of the Liber Extra (1234)<sup>47</sup>. This also holds good for the question to whose competence it belongs to rule on the issue. The question was not without practical interest. In several French and German territories there was, unlike in Italy, an existing practice of expelling robbers and murderers from the Church in which they had taken refuge in order to hand them over to be sentenced by the secular courts. In his *Aurea practica*, Giovanni Pietro de Ferrari, who in the early fifteenth century was lecturing law at Ferrara, referred to

<sup>43</sup> C.17 q.4 c.36: *Ante datam securitatem de atrio ecclesiae fugitiuus non cogatur exire. Item ex Concilio Aurelianensi Id constituimus obseruandum, quod ecclesiastici canones decreuerunt, et lex Romana constituit, ut (...); cf. C. de Clercq, Concilia Galliae A. 511 - A. 695, Turnhout 1963, 4 [CCSL 148A].*

<sup>44</sup> See G. Haenel (ed), *Lex Romana Visigothorum*, Leipzig 1848 (reprint Aalen 1962), 208-210.

<sup>45</sup> J. Vives, *Concilios Visigóticos e Hispano-Romanos*, Barcelona etc. 1963, 57.

<sup>46</sup> Vives, *Concilios*, 241.

<sup>47</sup> For a survey of the medieval developments see P. Landau, *Asylrecht III (Alte Kirche und Mittelalter)*, in: *Theologische Realenzyklopädie*, Part IV, Berlin-New York 1979, 319-327.

this practice, which seems to clash with CJ 1.12.1, X 3.49.10 and similar provisions<sup>48</sup>.

The Spanish jurist Ramiro or Remigio Goñi (1481-1554), professor at the Universities of Toulouse and Cahors<sup>49</sup>, taught that the right of asylum resulted from various sources, viz. not only from divine law and canon law, but also from civil law and ancient observance (*antiqua observantia*). According to him, the imperial constitutions did play a part, albeit not in order to show that asylum has a secular character, but to make clear that any infringement of the immunity of a Church will not only be punished by the ecclesiastical but also by the secular courts<sup>50</sup>. Goñi explicitly rejected the view that asylum was contrary to divine law. The latter opinion was defended in view of the Lord's exhortation in the Gospel that his house should be called a 'house of prayer' and not be a 'den of robbers'. If Christ had driven out of the temple those who were buying and selling, all the more would there be a ground for removing robbers and murderers from a Church building (cf. Mark 11.15-17). However, the vast majority of sixteenth century jurists appear to have made a choice. They qualified Church asylum either as an institution of divine law, or as one of human law<sup>51</sup>. Jurists defending the divine law origin were, amongst others, the Orleans professor and magistrate Jean Feu (1477-1549)<sup>52</sup>, the Dutch jurist Peter Peck (1529-1589), professor of canon law at Louvain and justice of the Great Council of Malines<sup>53</sup>, Pedro Jerónimo Cenedo († 1603), who was prior of the Church of Our Lady of *El Pilar* and from 1598 until 1602 rector of the University at Saragossa<sup>54</sup> and Anastasio Germoni (1551-1627), professor of canon law at Turin and later envoy of the Duke of Savoy and Piedmont at the Spanish court<sup>55</sup>. These scholars based the divine law

<sup>48</sup> Johannes Petrus de Ferrariis, *Aurea practica*, Venezia 1586, 996, Forma inquisitionis, n. 31.

<sup>49</sup> Literature: T.G. Barberena, *Un canonista español, el Doctor Ramiro de Goñi; Su vida, su obra científica (1481-1554)*, Pamplona 1947.

<sup>50</sup> Remigius de Gonni, *De immunitate ecclesiarum quo ad personas confugientes ad eas*, in: *Tractatus illustrium ... iuris consultorum*, Tom. XIII, Pars I, Venezia 1584, fol. 86<sup>r</sup>-112<sup>v</sup>, especially fol. 86<sup>vb</sup>-87<sup>ra</sup> (n. 7-10).

<sup>51</sup> A survey of the existing opinions on the question is displayed e.g. by the Portuguese jurist and theologian Luiz Correa († 1597), professor of the Decretals at Coimbra University, in his *Relectio ad caput inter alia de immunitate ecclesiarum*, Lordelo 1626, 31-34, Prima relectio n. 14.

<sup>52</sup> Ioannes Igneus, in l. 1 ff. ad senatus consult. Syllanian. § 1 a nu. 25.

<sup>53</sup> At any rate this author refers to 1 Kings 2; See Petrus Peckius, *De iure sistendi et manuum iniectioe, quam vulgo arrestationem vocant, succinta explicatio*, Antwerpen 1589, fol. 64, Cap. 6 n. 2.

<sup>54</sup> Petrus Cenedo, *Practicae quaestiones canonicae et civiles*, Saragossa 1614, 364, q. 42 nu. 6, with references to many more authors.

<sup>55</sup> De sacrorum immunitatibus, Liber III, Cap. 16 n. 6, in Anastasius Germonius, *Opera Omnia* Tom. I, Roma 1623, 257.

origin of asylum on various texts from the Bible, such as Exodus 21.13, Numbers 35.11, Deuteronomy 19, Joshua 20, 1 Kings 2 and Matthew 23.35.

Amongst the scholars who considered asylum to be a purely human institution we find Diego Covarruvias y Leyva (1512-1577), justice of the Court of Granada and later bishop of Segovia. Church asylum is no institution of natural or divine law but of positive human law, although the rules concerning asylum received force of law also on the basis of divine law. In case of conflict in matters of ecclesiastical immunity, sources of ecclesiastical law prevail over those of civil law, even in secular courts<sup>56</sup>.

The scholarly debate concerning the competence of Church and State in matters of asylum acquired major significance when, through the constitution *Cum alias nonnulli*, Pope Gregory XIV (Nicolò Sfondrato, 1535-1591) on 24 May 1591 set aside all existing canon law provisions on asylum and laid down the precise competence of ecclesiastical jurisdiction on the issue. Anyone infringing ecclesiastical immunity was threatened with excommunication *latae sententiae*<sup>57</sup>. As in many other European countries, so in the Southern Netherlands the constitution *Cum alias nonnulli* did not receive a royal *placet*, which gave rise to a number of conflicts between secular and ecclesiastical authorities during the seventeenth century.

The scholarly debate continued and again we see divergent views. On the one hand there were authors who supported and defended the Papal claims. The Italian jurist Prospero Farinaccio (1544-1618)<sup>58</sup>, who was *procurator fisci* under Pope Paul V (Camillo Borghese, 1550-1621) maintained, unlike Covarruvias, that ecclesiastical immunity is an institution of divine law<sup>59</sup>, and he referred to a number of sixteenth century and contemporary scholars who shared his view<sup>60</sup>, that secular rulers can decide nothing to the prejudice of ecclesiastical immunity. Similarly, the Roman Pontiffs never requested secular authorities to endorse their constitutions on immunity, which they promulgated long after the imperial constitutions were issued. Out of reverence,

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<sup>56</sup> Variarum Resolutionum Liber II, Caput XX, n. 2-3, in Didacus Covarruvias a Leyva, *Opera Omnia* Tom. II, Genova 1679, 269-270. A similar view can be found in the famous Italian jurist Alessandro Ambrosini (beginning seventeenth century); cf. Alexandrus Ambrosinus, *Commentaria in bullam Greg. XIV de immunitate, et libertate ecclesiastica*, Bracciano 1633, 11-12, Caput I n. 3-4.

<sup>57</sup> The text can be found in *Bullarium romanum*, Tom. 9, Torino 1865, 424-428.

<sup>58</sup> Cf. H. Schlosser, Prospero Farinacci (1544-1618), ein bedeutender Kanonist? in: M. Ascheri e.a. (eds), *„Ins Wasser geworfen und Ozeane durchquert“; Festschrift für Knut Wolfgang Nörr*, Köln etc. 2003, 893-903.

<sup>59</sup> Prosperus Farinacius, *De immunitate ecclesiarum et confugientibus ad eas*, Frankfurt 1622, 3-4.

<sup>60</sup> Especially to his contemporary, the young Sicilian jurist Mario Italia (1590-1618); cf. Marius Italia, *De immunitate ecclesiarum*, Palermo 1612.

the Emperors may confirm and support the ecclesiastical provisions, but the Pope is not dependent on imperial or royal authority in order to sustain Church asylum. Similarly, the secular magistrate has to observe the rules of canon law concerning immunity and the ecclesiastical court can compel him to do so<sup>61</sup>.

On the other hand, there were authors who maintained that Church asylum is an institution of human law and has absolutely no divine origin<sup>62</sup>. This opinion was defended, amongst others, by the Sicilian Jesuit Pietro Gambacurta (1545-1605). In his opinion the immunity of Church buildings has its origin in human law and is a human invention<sup>63</sup>. It was introduced by custom not by law and only in later times were various civil and canonical provisions issued on the matter. Moreover, secular rulers have the competence to grant asylum to the Church as a privilege<sup>64</sup>.

Another canonist who maintained explicitly that from the earliest days Church asylum had been a secular matter was Paolo Sarpi (1552-1623), the well-known advocate of the Republic of Venice in its conflict with Pope Paul V<sup>65</sup>. In the first five centuries of our era there was not a single ecclesiastical provision on the matter, but only imperial constitutions, of which Justinian adopted six into his *Corpus iuris civilis*<sup>66</sup>. On the basis of historical sources Sarpi thought he could maintain that in the Early Church the bishops were of the opinion that ruling on Church asylum did not belong to their competence. They accepted the secular constitutions and even requested new legislation from the Emperor<sup>67</sup>. Initially asylum was not meant for criminals but for infidels who wanted to convert. Asylum came into being *de facto* and the first legal provision, a constitution of Arcadius, was intended to control abuses of this *de facto* asylum<sup>68</sup>.

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<sup>61</sup> Farinacius, *De immunitate ecclesiarum*, 6-7.

<sup>62</sup> Some scholars adopted a middle course and stated that strictly speaking Church asylum is no institution of natural law or divine law, but that it may, generally speaking, be qualified as institution of canon law. Such opinions can be found in the theologian and jurist Martino Bonacina (1585-1631), referendary of both Signaturas; cf. *Summa Bonacina*, Torino 1678, 288, caput 636. This view was followed by the Italian jurist Michelangelo Donato (mid seventeenth century), vicar-general of the archdiocese of Cosenza; cf. Michael Angelus Donatus, *De asylia seu de immunitate locali resolutiones forenses*, Roma 1652, 8, Resol. III n. 3-5.

<sup>63</sup> Petrus Gambacurta, *Commentariorum de immunitate ecclesiarum in constitutionem Gregorii XIV libri octo*, Lyon 1622, 145-147, Liber III, caput VII.

<sup>64</sup> Gambacurta, *Commentariorum de immunitate ecclesiarum*, 151-172, Liber III, caput IX-XI.

<sup>65</sup> Pietro or Paolo (monastic name) Sarpi belonged to the Servite Order; literature: D. Wootton, *Paolo Sarpi; Between Renaissance and Enlightenment*, Cambridge-New York 1983.

<sup>66</sup> Sarpi, *De iure asylosum*, 7 ff.

<sup>67</sup> Sarpi, *De iure asylosum*, 9-10.

<sup>68</sup> Sarpi, *De iure asylosum*, 10-11.

In the Southern Netherlands there were in the seventeenth century several conflicts which provided the discussion with relevant cases. The most important of these was the case of Frans van Ophoven, who on 18 March 1700 had murdered a Spanish officer and, subsequently, had taken refuge in a Dominican monastery<sup>69</sup>. The case prompted a number of treatises and pamphlets. The *Motivum juris pro defensione juris asyli ejusque iudice competente* which at the instigation of archbishop Humbert de Précipiano (1627-1711) was published on 12 July 1700, in § XIX, rejected the thesis that all ecclesiastical jurisdiction and immunity is derived from secular rulers, but it did not pronounce upon the imperial constitutions of Roman antiquity<sup>70</sup>.

However, these constitutions were raised in the *Certamen pro immunitate ecclesiastica locali* of Pieter Govaerts (1644-1726), vicar-general of the archdiocese. Govaerts stated, without mentioning a source, that the constitutions of Theodosius and Honorius date from about 420. The text of Gregory of Nazianze about the aristocratic widow and the text of (pseudo) Augustine, adopted in C.17 q.4 c.8, are much older. Especially from the latter it appears that every ecclesiastical immunity has its origin in divine *ordinatio*<sup>71</sup>.

It was Zeger-Bernard van Espen (1646-1728), on the other hand, who defended the opinion in favour of the secular authorities and supported the teachings of Gambacurta and Sarpi<sup>72</sup>. The mission undertaken by the Council of Carthage in 399 shows that the African Fathers considered the right of asylum to depend on the secular rulers and that they had to address themselves to the Emperor for new legislation on the matter. For this reason the titles *de his, qui ad ecclesias confugiunt* in the *Codex Theodosianus* and the *Codex Justinianus* contain imperial constitutions, which grant or restrict the right of asylum, subsequently abrogate, reintroduce and enlarge it, but every time at the

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<sup>69</sup> Literature: J.J.E. Proost, *Histoire du droit d'asile religieux en Belgique*, Gent 1870, 183ff.; J.J.E. Proost, Du droit d'asile en Belgique, in: *Annales de l'Académie d'archéologie de Belgique* 36 (1880), 63-105 and M. Huisman, Un document relatif aux controverses sur le droit d'asile, in: *Bulletin de la Commission Royale d'Histoire* 100 (1936), 281-299.

<sup>70</sup> *Motivum juris pro defensione juris asyli ejusque iudice competente*, [s.l.] 1700, (41)-(46).

<sup>71</sup> Petrus Govarts, *Certamen pro immunitate ecclesiastica locali seu asylo, ejusque iudice competente*, [s.l.] 1700, (6)-(7) and (11), Appendix. Ascribing the text to St Augustine was already queried by Sarpi, *De iure asylo*, 21 and later also by Van Espen, *De asylo templorum*, 121, Caput III § III.

<sup>72</sup> See about Van Espen's teachings on Church asylum: C. Latini, Le droit d'asile dans la pensée de Van Espen; Profils juridiques de la formation du *ius publicum ecclesiasticum* dans les Pays-Bas catholiques, in: G. Cooman - M. van Stiphout - B. Wauters (eds), *Zeger-Bernard Van Espen at the crossroads of canon law, history and Church-State relations*, Leuven 2003, 115-132 [Bibliotheca Ephemeridum Theologicarum Lovaniensium, CLXX].

discretion of the secular authorities<sup>73</sup>. Similarly, from the letter of Augustine about the asylum of Fascius<sup>74</sup>, Van Espen deduced that Augustine, without any protest, submitted entirely to the constitution of CTh 9.45.1<sup>75</sup>. Furthermore, he argued that the Emperor Arcadius had not thought of exceeding the boundaries of his competence<sup>76</sup>.

### *Conclusions*

The early-modern canonists would like us to believe that the imperial constitutions on Church asylum from late Antiquity provide valuable information about society of those days, specifically about the relationship between Church and State. Especially those scholars who defended the competence of the sovereign and the secular authorities in matters of ecclesiastical immunity, are convinced that these constitutions show that asylum was a concession from the State to the Church and, what is more, that this was accepted and endorsed by the Primitive Church.

Thus we can ask ourselves whether the question - is asylum a concession granted by the State or a competence of the Church itself? - is correctly formulated as legal problem, because it does not say from which perspective the answer should be given. After all, the question regarding what justifies Church asylum can be answered in various ways, i.e. according to secular law and according to ecclesiastical law and depending on the system of law we select, the answer may be different. At the end of the fourth and the beginning of the fifth centuries, it was the Emperor who established a legal basis for Church asylum, but he also attempted to control and restrict this institution. Obviously the Emperors considered that they had the competence to do so. However, the idea that Church asylum results from the sacred character of the building may date from the same period. We cannot read it explicitly in the letter of Gelasius, but we do find it in a series of canons of local councils, the first being canon 5 of the Council of Orange from 441. Indeed it was comparatively late when the Church for the first time explicitly pronounced upon the issue, approximately at the same time as the *Codex*

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<sup>73</sup> See Z.B. van Espen, *Scholia in Canones Africanos*, scholion ad art. II post Canonem LVI, in: Id., *Opera Omnia*, Tom. VII, Leuven 1766, 247-248 and Van Espen, *De asylo templorum*, 113-114, Caput II § III in fine.

<sup>74</sup> See note 14.

<sup>75</sup> Van Espen, *De asylo templorum*, 112, Caput II § I.

<sup>76</sup> Van Espen, *De asylo templorum*, 112, Caput II § III. It may be noted that Van Espen did not refer to an important early canon which does relate asylum to the sanctity of the Church building, viz. canon 5 of the Council of Orange from 441.

*Theodosianus* with its title *de his, qui ad Ecclesias confugiunt* was acquiring force of law for the Western Roman Empire.

Substantially there need not always be a difference between secular and ecclesiastical law. The Council of Orléans (511) referred to ecclesiastical provisions as well as the *lex Romana*. And even if the Church had a deviating view on the ultimate basis of certain legal institutions, as long as there was no clash between secular and ecclesiastical law, the existence of contradicting views concerning the justification of these institutions is only a theoretical problem<sup>77</sup>.

And if there is a clash between systems of law, it is of no importance which system is the more correct. The only crucial question is which system prevails. In late Antiquity we cannot find traces of a conflict between secular and ecclesiastical sources of law. The only legal sources we can trace are a handful of imperial constitutions, which make clear that the Emperors considered themselves competent to settle the issue. *Nec mirum*. In the constitution *Cunctos populos* of the year 380, mentioned above, Emperor Theodosius I qualified all those who did not accept the doctrine of the Holy Trinity as insane (*dementes vesanosque iudicantes*). But what can we deduce from such a statement? That the Early Church accepted that secular rulers had teaching authority in theological doctrine? No one will say so. But that implies that we neither may deduce from the existence of title 9.45 of the *Codex Theodosianus* that the Early Church accepted that ecclesiastical immunity has a secular character. However, for the defenders of royal authority in the seventeenth century, the fact that during Antiquity ecclesiastical authorities appear to have submitted to the imperial constitutions dealing with Church asylum, and the fact that the Council of Carthage of 399 even requested a new imperial provision, were clear indications, if not even solid proof, that the Church implicitly had endorsed the secular origin of Church asylum. Nowadays, we have to admit that other explanations are possible. There could have been various reasons for the early councils to be reluctant to avoid a direct clash with the secular authorities.

In early-modern times the situation was quite different and ecclesiastical and secular authorities did not shrink from confrontation. Pope Gregory XIV promulgated his constitution *Cum alias nonnulli* claiming ecclesiastical competence and the sovereigns withheld their royal *placet* from it. According to

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<sup>77</sup> Also nowadays the secular lawgiver may claim that it is the State which grants, through art. 2:2 of the Dutch Civil Code, legal personality to the Churches and their independent parts. At the same time the Church can maintain that this article only acknowledges the existence of legal personality which the Church derives from itself. As long as there is no conflict, there can be a peaceful co-existence of both opinions.

the secular law of many European countries the constitution had no force of law. This was a sufficient ground for many conflicts which sometimes escalated seriously, such as in the case of Frans van Ophoven, mentioned above. In the summer of 1700, Archbishop Précipiano decided to excommunicate the procurator-general of the Great Council of Malines, Philippe du Jardin († 1707), on the ground of his having obstructed the exercise of ecclesiastical jurisdiction. The following day the Great Council sentenced the archbishop to a fine of *f* 6000, to be paid out of his temporal goods. Moreover, he was ordered to nullify the excommunication within 24 hours, while all subjects of the king were ordered not to have contact with the archbishop or to supply him with food.

Against the background of such events, the canonists who supported the position of the sovereign invoked the late antique imperial constitutions in order to substantiate their view. By appealing to these texts they tried to show that the Early Church had endorsed the secular character of Church asylum. However, it is probable that by so doing they deduced from this handful of constitutions more knowledge about State and society in ancient times than these texts actually permit. This result of my investigations and reflections may give a slightly meagre impression, but nevertheless I hope my contribution will please the honourand to whom this volume is dedicated, if only because this time I came to the conclusion not to adopt indiscriminately the teachings of van Espen.