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## How did the *prudentes* work on the *Breviarium Alaricanum*?

### The example of the laws on Jews\*

By Capucine Nemo-Pekelman

**Summary:** To understand the authors of the *Breviarium Alaricanum* (sixth century in Aquitaine), their object, their logic, and their methods, there is no alternative but to make an internal study of the work itself. Thus, we proceed to an internal analysis of the code, focusing on those laws that concern the Jews. In the selection of the sources of Roman law and their organization in the Breviary, the *prudentes* operated some significant choices. This is even more apparent in the rewriting and commentaries. This work reflects the issues which existed in the Jewish western communities in that time, which the compilers knew they were still dealt with in tribunals.

At this conference dedicated to the study of law during the early Middle Ages, — restoring it to its proper context, its creation and application — my paper will analyze the work undertaken by authors of the *Breviarum Alaricanum*, a law code created in the Visigothic kingdom of Aquitaine in the beginning of the sixth century. If we are to believe the number of extant manuscripts (fifty-three according to Editor Gustav Haenel, seventy in all if we also include the abstracts)<sup>i</sup>, that were copied centuries after the kingdom's collapse, the code enjoyed some success among legal practitioners in Gaul, Spain, and Italy<sup>ii</sup>.

The Breviary of Alaric was published under the authority of Alaric, the Visigothic king of Aquitaine, the 4 February during the twenty-second year of his reign, either in 506, or as has been recently proposed, in 507<sup>iii</sup>. Since at least the sixteenth century, it has been commonly known as a Breviary. This title seems to be inadequate, since the work is not — at least it was not at its inception — a simple abridgment, but a genuine code in the modern sense of the word. It is, indeed, a gathering of normative texts into a single entity, and which, moreover, approaches them in an exhaustive and exclusive manner. Its normative character, unlike other juridical compilations of the period created by private individuals (*constitutiones Sirmondianae*, *Fragmenta Vaticana*, *Consultatio veteris cujusdam jurisconsulti*, etc.) derives from the Breviary's public initiative. A certain number of exemplars would include at the beginning of the codex a short official letter, dating to February 4, 506 (or 507) from the palace at Toulouse called *Auctoritas Alarici Regis*, or the *Commonitorium*. It is the act of the code's promulgation, whereby the king gave the compilation his authority. This letter was sent at the same time that the copies of the Breviary were sent to judicial and administrative authorities in the provinces and cities of the kingdom of Toulouse. The Paris manuscript 4405 (a manuscript of Gallic origin from the end of the ninth century) reproduces the letter in its entirety, which a certain count Timothy received<sup>iv</sup>. The king enjoined him to ensure that

no other text of law or doctrine, other than those which were included in the code, would be referred to within his court. The king ordered the count to make sure that he:

presumes neither cite nor receive another law or process of law in his court. Because if, perchance, it should be established then you will get capital punishment, or to the loss of your goods<sup>v</sup>.

The count would thus pay with his head for the application or the citation of other legal texts than those sanctioned by the king, and collected into the codes. Someone by the name of Aignan is cited in this *Commonitorium* and also in the code's subscription. This high-ranking man held the chancellorship charged with authenticating copies of the code, guaranteeing their conformity with the original kept at Toulouse in the royal treasury. The Breviary should then have applied to all the inhabitants of the Aquitaine kingdom, the question of whether it applied to the Goth minority, or simply to the Gallo-Roman majority being already open. The thesis that the code was applied territorially has been gaining ground of late<sup>vi</sup>. However, this question has little bearing on the subject that concerns us here, since the Jews had certainly not been assimilated into the Goths. Unlike other compendia of official laws that were created during the same period (Edict of Theodoric, *Lex Burgundionum*), it presents itself as an exclusive source of law. That is to say that in the legal matters of family, of succession and contracts, it abrogated the Codes of Theodosius, Euric and of others uncodified Roman laws, or those that figured in private collections (Gregorian Code, Hermogenian Code, *Fragmenta Vaticana*, *constitutiones Sirmondianae*, *novellae*)<sup>vii</sup>.

We know little about the conditions under which the jurists charged with the *Breviarium*'s redaction worked, or the principles that guided their choices. We only know what little appears in some of the manuscripts' formulaic introduction to the code, the *Auctoritatis Alarici* or *Commonitorium*. It declares that the work was done with "better deliberation", which illuminated what was obscure in the Roman and ancient laws with "better intelligence." However, this tells us nothing about the real nature of the work, or the problems its authors attempted to resolve, or encountered in their deliberations.

The authors are difficult to pin down, because the *Commonitorium* only mentions "prudentes", a title that can be translated as "experts." The only name that appears is Goiaric. Still the presence of an Arian Goth at the head of this body of *prudentes* has recently been questioned<sup>viii</sup>. Certainly we can discern how some teachings were drafted. The *Commonitorium* indicates that clerics and members of the aristocracy were consulted prior to the work of the commission (*adhibitis sacerdotibus ac nobilibus viris*), and that once the work was completed, the text was submitted to the episcopacy and people chosen from the provinces for their approval (*venerabilium episcoporum vel electorum provincialium*

*nostrorum roboravit adsensus*), before the king, Alaric, promulgated the code<sup>ix</sup>. This suggests then an influence as much ecclesiastic as lay on the code's development. The political context is also significant. Thus, it is commonly accepted that Alaric had ordered the Breviary's preparation under pressure from events that were unfolding on his frontiers. The Frankish king, Clovis, was threatening to invade Aquitaine. Alaric's impetus for the code would likely have been to satisfy the demands of the Catholic Gallo-Roman population in the kingdom, suspected of desiring to betray him in favor of Clovis, a Catholic<sup>x</sup>.

However, if we refuse to efface the Breviary's true authors behind the names of its official authors — Alaric and the assembly of nobles and bishops; if we accept that the *prudentes* were not confined to the simple role of scribes, there is no alternative but to understand these men, the atmosphere in which they worked, their object, their logic, and their methods, through an internal study of the work itself. Thus, we will proceed to an internal analysis of the *Breviary*, focusing on the work done in a particular subject, those laws that concern the Jews. This area of law was, of course, open to religious and political influence, but the historian of law should not overlook the impact of other, especially the juridical, logics.

The work of the commission consisted, firstly, in making choices: choosing their sources, and selecting those they would retain from among them, then publishing the most important (1). The commission did not generally modify the texts, which they compiled. In order to update these texts, they supplemented them with texts called *interpretationes*, and which they also engaged in the work of redaction, as we shall see in the second part (2).

### **1. The process of selecting the sources and organizing the code**

The commission selected sources from the *leges* and from the *ius*, that is to say, from Roman laws and legal treatises. Thus, in the *Breviarium* we find, respectively, imperial constitutions from the Theodosian Code, the *Novellae* of Theodosius II, Valentinian III, Marcian, Majorian and Severus, the *Liber Gai*, the *Sententiae* of Paul, constitutions taken from the *Gregorian Code* and the *Hermogenian Code*, and a fragment from the *Responsa* of Papinian. Concerning the Jews, the sources retained by the *Breviarium* include nine Roman laws derived from the Theodosian Code, the Novella 3 of Theodosius II, and two *Pauli Sententiae*<sup>xi</sup>.

The *Breviarium* retained the structure of the original sources. The order of the books was kept, as was the order of the texts as they appear in these books. The commission did not run the risk of moving a law from one book to another and did not try to organize them

thematically. For example, there are two laws from the *Theodosian Code* and two from the *Sentences of Paul*, which regulate the Jewish ownership of slaves, but these laws do not appear together. This dispersal of laws concerning the same topic within the *Breviarium* may be a source of confusion. One law, taken from the *Theodosian code*, states that whoever circumcises a slave will be subject to a “penalty suiting the crime”, but without any further details (BA 3.1.5). This suggests that fixing the penalty was left to the judges’ discretion. But, if a judge had the good sense to read his code through to the end, where he would find the *Sentences of Paul*, he would also discover that he had no *arbitrium* in this matter, but that the penalty for circumcision was legally fixed: it was the death penalty (*Tit. Sent. Iulii Pauli*, 5, 24). Such was the inconvenience that resulted from one law appearing in book three, and two laws in book sixteen, even though all three dealt with the regulation of the Jews’ slaves (BA 3.1.5, 16.4.1 and 16.4.2). This may explain why there is a *signum*, written in a ninth-century hand, traced into the margin of the Paris manuscript 4404 (one edition dates it to ninth-century Gaul) next to law B.A. 3.1.5, and another *signum* opposite to law B.A. 16.4.1. The book’s owner signaled a thematic link between the two disparate texts in this way<sup>xiii</sup>.

In addition, the *Theodosian Code* carried some “twinned laws” (*leges geminatae*), laws that had been recopied two, even three times in different sections. The *Breviarium*’s compilers cancelled some errors (the law on *Shabbat* did not appear more than once), but kept others. The law from 393 forbidding intermarriage between Jews and Christians was again repeated twice (BA 3.7.2 and 9.4.4).

The *Breviarium* very perceptibly reduced the number of laws concerning the Jews comprised in the *Theodosian Code*. Out of forty-nine constitutions, it retains only nine, to which it added the *Novella* 3, and two *Sententiae* of Paul, that is twelve texts in all. This reduction affected all of the issues dealt with in the *Theodosian Code*; some matters of public law had entirely disappeared. Only ten percent of the texts that appear in the *Theodosian Code* were retained in the *Breviarium*.

In order to remove forty texts concerning the Jews, the commission followed these lines of reasoning:

Firstly, the commission excised redundant measures. Thus the series of laws that had hit the Jews during the first quarter of the fifth century with the removal of some civic rights (*ius honorum*, *ius militandi*, *ius accusandi*), and those that had restricted property rights over synagogues were not included. These laws had been made redundant because they were also contained in the *Novella* of January 31, 438.

Secondly, they removed the constitutions which had no purpose, that is the laws that dealt with institutions or phenomena which no longer existed. The Breviary did not retain laws relative to the Jewish patriarchate of Palestine, as this had been abolished by a law of 429 (CTh. 16.8.11, 16.8.22 et 16.8.29). They also left out laws which had no purpose in the West context, and particularly none in Aquitaine. These included a law condemning the Judaizing heresy of the *Caelicoli* in North Africa, the laws establishing privileges in favor of the *navicularii* of Egypt, and those forbidding to fixing price scales for Jewish merchants.

The numerous laws dealing with the immunity of municipal courts also disappeared from the Breviary. In much earlier periods, the Jews had obtained, by privilege, exemption from the duties of the curia. This privilege had been abolished in the west at the end of the 4<sup>th</sup> century (CTh. 12.1.158). The disappearance of any mention of this problem in the Breviary probably means that no Jew could be found to claim this ancient privilege before a tribunal. On the other hand, the Code of Justinian (the contemporary equivalent of the Breviary in the east) included numerous constitutions abolishing this privilege. This could be explained by the fact that this privilege had been abolished later in the east (in the mid-5<sup>th</sup> century), and that the Jews of eastern communities continued to claim their rights to it before the courts. The judges therefore needed to know the state of the law on this matter, that is whether the privileges had been abolished or not (CTh. 12.1.158, 12.1.157, 12.1.164 and 165).

Other laws with no purpose included those dealing with attacks against synagogues (CTh. 16.8.9, 12, 20, 21, 25, 27). In fact, it is obvious that these laws already existed in common law: attacks on private property were punished by corporal punishment and fines. These laws were not creative texts, but texts instructing the judges on the policies that the state intended for them to apply to criminals. As in the ancient codes, there was no hierarchy among the texts, instead they were placed at the same level as purely legislative laws, i.e. creative laws. The same remarks are valid concerning laws punishing Jews who committed violence against those who had converted to Christianity: common law was sufficient to instruct the judge on what penalty to apply (CTh. 16.5.44 and 46, CTh. 16.8.5, 6, 18, 44 and 65).

If the authors of the Theodosian Code retained these laws, it was because they indicated the level of punishments that judges were expected to give for this particular type of crime, that is, less severe than the usual punishment for those who committed violence against synagogues, but on the other hand more severe for violence inflicted by the Jewish community on Jews who had converted to Christianity. The fact that the authors of the Breviary removed these laws is thus quite significant, especially if we add that they removed the main ideological-religious work of the authors of the Theodosian Code, book 16.

The codifiers of the Theodosian Code had created a consistent work of propaganda, on the model of apologetic and heresiological literature, to create new legal categories of citizens defined by their religious adherence. They had created a legal category for heretics, one for pagans, and one for Jews. This was a work of political-religious propaganda, but had no legal precedent. It broke with the categories of the law of persons which existed in Roman law. The chapter on the Jews included a mixture of laws, which were not linked to any classical argument, as they touched upon all aspects of the law (marriage, property, contracts, penal law, et cetera). The only link was that they nominally included the name « Jews ». This accumulation of laws and their classification in the Code was meant to underline that these citizens were a marginal group within the civic body.

The authors of the Breviary did not extend this work of propaganda. They completely deleted the chapters incriminating the Arian religion of the Goths, for obvious reasons. They also deleted laws opposing other religions, including, notably, Judaism: in Book Sixteen, there are only three laws of a strictly religious nature, that is laws which forbid conversion to Judaism<sup>xiii</sup>.

In this first stage of the selection of the sources and the organization of the code, the authors of the Breviary did not simply skim off the superfluous laws.

This is even more apparent in the interpretation and redaction of the laws.

## **2. The process of interpreting the laws and editing**

As we already said, the Breviary retained twelve laws about the Jews. There are penal laws. These include laws against marriage between Jews and Christians, conversion to Judaism, circumcision of non-Jews, the purchase and possession of Christian slaves, and the construction of new synagogues.

To these should be added laws which reduce certain civic rights – honorific one's – of the Jews, taking away their *ius militandi* (the right to accede to public office), and their *ius accusandi* (the right to initiate a criminal procedure for which the accuser is not the victim).

The Breviary also preserves laws which give juridical weight to an actual state of affairs by recognizing a right or granting a privilege. Thus there are laws which recognize the existence of Jewish regulatory bodies as true tribunals, and which exempt the Jews from their legal or fiscal obligations on holidays according to their calendar.

These laws reflect the issues, which still existed in Jewish communities in the West during the fifth and the sixth centuries, and the compilers knew that these issues were still dealt with in tribunals.

However, as mentioned, these laws date from the third, fourth, and beginning of the fifth centuries, and were for the most part of eastern origin. They were not well-suited to the situation in Aquitaine at the beginning of the sixth century. They could not be used directly. They were introduced simply as “an appeal to authority”, giving normative weight to the interpretations which follow them.

The texts as they were actually applied derived from the interpretations, that is, from the texts which appeared immediately after each law and explained them. These interpretations derived from doctrinal works, perhaps issued from the work of the Gallic *doctors legis* of the fifth century<sup>xiv</sup>.

It is not clear that interpretations on the subject of the Jews were issued from the same source, as they show strong formal differences.

The interpretations under BA 2.1.10, 2.8.3, and 9.4.4 are limited to reformulating the original text in other terms. They copy the syntactical constructions, and are expressed, as in the model, in the second person plural and in the subjunctive or imperative mood, the mark of an imperial commandment. Some of them adopt the impersonal case-based construction “*si quis*” (BA. 16.4.1), a form of expression of the legal rule intermediate between the general and abstract form and the direct and concrete example which were not unknown to the *Codex Theodosianus* or of the *Pauli Sententiae*. Because of this they appear to be glosses.

The interpretations under BA. 3.1.5 and 3.7.2 are written based on the model of the explanation of the text. For example the interpretation begins with this kind of expression: “*nam ante legem datam, legis huius severitate prohibetur*”, as are other interpretations from Book 3 (such as BA. 3.1.3 “*Constantini imperatoris fuerat lege praeceptum*”, BA. 3.1.6 “*prior ordination legis fuerat*”, BA. 3.5.1 “*ante tempus*”). Because of this, it derives either from a dogmatic treatise or from the authors of the Breviary themselves. There is a textual unity among the interpretations of BA. 3.1, which means that they come from the same author. The interpretation under Novella 3 is also presented as an explanation of the text: “*Haec lex specialiter iubet ut...*”

The interpretations of Book 16 are content to mention “*haec lex interpretatione non indigent*” (under BA. 16.2.1), “*haec lex interpretatione non eget*” (BA. 16.3.1); “*ista lex interpretatione non eget*” (BA. 16.3.2), and to refer to other parts of the code.

Thus we can distinguish at least three different sources of the interpretations.

There are basic differences among the interpretations: Interpretation intended to better comprehend the model and interpretation adapting the law in a revolutionary sense. I can quote an interpretation radically and willingly misinterpreting the initial aim of the Roman law. Thus, law 2.1.10 originally sought to reduce the power of Jewish regulatory bodies, and insisted on the obligation that the Jews had, as Roman citizens, to integrate themselves into Roman law. The interpretation, however, acknowledges the existence of Jewish tribunals and the necessity that the Jews “can observe what has been established by their Hebrew laws”. It tries also to limit their jurisdiction by introducing the criteria of jurisdiction *rationae personae*: the Jews can be judged in Jewish tribunals in which the powers of a true jurisdiction can be seen. Thus, contrary to the emperor Arcadius, the authors of the Breviary were willing to recognize Jewish courts as true jurisdictions applying their own normative system.

There are also contradictory measures which did not exist in the original law but were introduced by the authors of the Breviary testifying to dissensions into the Commission.

Law BA. 3.1.5 typically expects that the penalty for a Jewish master who circumcises his slave should be very severe, and we can imagine that it refers to the Sentences of Paul, which call for death or exile and the confiscation of property (Pauli Sent., 5, 24, 3-4). However, at the end of this law, an apocryphal note has been added, which, for the same crime, calls for confiscation of the slave along with financial compensation. As we have proof of the legal application of this system of compensation in the middle of the sixth century in Gaul, we may think that this addition comes from an author of the Breviary who knew the applicable law<sup>xv</sup>. Yet the interpretation radically distances itself from its model, by claiming that the more favorable system was abrogated by the system calling for the death penalty. This may be proof that Law 3.1.5 and its interpretation were dealt with by many authors who disagreed with each other, one side taking a hard line and the other a softer line, and that this disagreement was recorded in the Breviary.

## **Conclusion**

At the end of this study, we would question the quality of the work realized by the authors of the Breviary starting from the corpus pertaining the Jews. It is common to point out the decline of

the juridical culture in the West starting in the Fifth century, the weakness of the schools of law compared to the schools of Beirut or Constantinople, and the lack of training for judges and notaries. We have the impression that, compared to the wordy Theodosian Code, which collected a plethora of laws edited in pompous and imprecise language, inspired by the necessities of the time and therefore concerned more with details than a general view of the law, the Breviary was an improvement. The authors radically removed laws which were not strictly legislative, deleted the majority of contradictory measures, and clarified the style.

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<sup>i</sup> G. Haenel, *Lex Romana Visigothorum ad LXXXVI librorum* (Leipzig, 1849 – Aalen, 1962), XL-XCIX; J. Gaudemet, “Le Bréviaire d’Alaric et les épitomés”, *Ius Romanum Medii Aevi*, pars I. 2. b. aa. β. (Milano, 1965), 12-15.

<sup>ii</sup> I. Wood, “The Code in Merovingian Gaul”, I. Wood, ed., *The Theodosian Code. Studies in the Imperial Law of Late Antiquity* (London, 1993 – 2010), 161-169; O. Guillot, “La justice dans le royaume franc à l’époque mérovingienne”, *La Giustizia nell’alto Medioevo (secoli V-VIII)*. Settimane di studio del CISAM, XLII, Spoleto, Centro italiano di studi sull’Alto Medioevo (1995), II,

653-735; I. Wood, “Le Bréviaire chez les Burgondes”, M. Rouche & B. Dumézil, eds, *Le Bréviaire d’Alaric* (Paris, 2009), 151-160; A. Dubreucq, “Le Bréviaire d’Alaric de Couches-les-Mines et l’influence aquitaine en Bourgondie”, M. Rouche & B. Dumézil, 161-178; C. Lauranson-Rosaz, “Le Bréviaire d’Alaric en Auvergne: Le *Liber legis doctorum* de Clermont (ms 201 [anc. 175] de la BMIU de Clermont-Ferrand”, M. Rouche & B. Dumézil, 241-277.

<sup>iii</sup> B. Saint-Sorny, “La fin du roi Alaric II : la possibilité d’une nouvelle datation du Bréviaire”, *Studi di Storia del diritto* III (Milano, 2001), 27-90.

<sup>iv</sup> Th. Mommsen & P. Meyer, *Theodosiani libri XVI cum constitutionibus Sirmondianis et leges novellae ad Theodosianum pertinentes* (Berlin, 1905, Nachdruck 1954, 1970), *Prolegomena*, XXXIII.

<sup>v</sup> [...] ut in foro tuo nulla alia lex neque iuris formula proferri vel recipi praesumatur.. Quod si factum fortasse constiterit, aut ad periculum capitis tui aut ad spendium tuarum pertinere noveris facultatum [...]

<sup>vi</sup> A. García Gallo, “Nacionalidad y territorialidad del Derecho en la época visigoda”, *AHDE* 13 (1936-41), 168-264; P. Merêa, *Estudos de direito visigótico* (Coimbra, 1948); Á d’Ors, “La territorialidad del derecho de los visigodos”, *Cuadernos del Inst. jurid. español V* (Roma-Madrid, 1956), 91-125; J. Alvarado Planas, *El problema del germanismo en el derecho español. Siglos V-XI* (Madrid, 1997) ; See *contra*: P. D. King, “The Alleged Territoriality of Visigothic Law”, Tierney & Linehan (eds), *Authority and Power* (Cambridge, 1980).

<sup>vii</sup> R. Lambertini, *La codificazione di Alarico II* (Torino, 1990), 5-17.

<sup>viii</sup> O. Guillot, “Brèves remarques sur l’esprit de quelques interprétations fondamentales du Bréviaire d’Alaric et sur sa réception par les rois mérovingiens”, M. Rouche & B. Dumézil, eds, *Le Bréviaire d’Alaric* (Paris, 2009), 182-187.

<sup>ix</sup> R. Mathisen, “Les relations entre la loi séculière et la loi canonique à la fin du royaume de Toulouse”, M. Rouche & B. Dumézil, 182-187; Gaudemet, 10 n. 32; Guillot, 187-188.

<sup>x</sup> H. Wolfram, *History of the Goths* (1990); M. Rouche, “Les Wisigoths en Aquitaine (418-507)”, M. Rouche & B. Dumézil, 13-26.

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<sup>xi</sup> *Codex Theodosianus* 2.1.10, 2.8.26, 3.1.5, 3.7.2, 9.7.5, 16.7.3, 16.8.5, 16.8.7, 16.9.1, 16.9.4; *Theodosius II, Novella 3*; *Pauli Sententiae* 5.22.3-4. A. M. Rabello, "The Legal Situation of the Jews in Visigothic Arian Spain. Alaric the Second and Its "Roman law of the Visigoths" or *Breviarium Alaricanum*", *Una manna buona per Mantova* (2004), 82-83.

<sup>xii</sup> According to Rosamond Mc Kitterick: "The sheer size, weight and dignity of the codex suggest that the owner heard cases in his own court. Here at least is a judge who had every intention of being conscientious in his administration of justice [...] It is possible that the magnate who owned the book was required to administer justice in an area where the majority of the population lived according to Roman law, and where there were, if one can deduce anything from the attention paid to references to Jews, some Jews as well." R. Mc Kitterick, "Some Carolingian Law-Books and their Function", *Books, Scribes and Learning in the Frankish Kingdoms. 6th-9th Centuries* (Aldershot, 1994), VIII, 21 - 22.

<sup>xiii</sup> B. Blumenkranz, *Juifs et chrétiens dans le monde occidental. 430 - 1096* (Paris, 1960-2007), 300.

<sup>xiv</sup> Gaudemet, 37-41; J. F. Matthews, "Interpreting the *interpretationes* of the *Breviarium*", R. W. Mathisen, ed, *Law, Society, and Authority in Late Antiquity* (Oxford, 2001), 11-32.

<sup>xv</sup> C. Nemo-Pekelman, *Rome et ses citoyens juifs. IV<sup>e</sup>-V<sup>e</sup> siècles* (Paris, 2010), 234-237 and 245-249.