

# Law and Empire in Late Antiquity

---

Jill Harries



**CAMBRIDGE**  
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE  
The Pitt Building, Trumpington Street, Cambridge CB2 1RP, United Kingdom

CAMBRIDGE UNIVERSITY PRESS  
The Edinburgh Building, Cambridge CB2 2RU, UK <http://www.cup.cam.ac.uk>  
40 West 20th Street, New York, NY 10011-4211,  
10 Stamford Road, Oakleigh, Melbourne 3166, USA <http://www.cup.org>

© Jill D. Harries 1999

This book is in copyright. Subject to statutory exception and to the provisions  
of relevant collective licensing agreements, no reproduction of any part may  
take place without the written permission of Cambridge University Press.

First published 1999

Printed in the United Kingdom at the University Press, Cambridge

Typeset in Plantin 10/12pt [vN]

*A catalogue record for this book is available from the British Library*

*Library of Congress cataloguing in publication data*

Harries, Jill.

Law and empire in late antiquity / Jill Harries.

p. cm.

Includes bibliographical references and index.

ISBN 0 521 41087 8 (hardback)

1. Justice, Administration of – Rome. 2. Public law (Roman law)

I. Title.

KJA2700.H37 1998

347.45'632 – dc21 97-47492 CIP

ISBN 0 521 41087 8 hardback

# Contents

---

<i>Preface</i>	<i>page</i>	vii
Introduction		I
1 The law of Late Antiquity		6
Confusion and ambiguities? The legal heritage		8
Hadrian and the jurists		14
Constitutions: the emperor and the law		19
Rescripts as law		26
Custom and desuetude		31
2 Making the law		36
In consistory		38
Making the text: the imperial quaestor		42
<i>Suggestio</i>		47
Judges and courts		53
3 The construction of authority		56
'Magisterium vitae': the Theodosian Code		59
Acclamation and response		65
<i>Acta publica</i> : the authority of the written word		70
4 The efficacy of law		77
Repetition: law and time		82
Context: law and place		88
Enforcement		93
Efficacy and accountability		96
5 In court		99
<i>Denuntiatio</i> or <i>editio</i>		104
The hearing		107
<i>Appellatio</i>		110
<i>Vice sacra iudicans</i> : Symmachus as Prefect, 384 CE		114

6	Crime and the problem of pain	118
	Accusation	119
	<i>Quaestio</i>	122
7	Punishment	135
	The justifications of punishment	144
8	The corrupt judge	153
	<i>Iniuria iudicis</i>	158
	The liability of the judge	161
	<i>Gratia</i>	163
	The accountability of the <i>iudex</i>	167
9	Dispute settlement I: out of court	172
	Arbitration	175
	Petitions and disputes	184
	Negotiation	187
10	Dispute settlement II: <i>episcopalis audientia</i>	191
	Conclusion	212
	<i>Bibliography</i>	217
	<i>Index</i>	227

# 1 The law of Late Antiquity

---

Law was, in theory, the ‘art of the good and the fair’.<sup>1</sup> Many citizens of the Roman Empire thought otherwise. As so much of what was written about the operation of law derived from a discourse about law, which confused perceptions, tendentious rhetoric and fact, some sense of the framework of the contemporary debate is required. The terms were cogently set out by Priscus of Panium, the Greek classicising historian, who, in 448, was sent with others on a delicate mission to Attila the Hun. In his *History*,<sup>2</sup> Priscus recalled an encounter with a Greek-speaking former citizen of the Roman Empire, who had been taken prisoner and settled with the barbarian. One reason for the latter’s dislike of Roman rule was the iniquities of the legal system. His criticism focussed especially on the system in operation. The laws did not apply equally and if a wrongdoer came from the wealthy classes, then he might escape punishment, whereas a poor man, because of his ignorance of how to conduct such matters, would undergo the penalty prescribed by the law – if he did not die before the case was concluded, after protracted delays and much expense. The worst thing of all, he said, was that what should have been obtainable from the law could be acquired only by paying money.

In his defence of the Roman system, Priscus emphasised the ideal of law, rather than its malfunctions in practice. Justice, he argued, was administered according to rule and enforced, thus preventing one lawsuit leading to another, and, as law existed to help litigants, it was right that it should be paid for, just as farmers should pay to be defended by soldiers, and when litigants had wasted money on cases they had lost, this was their fault. The real grievance, which was the level of expense required to go to law, was not addressed. Nor was Priscus prepared to concede that the judiciary might be at fault. He attributed the law’s delays to conscientious scruples on the part of judges, rather than the complexities of the judicial procedures of trial and appeal; it was right, he said, that a judge should take care not to make a mistake by being in too much of a

<sup>1</sup> *Dig.* 1. 1. 1 (Ulpian, *Institutes*), see n. 4.

<sup>2</sup> Priscus, fr. 8, *FHG* 4, pp. 86–8.

hurry. The laws applied to everybody and even the emperor had to obey them.<sup>3</sup> If rich men oppressed the poor in lawsuits, they could only get away with it if no one noticed – and that was true of poor men also.

As the second speaker, Priscus had the advantage of being able to offer a refutation of his opponent point by point. His method was to act as an advocate for the ideals of fairness and justice on which the law was based, while glossing over its malfunctions in practice. Law was given its place in the balanced functioning of the state as a whole, as a system of enforceable justice, to which even the emperor was subject. The aim of the whole literary construct was that the empire, which Priscus served and was, at the time, representing as ambassador, should be vindicated and such, predictably, was the outcome. Faced with this eloquent reminder of the ideal of Roman citizen law (*ius civile*), Priscus' opponent broke down in tears: 'the laws were indeed noble and the Roman constitution good, and it was the magistrates (*archontes*) who failed to match those of long ago and undermined its reputation'. The fault, in other words, lay, not with the system of law itself, but with those who administered it.

Priscus and his friend were not alone in their idealisation of the Roman *politeia*. Writing in the early third century, Ulpian argued that law was virtually a religion and that legal experts, like himself, were its priests; 'For we serve the needs of justice and advance knowledge of the good and the just, distinguishing the just from the unjust, separating the legal from the illegal, seeking to make men good not only through fear of punishment but through the incentive of rewards, practising, if I am not mistaken, no fake philosophy but a true one.'<sup>4</sup> Idealism of a different kind was expressed by a former enemy of Rome. In the early fifth century, the Spanish historian, Orosius, heard tell that a citizen of Narbonne had had conversations with the Goth Athaulf, who had succeeded his brother Alaric as leader of the Goths a few months after the Sack of Rome in 410.

<sup>3</sup> This view contrasts with that of Ulpian, *Dig.* 1.3.31 (from *Lex Julia et Papia*). *Princeps legibus solutus est* (as was the empress), but for expression of imperial subjection to law, see *CJ* 1. 14. 4 (429, west), 'maius imperio est submittere legibus principatum'. It was, of course, in the interests of the powerful block of lawyers in the administration that the emperor be subject to law.

<sup>4</sup> *Dig.* 1.1.1 (from Ulpian, *Institutes* 1), *iustitiam namque colimus et boni et aequi notitiam profitemur, aequum ab iniquo separantes, licitum ab illicito discernentes, bonos non solum metu poenarum, verum etiam praemiorum quoque exhortatione efficere cupientes, veram, nisi fallor, philosophiam, non simulatam affectantes*. Cf. Honoré (1978) on the legal profession as 'a body of initiates, conscious of its moral worth, with a continuous history from the pontifical college of the republic to Tribonian's commission'. For a further encomium, with a sting in the tail, see Gregory Thaumaturge, *Address to Origen* 7, on 'these admirable laws of ours, by which the affairs of all men under Roman rule are governed and which were neither composed nor can be mastered without effort, being themselves wise, precise, varied, wonderful and, in short, – very Hellenic'. Gregory had chosen to drop out of his legal education.

After being at first hostile to Rome, Athaulf had come round to believing that laws were a pre-requisite for both civilisation (as opposed to barbarism) and statehood. Having seen, all too often, that the Goths were unable to obey laws because of their 'unrestrained barbarity', Athaulf further concluded that laws could not be banned from a state (*respublica*) because without laws a state could not be a state at all, therefore he would amalgamate his Gothic strength with the 'Roman name'.<sup>5</sup> This interpretation is not far removed from that of Priscus, in that both connected law and the state, but, while Priscus, the Roman citizen, saw law as being envisaged by the founders of the Roman constitution as an integral part of the state, Athaulf, the outsider, saw it as a precondition for having a state in the first place. However, the outsiders, Athaulf and Priscus' opponent, who had the advantage of surveying the Roman system from the standpoint of competing systems, those of the Huns and the Goths, also differed in one important respect; the former subject of the Empire was disaffected because of the unjust operation of law, while the Germanic observer set the issue of operation to one side, in the belief that, without any system of law, there could exist neither order nor a state.

Despite their differences, all the contemporaries thus far discussed subscribed to the existence of the ideal constitution or system of laws (*nomoi*) which, if observed, should guarantee order and justice. Priscus and his Greek-speaking acquaintance also both believed that this ideal system could be subverted by those who ran it, resulting in injustice. This simple opposition between the law, as a set of inviolable rules requiring to be obeyed, and extraneous factors, such as the exertion of arbitrary power by litigants through wealth or influence, or the susceptibility to extra-legal pressures of judges, tax-collectors or other officials, was one subscribed to by contemporaries, including emperors, and offers, at first sight, a convenient explanation for the malfunctioning, if not the decline, of the Later Roman Empire. It is the contention of much of this book that analysis of law and society based on a supposed conflict between the law (or rules) and power is simplistic and inappropriate. Instead, late Roman society must be viewed in terms of a multiplicity of relationships, in which the law was used as a tool of enforcement, an expression of power, or a pawn in the endless games played out between emperor and citizen, centre and periphery, rich and poor.

### **Confusion and ambiguities? The legal heritage**

Not all were content to ascribe the failings of the legal system only to those who ran it. The law itself was regarded by some as being riddled

<sup>5</sup> Oros. *Historia adversus paganos*, 7.43.

with confusion, making it impossible to know what the law was. In the late 360s, an anonymous petitioner concluded a small treatise on military machines and other matters with a plea to the emperors to 'cast light on the muddled and contradictory rulings of the laws, throwing out unprincipled litigation, by the judgement of your imperial opinion'.<sup>6</sup> Although slow to take action, emperors, once convinced of the merit of systematising the law, took credit to themselves for addressing the problem. Launching his collection of imperial constitutions, the Theodosian Code, in 438, Theodosius II blamed the chronic shortage of legal experts on there being too many books, forms of bringing suit and heaps of imperial constitutions, which concealed knowledge of the law in a thick, dark fog.<sup>7</sup> This state of affairs (he claimed) was exploited by self-styled experts in the law to conceal their own ignorance and overawe their clients.<sup>8</sup> Nearly a century later, the emperor Justinian found the 'way of the law' in so confused a state that it appeared to be stretching ahead with no end in sight,<sup>9</sup> a situation which his *Digest*, a compilation of extracts from juristic writings, was designed to remedy.

Codifications of law had obvious attractions for emperors as prestige projects. It would have been less clear that the more the law was defined, the less scope there might be for emperors to exert discretionary powers as patrons. The confusion and ambiguities in the system so much deplored by the imperial codifiers had in fact given them greater scope to exercise discretion as patrons and innovators.<sup>10</sup> By contrast, given that rationalisation of law limited imperial discretion, codification should have worked to diminish imperial power. Yet neither Theodosius II nor Justinian seem to have regarded this as a problem. Perhaps they believed that adequate scope for patronage remained. More important would have been the conviction that the creation of a law-code incorporating the laws of predecessors set the codifier on a higher level than the legislators who had gone before him. Despite the rhetoric, emperors' reasons for authorising prestige projects like the codification of law were not wholly

<sup>6</sup> *De Rebus Bellicis* 21, ut confusas legum contrariasque sententias, improbitatis reiecto litigio, augustae dignationis illumines.

<sup>7</sup> *NTh.* 1.1 pr., quod ne a quoquam ulterius sedula ambiguitate tractetur si copia immensa librorum, si actionum diversitas difficultatesque causarum animis nostris occurrat, si denique moles constitutionum divalium principum, quae velut sub crassa demersae caligine obscuritatis valde sui notitiam humanis ingeniis intercludit.

<sup>8</sup> *Id.*, ne iurisperitorum ulterius severitate mentita dissimulata inscientia velut ab ipsis adytis expectarentur formidanda responsa . . .

<sup>9</sup> *Const. Deo auctore* 1, reperimus autem omnem legum tramitem, qui ab urbe Roma condita et Romuleis descendit temporibus, ita esse confusum, ut in infinitum extendatur et nullius humanae naturae capacitate concludatur. See Note on abbreviations, p. 217.

<sup>10</sup> For imperial interest in maintaining confusion, see C. M. Kelly (1994).



based on an altruistic yearning for clarity or a reduction in the legal costs incurred by Roman citizens.<sup>11</sup>

What forms of law, then, combined to create this system? By the time of Justinian, what mattered, and what was therefore codified, was the *ius civile*, the citizen-law of the Romans. But, from early in the development of their law, Roman jurists were aware of the influence of external factors, and other, broader systems, with which the citizen-law would be required constantly to interact. As the small Republic gradually extended its dominance over its neighbours, it was forced to find ways of conducting legal dealings with people who were not Romans, but whose laws could have something in common with Roman law. The imperial jurists distinguished the *ius civile*, the law of the *civitas* from the *ius gentium*, law of peoples, and the *ius naturale*, the law of nature. The *ius gentium* did not refer to anything approximating to international law, but rather to the things that the Roman *ius civile* had in common with the usages of other peoples. Gaius, in the second century, assimilated the law of peoples to the law of nature, writing that the 'naturalis ratio' was observed equally among all peoples and was therefore called the law of peoples as all nations used it.<sup>12</sup> Ulpian, however, perhaps with Gaius' *Institutes* in mind, insisted that the law of nature was that which applied to creatures of the land and sea and to birds, as well as to man, citing procreation and the rearing of young as an example; the *ius gentium*, on the other hand, applied to men only, not to animals, and, as an illustration of this, slavery originated from the *ius gentium* and clearly could not be part of the *ius naturale*, under which all men were born free.<sup>13</sup> Although these contradictory statements, both later included in Justinian's *Digest*, indicate some uncertainty over the definitions, they had in common one important limitation: they were statements of fact, in juristic terms, not a moral prescription, that men ought to be equal, or on a level. The law of nature was, usually, the actual (and flawed) common practice of living creatures, not the divine law.<sup>14</sup> Not that there was agreement about this either. Some

<sup>11</sup> For Theodosius' political motives with regard to the West, see Matthews (1993) and below, pp. 37 and 64. For Justinian's justification for imposing his law (as the sovereign legislator) on ancient texts, see *Const. Deo auctore* 7.

<sup>12</sup> Gaius, *Inst.* 1. 1, quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur, vocaturque ius gentium, quasi quo iure omnes gentes utuntur.

<sup>13</sup> *Dig.* 1.1.1. 4 (Ulpian), ius gentium est quo gentes humanae utuntur. Quod a naturali recedere facile intellegere licet, quia illud omnibus animalibus, hoc solis hominibus inter se commune sit. Also id. 1.1.4, that slavery originates from the *ius gentium*, 'utpote cum iure naturali omnes liberi nascerentur'.

<sup>14</sup> Contrast Cicero, *De Officiis* 3.5.23, arguing, from Greek philosophy, that men would not cheat, or be acquisitive at another's expense, if they obeyed the law of nature: Atque hoc multo magis efficit ipsa naturae ratio, quae est lex divina et humana: cui parere qui velit – omnes autem parebunt, qui secundum naturam volunt vivere – numquam committet ut alienum appetat . . .

jurists, notably Paulus, did see the *ius naturale* as an expression of what was 'always' good and fair, while the *ius civile* was designed to benefit all, or the majority, of the citizens of a city or state.<sup>15</sup> The universal principles of what was good and 'fair' were therefore set against the strict law of the citizen body, and the importation into the citizen-law of the social attitudes defining the concept of 'fairness' or *aequitas*, at any given time was legitimised. Even, therefore, on the most fundamental level, law would be influenced by contemporary morality,<sup>16</sup> no less (and perhaps more) than by strictly legal principles.

Writing under Septimius Severus, Papinian, perhaps the authority on law most respected in late antiquity, listed the sources of the *ius civile* as statutes (*leges*), popular resolutions (*plebiscita*), senatorial enactments (*senatusconsulta*), decrees of emperors (*decreta principum*) and the authoritative pronouncements of men learned in law, the jurists (*auctoritas prudentium*).<sup>17</sup> To these was added the *ius honorarium*, the law contained in the Edict of the praetor, who, under the Republic and Early Empire administered law in Rome; this form of law derived its name from the praetor's magistracy (*honos*) and was held to 'assist, supplement or amend' the *ius civile*.<sup>18</sup> This accumulation of diverse forms of legal pronouncement had its roots in the length of time over which Roman law had developed. In the 530s, Justinian complained that his codification of Roman law had to sort out confusions stretching back over 1400 years<sup>19</sup> – to, on his calculation, c.870 BC. Others, less ambitiously, took the Law of the Twelve Tables of 450 BC as their starting point. In 380, Theodosius I insisted that the law of the Twelve Tables be enforced, alongside the Praetorian Edict, in cases of succession to the property of condemned criminals,<sup>20</sup> and, in 392, the same emperor derived the law's authority to refer to arbitration boundary disputes over strips of land less than five feet wide from 'the ancient law', meaning, again, the Twelve Tables.<sup>21</sup>

Thanks to the Roman disinclination to break any tie that bound them to the past, all forms of past legal enactment were still, technically, valid, although, as we shall see, laws could also cease to be valid, if they fell into desuetude.<sup>22</sup> Under the Republic, statutes (*leges*) were passed by the popular assemblies, who, being sovereign, had the right to enact legislation binding on the whole state. Centuries later, in Late Antiquity, some of these

<sup>15</sup> *Dig.* 1.1.11 (Paulus, *Sabinus* 14). *Ius pluribus modis dicitur: uno modo, cum id quod semper aequum ac bonum est ius dicitur, ut est ius naturale, altero modo, quod omnibus aut pluribus in quaque civitate utile est, ut est ius civile.*

<sup>16</sup> For a stimulating, if dated, discussion of *ius naturale*, see Maine (1861) chs. 3 and 4.

<sup>17</sup> *Dig.* 1.1.7 (Papinian, *Definitiones* 2).

<sup>18</sup> *Dig.* 1.1.7.1 (Papinian), *ius praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia, propter utilitatem publicam.*

<sup>19</sup> Justinian, *Const. Deo auctore* 5, *totum ius antequam per millesimum et quadringentesimum paene annum confusum.* <sup>20</sup> *CT* 9.42.9 pr. and 3. <sup>21</sup> *CT* 2.26.5.

<sup>22</sup> *Dig.* 1.3.32–40, discussed below, pp. 33–4.

statutes still made their ghostly presence felt. Citations in the legal enactments of emperors in the fourth century included reference to the Lex Laetoria of 200 BC for the protection of minors,<sup>23</sup> and the Lex Cincia of the same period, both cited by Constantine,<sup>24</sup> to the *stipulatio Aquilia*, from the early but undated Lex Aquilia on wrongful damage to property<sup>25</sup> and the Lex Falcidia on legacies of 40 BC.<sup>26</sup> Nor were the powers of the Senate as legislator ignored. Resolutions of the Senate (*senatusconsulta*) had acquired greater authority under the Early Empire, as the legislative powers of the popular assemblies fell into disuse, and favoured points of reference for late antique lawyers were the SC Claudianum on the marriage of free women with slaves<sup>27</sup> and the SC Tertullianum, from the reign of Hadrian, allowing mothers to inherit from their children.<sup>28</sup>

The criminal law owed much to the reforms of two past lawgivers, the proto-emperor, L. Cornelius Sulla (dictator and consul, 81–80 BC), and the emperor Augustus. Sulla established a number of courts (*quaestiones*) to try various criminal offences, such as murder and poisoning (or use of charms), or forgery; in the statutes he would have defined the crime and the penalty. In other areas of criminal law, the framework supplied for later developments by the *Leges Iuliae*, the legislation of Augustus, predominates, with whole sections of the imperial law-codes devoted to imperial enactments relevant to the Julian laws on adulteries, corrupt solicitation (*ambitus*), extortion (*repetundae*), treason (*maiestas*) and on violence.<sup>29</sup>

As the jury-courts fell out of use under the Early Empire, to be replaced by hearings before a single magistrate or judge, the courts established by the criminal statutes ceased to operate, but the statutes themselves remained, as they specified offence and punishment. People prosecuted for murder, poisoning, or other relevant offences were still prosecuted under Sulla's law and liable to its penalties. Since his time, the definition of the offences had been progressively refined by juristic interpretations and imperial enactments. Liability under the Lex Cornelia on forgery, for example, was extended to the malicious giving of false witness, the taking

<sup>23</sup> *CT* 8.12.2 (316).

<sup>24</sup> *CT* 8.12.4 (319) see also *Fragmenta Vaticana* (hereafter *FV*) 260–316.

<sup>25</sup> *CT* 2.9.2 (Theodosius I, 381). <sup>26</sup> *CT* 9.14.3.2 and 5 (Arcadius, 397).

<sup>27</sup> *CT* 4.12. *Ad Senatus Consultum Claudianum*, contains some seven constitutions relevant to the SC., which is also cited by Gratian at *CT* 10.20.10 and by Honorius at *CT* 12.1.179 (415), 'confirming the authority' of the SC. Juristic commentaries were also compiled, on *senatusconsulta* in general (Pomponius, 5 books; Paulus, 1 book), and single books by Paulus on the SCs Orfitianum, Tertullianum, Silanianum, Velleianum and Libonianum/Claudianum.

<sup>28</sup> *CT* 3.8.2.1 (Theodosius I, 381), referring only to a 'decree of the Senate'.

<sup>29</sup> *CT* 9.7 = *CJ* 9.9 (adulteries); *CT* and *CJ* 9.26 (corruption); *CT* and *CJ* 9.27 (extortion); *CT* 9.5 and *CJ* 9.8 (treason); *CT* 9.10 and *CJ* 9.12 (violence).

of money for giving or withholding evidence, the corruption of a judge, falsification of records, opening the will of a person who was still alive,<sup>30</sup> destruction of a will in order to claim intestacy<sup>31</sup> or selling the same thing as a whole twice to two different people.<sup>32</sup> Jurists writing on *falsum* (forgery) cited the precedent of an edict of Claudius, making those who wrote legacies to themselves in another's will liable as if he had offended against the Lex Cornelia;<sup>33</sup> other precedents for revision of definitions came from rescripts of Hadrian, Pius, Marcus and Commodus, and Severus Alexander,<sup>34</sup> along with Septimius Severus' condemnation of the Prefect of Egypt for forgery of public records.<sup>35</sup> In addition, the *Codex Justinianus* contained twenty rescripts relating to types of offences counting as forgery, plus four imperial 'general laws'. The expansion of the criminal law and the effective creation of new criminal offences by including more actions under the provisions of the criminal statutes must have been hard to keep track of, before the authoritative imperial codifications, which catalogued the modifications under the heading of the statute itself, 'Ad Legem'. Such knowledge was necessary for proper procedure as a man accused of a crime covered by a criminal statute would be prosecuted as a 'reus' (defendant) under that statute, and be liable to its penalty.<sup>36</sup> In that, limited, sense, the statutes of Sulla and Augustus were still living law.

None of this is evidence for the existence in Late Antiquity of libraries or of private collections featuring the complete texts of Republican or even Augustan statutes. Many of the references to the past in late antique texts are in fact formulaic; lawyers knew, for example, the basics of the requirements of the Lex Cincia on gift-giving, without having to go back to a text now some six hundred years old, and the 'quarta Falcidia', the minimum portion of an inheritance to be left to an *heres* (heir and executor), was accepted common usage, at least among lawyers, as were the testamentary restrictions imposed on the childless by the Lex Iulia et Papia.<sup>37</sup> Nor could the texts themselves have remained immune from the ravages of the centuries, from emendation, or copyists' errors. The continuance of procedures or provisions deriving, or claiming to derive, from ancient statutes provides no proof of the survival of their texts, indepen-

<sup>30</sup> *Dig.* 48. 10. 1 (Marcian, *Institutes* 14).     <sup>31</sup> *Dig.* 48. 10. 26.     <sup>32</sup> *Dig.* 48. 10. 21.

<sup>33</sup> *Dig.* 48. 10. 15 (Callistratus, *Quaestiones*) cf. *CJ* 9. 23. 3 (223).

<sup>34</sup> *Dig.* 48. 10. 1. 7; 21; 29; 31-2.     <sup>35</sup> *Dig.* 48. 10. 1. 4.

<sup>36</sup> *CT* 9. 14 = *CJ* 9. 16 (murder); *CT* 9. 19 = *CJ* 9. 22 (forgery). See esp. *CJ* 9. 16. 5, si quis te reum Corneliae legis de sicariis fecerit, and 6, Is, qui cum telo ambulaverit hominis necandi causa . . . legis Corneliae de sicariis poena coercetur. Compare refs. to Lex Fabia on kidnapping at *CJ* 9. 20 2 (213), legis Fabiae crimen . . . persequi potes; 3(224) Ut legis Fabiae poena debeat . . . ; 5(259) legis eum Fabiae . . . reum debes postulare; 9(293) Fabiae legis crimine teneri non est incerti iuris.

<sup>37</sup> *CT* 13. 5. 7 (Constantine, 334) exempting shipowners.

dently of the use of extracts in commentaries by the jurists writing in the first to the third centuries.<sup>38</sup> However, past statute law retained one important function. By exploitation of these ancient and respected points of reference, lawyers were able to fit later legal enactments or texts into convenient and accessible categories, while reference to laws enacted in the distant past had the further, reassuring effect of asserting the length and continuity of the legal tradition and its roots in Roman imperial history.

### **Hadrian and the jurists**

The Praetorian Edict, codified by Salvius Julianus on the orders of Hadrian, probably in the 130s, had considerably more impact on the shape of private law in late antiquity than did the ancient statutes. The intrinsic value of its quaintly archaic text<sup>39</sup> was limited, except as a reaffirmation of continuity with the ancient past, and its contents had been superseded, for practical purposes, by later legal commentaries and imperial enactments. However, the Edict, known from the Severan period onwards as the *Edictum Perpetuum*<sup>40</sup> was uniquely influential in the field of private law in two important respects. One was that the order of its books and clauses, which shaped two major legal commentaries by Hadrianic jurists, the *Digesta* of Salvius Julianus and Celsus, was followed by the creators of the structure of later imperial codifications of law. The imperial law-codes of Theodosius II in 438 and Justinian (529, revised 534) had distinct beginnings,<sup>41</sup> but then both proceeded to arrange their extracts from imperial constitutions in a structure generally shadowing that of the Edict.<sup>42</sup>

The second was that, in the light of later events, Hadrian achieved an extraordinary status as being, in some respects, the first late-antique imperial lawgiver.<sup>43</sup> This was not only due to his initiative in authorising

<sup>38</sup> When Theodosius II planned his definitive Code of Roman Law in 429, he had no intention of including the texts of Republican or Augustan statutes; as Justinian was to do in 529–34, he envisaged law in terms only of imperial enactments (constitutions) and juristic writings.

<sup>39</sup> The Praetorian Edict (or *Edictum Perpetuum*) was partially reconstructed by Lenel (1927), largely from citations of the text in the juristic commentaries. For the text as reconstructed, see also *FIRA* 1 (2nd ed.): 335–89. For its construction, see Guarino (1980).

<sup>40</sup> See Pringsheim (1931/61) for collected references to *Edictum* as ‘perpetuum’, or ‘praetorium’ in the jurists and imperial constitutions.

<sup>41</sup> The *Codex Justinianus* begins with Christian legislation, a topic postponed by Theodosius’ lawyers to their final book.

<sup>42</sup> For the Edict and the Theodosian Code, see Mommsen (1905).

<sup>43</sup> If the anonymous author of the *Historia Augusta* was, as suggested by Honoré (1987), a lawyer, his beginning his biographies of emperors with Hadrian becomes a further

the codification of part of Roman law through the Edict and thus providing a model for future imperial codifiers. Even more important, perhaps, from the emperors' standpoint, was that he arrogated to himself (and therefore removed from the Praetor) the sole right to modify the *ius honorarium*, the law of the Praetorian Edict, by means of imperial enactments. Consequently, from Hadrian onwards, the updating and modification of much of private law was expressed through imperial law, thus creating a new, distinct category of involvement on the part of the emperor with the law of the Empire. However, there was no mechanism for integrating imperial law into the Edict. Instead, imperial enactments, specifically rescripts, were treated as a continuation of the Edict. Therefore when, in the 290s, one Gregorius decided to codify imperial rescripts, he naturally began with Hadrian, and collected rescripts from Hadrian to Diocletian in the *Codex Gregorianus*.<sup>44</sup> His code was in turn continued by Hermogenianus, almost certainly one of Diocletian's lawyers and their identification of Hadrian as a starting point fed through into Justinian's codification of imperial law which merged the Diocletianic codes with that of Theodosius II. Moreover, Justinian used Hadrian's insistence that the praetor's law could be changed only through imperial constitutions as precedent and justification of his own extension of imperial legislative authority to cover the writings of the jurists, collected in extracts in his *Digest*. Henceforward, he asserted, there would be no more juristic commentaries as all changes to law would be the emperor's responsibility.<sup>45</sup>

Despite, then, the attachment of late antiquity to the legal tradition, past law was used mainly as a framework for the living law, which took two forms, the writings of past experts on the law, the jurists, some of whom had achieved canonical status, and the legal enactments of emperors, whose authority surpassed every other source of law. Under the Republic, the jurist was an aristocratic amateur, whose expertise in law was a kind of hobby co-existing with more important career obligations. According to Pomponius,<sup>46</sup> writing under Hadrian and Antoninus Pius, the founders of the *ius civile* were the jurists of the second century BC, P. Mucius Scaevola, M. Junius Brutus and M. Manilius, all of whom compiled collections of legal opinions. A generation later, Q. Mucius

expression of the special status of that emperor in the eyes of lawyers.

<sup>44</sup> On Gregorius, Hermogenian and Diocletian, see Corcoran (1996).

<sup>45</sup> *Const. Deo auctore* 12, nullis iuris peritis in posterum audentibus commentarios illi applicare et verbositate sua supra dicti codicis compendium confundere; *Const. Tanta* 18 citing Salvius Julianus (and Hadrian) that deficiencies in the Edictum Perpetuum should be supplied by imperial fiat ('ab imperiali sanctione').

<sup>46</sup> *Dig.* 1.2.2.39, from Pomponius' *Enchiridion*, or 'Handbook'. On Pomponius in general, see Nörr (1976).

Scaevola, the son of Publius wrote a book on the definitions of terms in law, which was influenced by Greek treatises, not on law but on knowledge, which drew attention to techniques for inferring the general from the particular. These jurists of the late Republic were men active in public life who were free to discuss matters of law and express divergent opinions. Their eminence derived partly from their social and political status as leading men in the senate, and partly from the fact that there was no separate legal 'profession' in Rome. The judges to whom the praetor delegated the hearing of cases, once he had established the form of the action, were non-experts whose job was simply to establish the facts in a case. Advocates could, and did, master the details of law, as Cicero demonstrated in a number of show-trials, but it was a matter of debate as to whether too much legal learning might not be detrimental to a client's interests.<sup>47</sup>

Already in Cicero's lifetime, however, changes, which foreshadowed what was to come, were making themselves felt. Caesar as Dictator in the 40s BC had in his entourage legal advisers, whose status depended on his patronage and whose assistance he may have intended to use in his projected codification of Roman law.<sup>48</sup> Under the Early Empire, many jurists, such as Neratius Priscus, Cervidius Scaevola, Salvius Julianus, Paulus and Ulpian, were to be found serving on the emperor's *consilium*, either as 'friends' (*amici*) of the princeps, without formal responsibilities, or as holders of office; both Papinian and Ulpian rose to the Praetorian Prefecture under the Severi. They were recruited not only from Italy and the Latin West but increasingly from the Greek and, under the Severans, the Semitic, East; Papinian was allegedly related to Julia Domna, from Emesa and Ulpian came from Tyre, which fondly preserved his memory into the fourth century. For ambitious men, seeking to make their mark, the emperor's service was the best avenue for advancement. Conversely, the dependence of many jurists on his patronage gave enterprising emperors openings to expand their personal control of Roman law. In his short history of Roman jurisprudence, Pomponius ascribed to Augustus a reform which granted to a few favoured jurists the right to give opinions (*ius respondendi*) which carried with them the emperor's *auctoritas*, the alleged aim being to enhance the authority of the law;<sup>49</sup> other jurists could give opinions too, but they would carry less weight. Although it was characteristic of Augustus both to take an interest in expressions of

<sup>47</sup> Discussed by 'Crassus' and 'Antonius' in Cicero's *De oratore* 1, a fictitious dialogue set in 91 BC. In the *Pro Murena*, of 63 BC, Cicero also mocked the distinguished but dull jurist, Servius Sulpicius Rufus, for his forensic ineffectiveness.

<sup>48</sup> Suetonius, *Divus Julius* 23. For jurists under the Republic, and discussion of the significance of Caesar, see Frier (1985), and for the intellectual background, Rawson (1985) 211–14.

<sup>49</sup> *Dig.* 1.2.2.49, ut maior iuris auctoritas haberetur.

*auctoritas* and to expand the range of his own patronage and control, there is no contemporary attestation for this innovation and the power to designate favoured jurists does not appear to have been exploited by his successors;<sup>50</sup> there remains, therefore, the possibility that Pomponius innocently reproduced a Hadrianic version of the past, justifying a similar innovation by that energetic emperor<sup>51</sup> by reference to an imaginary Augustan precedent. Hadrian's own interest in asserting himself in the field of law (as elsewhere), which we have seen in action with reference to the Edict, also showed itself in a declaration that, in trials, unanimity of view among a group of approved jurists could count 'as if it were law' and that, where they differed, a judge could choose freely between them.<sup>52</sup> However, Hadrian's endorsement of an imperially chosen juristic elite was little more than a ratification of existing acceptance of officially sponsored jurists as, in effect, lawmakers; thus the shadowy second-century jurist, Gaius, defined the 'opinions of jurists' (*responsa prudentium*) as the 'decisions and opinions of those to whom it is permitted to lay down the law'.<sup>53</sup> What is not clear, however, is whether Gaius himself was ever one of the favoured few and, if he were not, how his writings came to be copied (and presumably read) in Egypt by the late second or third century.<sup>54</sup>

Selection of authorities had a second motive; it helped to regulate and restrict the volume of authoritative material liable to be cited in court. By the late empire it was clear that such restrictions were inadequate. When Justinian's legal team, led by his legal officer, or quaestor, Tribonian, turned their energies to the *Digest* of juristic writings, they found themselves faced with the task of reading some 3,000,000 lines of writings by no less than 38 jurists (and others may have been excluded from the final version). Among them were several ominously prolific authors: Salvius Julianus had 101 books, including his *Digest* (90 books); Pomponius had 129 books, Cervidius Scaevola 72, Gaius, 86 (including 32 on the Provincial Edict), Papinian an elegant 61 books, Ulpian, 242, of which 83

<sup>50</sup> Reform accepted as Augustan by e.g. Schulz (1946) 113. For a brief summary of the state of the question see Tellegen-Couperus (1990, tr. 1993) 95–7.

<sup>51</sup> Honoré (1962) 82–5 on *Dig.* 1.2.2.49, expounds a punning reply given by Hadrian to a group of *virī praetorii* foolish enough to request Hadrian 'that they might have permission to reply'. Playing on the meaning of 'praestari' as either 'to be granted' or 'to make good, perform', Hadrian replies 'hoc non peti sed praestari solere', either that this is a favour granted, not asked, or that this is something you do, not something you ask to do.

<sup>52</sup> Gaius, *Institutes* 1.7, legis vicem. Crook (1955) 58 n.2 suggests that this was to alleviate the workload of emperor and *consilium*.

<sup>53</sup> Id. *sententiae et opiniones eorum quibus permissum est iura condere*.

<sup>54</sup> Parts of *Institutes* 4 survive in *P. Oxy.* 2103. Honoré (1962) suggests that the clarity of the *Institutes* won Gaius a wide readership, as the 'teacher of the Roman Empire', although he was not listed among the canonical jurists before *CT* 1.4.3 (426).



comprised his commentary on the Praetorian Edict, and Paulus 296, including 80 books also on the Edict and no less than 71 different titles; finally the third-century jurist, Modestinus, clocked in with a mere 64. Little wonder, then, as Theodosius II observed in 438, few had the learning to master the law, despite the great rewards available to its practitioners.

Students of law in late antiquity would have been confronted with a bewildering variety of authorities on civil, criminal and, increasingly, administrative law. Some books were on subjects which needed specialised treatment; trusts, *fideicommissa*, for example, generated treatises by Pomponius (5 books), Valens (7 books), Maecian (16 books), Gaius (2 books), Ulpian (6 books), Paulus (3 books) and Modestinus (one book, on Legacies and Trusts). Jurists also formulated their thoughts in terms of controversies, through works entitled *Quaestiones* (Questions) and *Responsa* (Replies); Papinian's surviving work consists mainly of 37 books of *Quaestiones* and 19 of *Responsa*. Attempts were also made to provide analyses of law in the form of *Digesta*, which were both comprehensive and comprehensible; Salvius Julianus' reputation rested mainly on his *Digest* of 90 books, along with his codification of the Edict. Jurists also seem to have understood the need to make their subject accessible by going back to first principles; five jurists, in addition to Gaius, composed *Institutes*, without perhaps appreciating that a proliferation of basic explanations might confuse rather than clarify the subject.<sup>55</sup> From the late second century onwards, in a development significant for the self-definition of 'law', jurists wrote treatises about the duties of officials. Most influential of these was Ulpian's 10-book work, *De Officio Proconsulis* (On the Duties of a Provincial Governor),<sup>56</sup> although three other jurists also contributed briefer treatments.<sup>57</sup> Under the Severi, the administration of the city of Rome still exerted a fascination over his provincial-born jurists and short works were compiled on the City Prefect (Papinian, Paulus, Ulpian), the Praefectus Vigilum, and the Praetor Tutelaris (Paulus and Ulpian), with further discussions by Ulpian (who ended his days prematurely as Praetorian Prefect), on the consul, and, reverting to a less Rome-centred focus, the curator rei publicae. Finally, a century later, Arcadius Charisius responded to Diocletian's administrative overhaul of the Roman Empire with a treatise on the new-style Praetorian Prefect. These encroachments on administrative law created a

<sup>55</sup> Florentinus (12 books), Ulpian (2 books), Paulus (2 books), Callistratus (3 books), Marcian (16 books).

<sup>56</sup> *AE* 1966 from Ephesus (3rd c), 436, discussed by Millar (1986) 279, is a letter, probably from the proconsul of Asia, urging the city to present evidence for its privileges compiled from the 'ancient *nomoi* in the *De Officio* of Ulpian', imperial constitutions, and *senatus-consulta*. <sup>57</sup> Venuleius Saturninus (4 books), Paulus (2 books), Macer (2 books).

precedent for the sections on officials, which were to be prominent in Justinian's *Digest* and the codifications of imperial law.

Although it suited the imperial codifiers to make much of the confusions they sought to rectify, in practice citations of jurists in courts were limited to a few authorities who were generally read, perhaps excerpted in anthologies, like the so-called *Fragmenta Vaticana* from the early fourth century, and sometimes endorsed by imperial fiat. In the early 320s, Constantine, with characteristic contempt for 'interminable controversies', withdrew official sanction from the so-called notes of Ulpian and Paulus on Papinian, because their interpretations of Papinian were wrong<sup>58</sup> but, a few years later, granted formal approval to Paulus' *Sententiae*, (which were not by Paulus)<sup>59</sup> as being clear, well expressed and legally sound.<sup>60</sup> A century later, in a long communication to the Roman Senate (*oratio*), Valentinian III and Theodosius II continued the long-established imperial practice of nominating authorities.<sup>61</sup> This time, they confirmed the writings of Papinian, Paulus, Gaius, Ulpian and Modestinus, laying especial emphasis on Gaius as equal to the rest. Authority was given to their works in their entirety, and to others whose treatises had been incorporated into the works of the big five, such as Cervidius Scaevola, Sabinus, Julianus and Marcellus, – provided that the manuscript texts were checked first, 'because of the uncertainty of antiquity'. When conflicting opinions were cited, the majority were to prevail; if there was a tie, Papinian's view was to take precedence. To purists, this reads like a deplorable abdication of responsibility; the opinions of 'authorities' were to prevail, to the exclusion of creative legal argument. But, as we have seen from the practice of Augustus, perhaps, and certainly Hadrian, the nomination of jurists with *auctoritas*, whose opinions were expected to be adhered to, would have come as a welcome relief to hard-pressed judges and was not a phenomenon peculiar to late antiquity.

### **Constitutions: the emperor and the law**

Alongside the jurists, imperial constitutions, described by their authors as '*leges*', formed the living law of the Later Empire. Gaius had defined a '*constitutio principis*' as what the emperor decided through decree, edict or letter<sup>62</sup> and had no doubt that this counted as '*lex*' because the emperor had received his *imperium* as a magistrate by virtue of a '*lex*', which

<sup>58</sup> *CT* 1.4.1 (321/4).

<sup>59</sup> Liebs (1989) argues that the *Sententiae* were not by Paulus but originated in Africa sometime before 300.      <sup>60</sup> *CT* 1.4.2 (327/8).

<sup>61</sup> *CT* 1.4.3 (426), of which many other extracts are preserved in the *CT* and *CJ*.

<sup>62</sup> Gaius, *Inst.* 1.5.

reflected the will of the sovereign *populus*, a view also developed by Ulpian.<sup>63</sup> In discussing the form taken by what ‘we call, in common parlance, constitutions’, Ulpian, influenced perhaps by his own experience in the imperial law offices, distinguished between pronouncements by letter or subscript, decrees issued as judicial decisions, interlocutory decisions and instructions promulgated as edicts.<sup>64</sup>

More significantly for the relationship of the emperor to the law, Ulpian also perceived the necessity of differentiating imperial acts of patronage, shown in the granting of favours (or especially bad treatment) to individuals, from laws which established precedents.<sup>65</sup> This differentiation went to the heart of the emperor’s relationship with the law of the empire. No one could challenge his right to act as a patron, and exercise his power in a discretionary fashion, as and when he chose. What Ulpian attempted to do was to limit the impact of the emperor’s activities as patron on the operation of the general law, by which the empire was governed. The emperor could, of course, make deliberate changes to Roman general law, as and when he chose, and the constitutions of the Later Empire show the reformer’s hand constantly at work. What was not desirable was that changes should be made through the creation of precedents by casual infringements of the rules. The resultant tension between the emperor’s urge to exhibit power through the conferring of favours, *beneficia*, and his subjection to the law as it stood emerges even in Justinian’s own discussion of the constitutions of emperors. On the one hand, the ‘*beneficium imperatoris*’ was to be interpreted as generously as possible.<sup>66</sup> On the other, he was subject to the law; if, wrote Ulpian in a different context, law which had been regarded as just for a long time was to be reformed, there had better be good reason for the change.<sup>67</sup>

In late antiquity, imperial constitutions took three main forms, edicts, issued to the People or Provincials or some other generalised recipients, along with *orationes* to the Senate, official letters, *epistulae*, sent to heads of bureaux or provincial administrators, and rescripts, sent to private indi-

<sup>63</sup> *Dig.* 1.4.1 (Ulp., *Institutes* 1). Quod principi placuit, legis habet vigorem: utpote cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat.

<sup>64</sup> *Dig.* 1.4.1.1. Quodcumque igitur imperator per epistolam et subscriptionem statuit, vel cognoscens decrevit, vel de plano interlocutus est vel edicto praecepit, haec sunt quas volgo constitutiones appellamus.

<sup>65</sup> *Dig.* 1.4.1.2. Plane ex his quaedam sunt personales nec ad exemplum trahuntur; nam quae princeps alicui ob merita indulsit vel si quam poenam irrogavit vel si cui sine exemplo subvenit, personam non egreditur.

<sup>66</sup> *Dig.* 1.4.3 (Iavolenus). Beneficium imperatoris, quod a divina scilicet eius indulgentia proficiscitur, quam plenissime interpretari debemus.

<sup>67</sup> *Dig.* 1.4.2 (Ulpian, *De Fideicommissis*). In rebus novis constituendis evidens esse utilitas debet, ut recedatur ab eo iure, quod diu aequum visum est. The emperor’s subjection to the law was acknowledged at *CJ* 1. 14. 4 (429).

viduals. A problem of terminology should be acknowledged here. Because a 'rescript' is literally something 'written back', it is also possible to label *epistulae* as rescripts.<sup>68</sup> However, between the 290s, when Gregorius and Hermogenianus issued their codification of imperial rescripts, with the intention that they should have universal validity,<sup>69</sup> and the issue of the Theodosian Code in 438, new ideas about the forms in which laws should be expressed came to the fore. Edicts, *orationes* and letters came to be the form in which were couched 'general laws', *leges generales*, while rescripts were issued to private individuals, for specific purposes. The use of the word rescript, therefore, will be confined to the brief documents on both law and status issued to private individuals from the late third century onwards by the imperial bureaux. It should also be noted that brief answers to petitions added to their text were also known as subscriptions; as many apparent 'rescripts' survive independently of the petitions to which they responded, the precise status of some as 'rescripts' or 'subscriptions' is unknowable, but has little significance for their legal importance.<sup>70</sup>

The means by which imperial law has survived the centuries place further pitfalls in the path of its students. Important inscriptions record the whole or substantial sections of some original texts, notably edicts from the reigns of Diocletian and Constantine, such as Diocletian's Edict on Maximum Prices and Constantine's On Accusations.<sup>71</sup> Private anthologies, such as the *Fragmenta Vaticana*, a collection of extracts from jurists and imperial constitutions dating from the early fourth century; an eccentric compilation mostly<sup>72</sup> dating from the same period, known as the *Collatio Legum Mosaicarum et Romanarum*; or the so-called *Constitutiones Sirmondianae*, a collection of laws about the Church,<sup>73</sup> preserve the full texts of laws known otherwise only in part or not at all. However, most of what we think of as imperial laws survive in the form of extracts, made from substantially longer texts by the lawyers of Theodosius II, who created the Theodosian Code and their successors under Justinian, who used and adapted the work of the lawyers of both Diocletian and Theodosius to create the more rigorously structured Justinianic Code of imperial law as the first step in their creation of the *Corpus Iuris Civilis*.

Although the compilers of the Theodosian Code described their undertaking as being 'like' the Diocletianic Codes of Gregorius and Her-

<sup>68</sup> See e.g. Watson (1995b). <sup>69</sup> See Corcoran (1996) 25–42.

<sup>70</sup> On subscriptions and petitions, see Turpin (1991).

<sup>71</sup> Listed by Corcoran (1996) 170–203.

<sup>72</sup> The *Collatio* contains a copy of a law against homosexuals from 390, posted 'in atrio Minervae' but many put the main text in c. 320, because of references to laws of 315 as 'novellae constitutiones'. There can, as yet, be no certainty as to date. For refs. to recent discussions, see Corcoran (1996). <sup>73</sup> Discussed by Vessey (1993).

mogenianus, the project of 429 probably had stronger official backing and tighter controls than its predecessor. In 429, when the 'first commission' of nine experts, headed by the elder Antiochus, was set up,<sup>74</sup> it was envisaged that there would be a Code of imperial law from Constantine to Theodosius II, a collection of juristic writings, and a final code, which would be an amalgamation of the Diocletianic Codes, and the other two, to create a definitive statement of Roman law. In the event, only the first part of the great design was realised, but the project as a whole was never officially abandoned.<sup>75</sup> In 429, the ground rules for the undertaking of the first code were laid down. It would contain extracts from laws, conveying their legal substance, but omitting the surrounding rhetoric, from the time of Constantine to the present. Although there was a case for limiting the contents of the Code to valid laws, nevertheless the preference of the 'diligentiores', experts in legal history, for recording laws 'valid only for their own time' was also to be catered for. As laws would be dated by consular year, it would be possible to arrange them chronologically under subject-headings, with the later entries accorded greater validity. Thus it could be used both in the courts and as a form of potted legal history.

Whether the Code actually contained every law illustrating the development of imperial legal decisions is uncertain. It is true that some laws were included which were no longer in force. A simple example is the fate of the festival of the Maiuma, which was dealt with by two laws, the first allowing it to continue, provided decorum was preserved, the second abolishing the celebrations, on the grounds that the conditions set out in the first law had not been honoured.<sup>76</sup> Another example concerns lawless monks who, in a law of 390, were kept away from urban centres, but who, in 392, were allowed to return.<sup>77</sup> However, if all laws relevant to the evolution of existing law were eligible for inclusion, it is not clear what criteria were used, if any, for leaving laws out. In 438, Theodosius explicitly excluded all previous imperial constitutions not included in the Code from having any validity in the courts, implying that vagrant, and now non-authorised, constitutions were still at large. If all constitutions unearthed by the compilers were included – and if the extant text of the Theodosian Code were complete, which it is not – we would reach an average rate of production of imperial constitutions per annum of twenty-one. Even allowing for fallow years, disrupted by wars, usurpations or wrangles with the Church, this seems a low rate of output. It must

<sup>74</sup> *CT* 1. 1. 5 (26 March 429).

<sup>75</sup> In the *Gesta Senatus* of 25 December 438, when the Theodosian Code was formally received by the Senate at Rome, the constitution of 429 was read out as still operative. See Honoré (1986), Matthews (1993). <sup>76</sup> *CT* 15. 6. 1 (396); 2 (399).

<sup>77</sup> *CT* 16. 3. 1 and 2, both eastern, but the first given by Theodosius I at Verona, when temporarily resident in the West.

therefore be concluded that some constitutions were excluded, but perhaps fewer than might be expected.

Between the setting up of the first commission and a second law on the Code in 435, the movements and policy of the compilers are uncertain. On one view, they travelled over much of the Empire visiting official archives and private collections, in order to accumulate as much material as possible. This activity would of course have included not only centres such as Rome, Ravenna and Carthage, along with, perhaps, other African towns, but also research in the archives at Constantinople itself. An alternative interpretation of the gap is that the compilers spent most of their time in Constantinople itself, that they did not travel and that the relatively few constitutions which could not have derived from the central archive were extracted from private collections.<sup>78</sup> Six years seems a long time for the job of collection, but the interval did see various distractions, not least the events surrounding the controversial Council of Ephesus in 431, and progress may have been further impeded by the deaths of some of the members of the commission. By 435, when a second commission was set up, consisting this time of sixteen people, the elder Antiochus had left the scene and his place as head of the group was taken by his son, Antiochus 'Chuzon', who as quaestor, had drafted the initial law of 429. The job of the new commission was to arrange the material collected under headings, as specified in 429, remove superfluous verbiage and make the minor stylistic adjustments required by the excerpting process. What they were not entitled to do was to create new law.

The editing process launched by the constitution of 435 did not represent a departure from the initial project, rather a refinement of its first stage. The work of arrangement was not to take long. In October 437, Valentinian III was married to Theodosius' daughter at Constantinople and the senior Augustus took the opportunity to present completed copies of the Code for official launch in East and West, to come into effect on 1 January 439, and, as he declared in February 438, 'to be called by our name'.

Theodosius' agreement to name the 'first code' after himself may denote a private cooling of enthusiasm for the larger project initially envisaged. It also signalled a greater personal involvement on the part of the emperor with legal codification; the Diocletianic codes had been called after their authors. Moreover, the text itself was given greater protection than had been the case with Gregorius and Hermogenian, whose codes were continued with additions well into the reign of Constantine and, less systematically, down to the mid-fourth century. Special

<sup>78</sup> Matthews (1993) for the view that compilers travelled, versus Sirks (1993) championing near-exclusive use of central archive.

officials, called *constitutionarii*, were entrusted with the task of making reliable copies of the text, which would be kept safe in the offices of named administrators. Any constitution excluded from the Code would have no validity in law, a provision which, in effect, repealed all previous laws not, for whatever reason, made part of the Code.

In the late 520s, Justinian took steps to succeed, where Theodosius II had failed. His *Codex Justinianus* brought together the Diocletianic Codes, the Theodosian Code and subsequent *novellae* (new laws) of emperors, which were, of course, excerpted, as previous laws had been. The commission to see to this was set up on 13 February, worked with great speed and produced the first recension of the Justinianic Code on 7 April 529. On 15 December 530, a second commission was set up, chaired by the quaestor, Tribonian,<sup>79</sup> for the compilation of the *Digest* in fifty books, which, with Justinian's new *Institutes*, would form the basic texts for legal education thereafter. This great project was completed late in 533, and the whole was rounded off with a new edition of the Justinianic Code, incorporating recent new laws, which appeared in 534 and superseded its predecessor.<sup>80</sup> Whereas Theodosius II had allowed for the inclusion of material for its historical interest and condoned some repetition, Justinian's lawyers were more rigorous in their exclusion of what they regarded as redundant, and, on occasion, fused together the texts of more than one constitution, from different dates, to make the statement of law more coherent. Like Theodosius' project, Justinian's codification had a political dimension. Victorious in war, the emperor turned to law as the supreme art of peace, defining his roles as general and legislator.<sup>81</sup> While this may seem banal, it is worth recollecting that rule 'through law' is one of several options available to a ruler, that many fields of human activity of interest to rulers lay (and lie) outside the scope of law, and that questions of more or less regulation are part of current public debate in Britain, as they were not in late antiquity.

Two dangers threaten the unwary historian who ventures into the minefield of codified imperial law. One is that the Theodosian compilers in 438 were obliged to impose their concept of 'general law' on imperial enactments going back to Constantine, and emperors who had not em-

<sup>79</sup> For his career, see Honoré (1978) 40–69.

<sup>80</sup> *P. Oxy* 1814 contains a list of titles from the first *CJ*. Of particular interest is the section 'de legibus et constitutionibus principum et edictis', which retains *CT* I. 4. 3, the famous 'Law of Citations', extracted from a long *oratio* issued to the Roman Senate in 426. This was excluded from the final *CJ*. The first *CJ* had, however, already dropped *CT* I. 4. 1 and 2, the rule being better expressed in *CJ* I. 17. 1. 6.

<sup>81</sup> *Const. Imperatoriam* prooemium; *Imperatoriam maiestatem non solum armis decoratam, sed etiam legibus oportet esse armatam, ut utrumque tempus, et bellorum et pacis, recte possit gubernari*. For similar sentiment of Theodosius' propaganda, see *Gesta Senatus* 2: ornamentis pacis instruit, quos bellorum sorte defendit. cf. Simon (1994): 1–12.

ployed that term. Consequently, they had to fit their heterogeneous documentation preserved from more than a century previously, into a system for which the originals were not designed. The result of this was that the final production glossed over the diverse and curious ways in which earlier emperors went about disseminating their legislation. Official letters, *epistulae*, for example, as complete samples from Constantine or Julian show, might or might not contain what the Theodosian lawyers chose to regard as a 'general law'. This lack of distinction between a law-letter and a general policy pronouncement, such as Constantine's declarations to Eastern cities about Christianity, which contained no laws, does not seem to have bothered emperors and, as we shall see, is important for appreciating what they thought they were doing when they did issue 'laws'. But it did (and does) worry lawyers.

The second problem for the historian lies in the form taken by the imperial codifications. The imperial lawyers' exclusion of what they viewed as 'superfluous verbiage' has consequences for understanding what imperial laws were really about. Robbed of their context, many 'laws' in the Codes are silent on the things we need to know. How did a particular law come into being? What was the background, the specific situation that evoked it? What else was in the law, which might affect our interpretation of what we have? Did the compilers extract from the now irrecoverable complete text the bit that really mattered? How was the law justified by the legislator? How effective a response was it to the problem it was designed to address? Many of these questions can be partially answered by reference to the complete texts of laws, especially the *Novellae*, which survive independently, or from fuller extracts in the Codes themselves. But, in using the laws as documents for late antique history, we must be aware of what we do not, and cannot know. The Theodosian Code (which does not survive intact) and, to a different degree, the Code of Justinian are, for the historian, a net full of holes.

Late Antiquity, then, was an autocracy, but an autocracy founded on accumulated tradition, which was required to pay at least lip-service to the rule of law. It was part of the emperor's image that his authority rested on popular consent, on the 'consensus universorum'. The language of constitutionality survived. Ammianus praised the 'venerated city', Rome, for handing over the regulation of her heritage to the Caesars 'as to her children'; the tribal and centuriate assemblies were no more but the stability of Numa's reign had returned.<sup>82</sup> Constantius II on his visit to Rome in 357 exchanged witty pleasantries with the plebs in the Circus; the crowd did not presume on their position, commented the historian,

<sup>82</sup> Amm. Marc. 14.6. 5-6.