THE ALLEGED TERRITORIALITY OF VISIGOTHIC LAW

by P. D. KING

FOR ALL the difficulties and dangers into which their unconsidered use can lead the unwary, the secular legal monuments of the early Middle Ages stand unsurpassed in their evidentiary value for the historian. On the one hand – and the point has been made on a wider scale with no greater authority and assiduity than in the writings of Walter Ullmann himself – the laws reflect, and allow us therefore to perceive, the ideological principles and objectives of their creators; on the other, they furnish a rich fund of information on the more mundane realities of life within the societies in which they operated. In general, therefore, the more copious the quantity of legal material, the more plentiful the historical harvest which stands to be reaped; and not one of the barbarian kingdoms has more to offer in this respect than the Visigothic, from which an abundance of laws, promulgated by eleven or twelve different kings and over a period of some two and a quarter centuries, has survived. But one obviously essential preliminary to the correct employment of these sources is identification of the groups which they were intended to rule; and when the writer as a research student first lit upon the Visigoths – coming to them by a route, as deviously bewildering to himself as to a remarkably long-suffering supervisor, which had begun with Jonas of Orléans and Frankish episcopalism in the ninth century – it swiftly became apparent that precisely this matter was the subject of dispute.

Fundamental controversy was of relatively recent origin. Traditionally, Visigothic legal history had been explained in terms of development from an early 'national' stage, when Goths and Romans were ruled by separate bodies of law, to a later territorial one, when a single code governed both peoples. All had been agreed that the *Codex Euricianus* (CE), the compilation issued about 476 by the founder of the independent Visigothic kingdom and now surviving only in fragmentary form, was designed for the government of the Goths alone –

though it also contained certain provisions regulating the relations between them and the Romans and probably operated in mixed cases – and that Alaric II's celebrated *Lex Romana Visigothorum* (LRV), or Breviary, was promulgated in 506 for the internal use of the Romans, previously ruled by the Theodosian Code (CT) and other traditional sources of Roman law. A handful of scholars had maintained that a territorial regime was then introduced by the *Codex Revisus* (CR) of Leovigild (?568–86), the laws of which, though no longer extant, bulk large, as *Antiquae* and untitled texts, in the code (called here the LV) issued by Reccesvind, probably in 654, and still surviving; but the great majority had preferred to regard the CR as a simple 'national' substitute for the CE and the transition to territoriality as coming about rather with the publication of the LV itself. During the Second World War, however, a first radical challenge to this broad consensus had appeared. A lengthy article by the Spanish scholar Alfonso García Gallo had argued that the law of the independent Visigothic kingdom was territorial in scope from the very beginning: there was a succession of codes – the CE, the LRV, the CR, the LV – each abrogating its predecessor and wielding sole and universal sway over Goths and Romans alike. An important variation on this basic territorialist theme had been the work of Alvaro d'Ors in 1955. According to this distinguished Romanist, the CE was a collection of territorial law which stood in complement first to the variety of Roman legal and juristic sources which ruled towards the end of the fifth century and then to the LRV, a didascalic compilation: the CR replaced the CE but similarly coexisted with the Breviary until their conjoint territorial rule was abolished with the publication of Reccesvind's code.

The writer's research dissertation was eventually devoted to an examination of the whole question of the character of Visigothic legal development.[1] Its conclusion was that with regard to the CE and the LRV the traditional view – no justification of which, remarkably, had

[1] P. D. King, 'The character of Visigothic legislation' (unpublished doctoral dissertation: University of Cambridge, 1967), where pp. xxxix–xli describe the codes and pp. xlii–l the various views, including reactions to A. García Gallo, 'Nacionalidad y territorialidad del derecho en la época visigoda', *Anuario de historia del derecho español*, XIII (1936–41), pp. 168–264, and A. d'Ors, 'La territorialidad del derecho de los visigodos', *Estudios visigóticos*, I (Rome–Madrid, 1956), pp. 91–124 (also in *Settimane di studio del centro italiano di studi sull'alto medioevo*, III (1956), pp. 363–408). Brief comments in my *Law and Society in the Visigothic Kingdom*, Cambridge studies in medieval life and thought, 3rd series, V (Cambridge, 1972), pp. 6–10, 13, 18–19: cf. also my article cit. below, n. 3.

ever appeared[2] – must be retained but that the first territorial code was the work not of Leovigild or of Reccesvind but of the latter's father, Chindasvind, in 643/4.[3] The aim of the following pages is not to summarise the dissertation but to sketch the main lines of the case made there for the necessary rejection of both the territorialist verdicts concerning the relationship to each other of the different codes. This is a vital matter, for if it can be shown that neither García Gallo's 'abrogation' interpretation nor d'Ors's 'coexistence' thesis can conceivably be correct, then we are left with the very strongest of arguments for acceptance of the 'national' view: quite simply, what feasible alternative presents itself?

We may begin with the testimony of the two passages devoted to legal developments among the Goths in Isidore's *Historia Gothorum*:[4]

c. 35 Sub hoc rege (*scil.* Eurico) Gothi legum instituta scriptis habere coeperunt. Nam antea tantum moribus et consuetudine tenebantur.

c. 51 In legibus quoque ea quae ab Eurico incondite constituta videbantur correxit (*scil.* Leovigildus), plurimas leges praetermissas adiciens, plerasque superfluas auferens.

Now, whatever inaccuracy there may be in the first of these reports, the reliability of the second is beyond all challenge. Already of adult years when Leovigild died in 586, and moving in the highest circles even before he became bishop of Seville (*c.* 600), Isidore was admirably placed to know the truth. Moreover, the CR was still in force when he wrote his history in the mid-620s, for he would assuredly have mentioned the production of a new corpus if such had been the work of one or other of the Catholic kings since the Arian Leovigild: the *e silentio* argument, unusually strong in this instance, finds corroboration in the fact that of the 207 post-Leovigildian laws in the LV a mere five are attributable to these rulers. Nothing is more likely than that the promulgation decree of the CR, referring back to the CE, spelled out the changes being made in this, and that it is Isidore's use of this decree as a source which accounts for the precision of his report of the form

[2] With the single exception of the defence of the 'national' character of the LRV by F. de Cárdenas, *Estudios jurídicos*, I (Madrid, 1884), pp. 60–3 (remarks originally appearing in 1847/8).

[3] On this second matter see P. D. King, 'King Chindasvind and the first territorial law-code of the Visigothic kingdom', in E. F. James, ed., *Visigothic Spain: new approaches* (Oxford, 1980), pp. 131–57.

[4] MGH, Auct. ant., XI, ed. T. Mommsen (Berlin, 1894), pp. 281, 288.

taken by Leovigild's recasting – a form largely confirmed by a comparison of the Eurician texts with their corresponding *Antiquae*.[5]

Isidore's evidence strikes an important blow against the 'abrogation' thesis. For while he leaves no doubt that the CR was nothing but a revised edition of the CE, the irresistible implication of his language – the reference to Leovigild's correction of 'those things which seemed confusedly established by Euric', to his addition of laws 'overlooked' by his predecessor, to his removal of 'superfluous' laws – is that the revision was introduced precisely because Euric's code was still in force but marred by faults which rendered it inadequate for the changed legal needs of the time. To believe that the CE had been replaced by Alaric's Breviary as the exclusive law-code governing all the inhabitants of the kingdom and that it was the LRV which Leovigild's collection now replaced is to fly in the face of the natural sense of the bishop's report. Moreover, if the territorialist view has substance, how are we to explain Isidore's failure to mention the rule of the LRV over the Goths, even though this would have endured for some seventy years, have survived into his own early days at least, and have been in any case a matter of common knowledge among his older contemporaries? Isidore's evidence quite apart, the 'abrogation' argument involves the wholly untenable proposition that Leovigild took as the basis of his new code not the law which he found in force but a compilation which had been legally defunct for a lifetime[6] and which contained provisions frequently at striking variance, as we shall see, with those of the LRV. And as if all this were not enough, it so happens that the continued validity of the Breviary after the publication of the CR can be directly proved by seventh-century conciliar evidence.[7] Two of the canons of the Second Council of Seville, held in 619 (and presided over by Isidore), refer to *leges mundiales* which on grounds of terminology and content are indubitably to be identified with laws of the Breviary. Nineteen years later, a *sententia legum* read out and accepted in legal proceedings at the Sixth Council of Toledo turns out to be an exact rendering of one of Paulus's *Sententiae* from the LRV. It is out of the question that the fathers at Seville would have supported their canons by recourse to the rulings of an out-of-force compilation, the

[5] See, convincingly, K. Zeumer, 'Geschichte der westgothischen Gesetzgebung, I', *NA*, XXIII (1898), pp. 426ff., 476. Leovigild's omissions of Eurician texts cannot be proved, of course.
[6] García Gallo, 'Nacionalidad', p. 231, himself speaks of the 'disinterment' of the CE.
[7] Some details in King, 'Chindasvind', pp. 136–8: the much fuller account in *idem*, 'Legislation', pp. 119–36, draws attention also to highly probable and possible allusions.

use of which would assuredly have entailed severe penalty if the CR had been the exclusive legal authority of the kingdom, let alone that those at Toledo would have admitted the validity of one of these rulings in the resolution of a law-case: indeed, the use of the present tense – 'scribitur enim in lege mundiali' – in one of the Seville canons allows no possibility of doubt but that the 'worldly law' in question was currently in force.

The 'abrogation' argument fares no better when the pre-Leovigildian evidence is examined. Not only does this fail to offer a single jot of support for the view that the CE was abrogated in 506:[8] it shows that before that date the CE did not rule alone. It is the introductory *Commonitorium* to the LRV – the lone survivor from among the promulgation decrees of the pre-Reccesvindian codes – which is of central importance here.[9] If the territorialist interpretation were correct, we should naturally expect to find in this lengthy preamble explicit reference to the abrogation of the CE – the more so since the publication of the Breviary was designed, like the calling to Agde earlier in 506 of the first-ever Catholic council of the kingdom, to win Roman support in the imminent struggle with the Franks,[10] and the implication of an alleged decision concomitantly to repeal the CE is thus Roman dissatisfaction with its laws: how could Alaric II in these circumstances have failed to make excellent propaganda-capital by direct allusion to its annulment? But there is nothing which by even the most elastic stretch of the imagination can be construed as such a reference. There are, it is true, various phrases of the *Commonitorium* which are in themselves susceptible of a territorialist interpretation and might thus be held implicitly to indicate the CE's abrogation; but all these are also perfectly compatible with the traditional view of the LRV as a 'national' code for the Romans.[11]

The truth is that Alaric was totally unconcerned with the CE in the

[8] The lack of sixth-century references to the CE does not prove abrogation: where would we expect to find it mentioned? D'Ors, 'Territorialidad', p. 120, points out that the fragments, written in a sixth-century hand, almost certainly date from after 506 and that a defunct code is unlikely to have been copied.

[9] Ed. T. Mommsen in K. Zeumer, MGH, LL, I, Leges nationum Germanicarum, i: Leges Visigothorum (Hanover–Leipzig, 1902), pp. 465–7. References to the Visigothic laws are to Zeumer's edition or, in the case of the Breviary, to G. Haenel, *Lex Romana Visigothorum* (Leipzig, 1849).

[10] See King, *Law*, pp. 10–11, with the literature, especially Bruck, who is basic. Both García Gallo, 'Nacionalidad', pp. 261–2, and d'Ors, 'Territorialidad', p. 121, accept the Breviary's publication as politically inspired.

[11] On these, which cannot be discussed here, see King, 'Legislation', pp. 95–101.

publication of the LRV. He leaves us in no doubt about the purpose of his compilation:

> Quod in legibus videbatur iniquum . . . corrigimus, ut omnis legum Romanarum et antiqui iuris obscuritas . . . in lucem intellegentiae melioris deducta resplendeat ac nihil habeatur ambiguum, unde se diuturna aut diversa iurgantium inpugnet obiectio.

Now, it is quite clear that the CE was not in mind here, for on no showing could it be regarded as a compilation of *ius antiquum* or *leges Romanae*. Alaric was referring rather to the removal of the obscurities in traditional Roman law and the ancient juristic pronouncements.[12] And far from being out of force already for a generation, as the 'abrogation' argument has it, this *lex* and *ius* was, the text makes plain, current: it was not a question of the resurrection and elucidation of law which was dead but of the clarification of that which was in constant use. Unless we care to assume that the CE had already been withdrawn *before* 506, then we are compelled to conclude that the legal regime of the Visigothic kingdom until that time was characterised by the dual rule of the CE and a complex of Roman laws and juristic *dicta*. It was Alaric's aim in the production of the Breviary to replace the variety of these latter with a single and definitive code which would contain the only authorities in future admissible: 'ut . . . nulla alia lex neque iuris formula (*scil.* Romana) proferri vel recipi praesumatur'. This is the only interpretation to which the text of the *Commonitorium* lends itself, and it is entirely borne out by the contents of the Breviary which we find to be, exactly as we should expect, a collection of Roman juristic maxims and Roman laws, the latter without exception culled from the Theodosian code and later imperial novels. Not only is there no reference to the CE in the *Commonitorium*, but neither do the laws of the LRV owe any debt whatsoever to those of Euric. It is as if the CE had never existed.

But what problems this presents if the LRV abrogated the earlier code! To take but one example: how can we account for the omission of those Eurician laws which had dealt with the profoundly important issue of the division of lands? Are we to believe that this was a matter which required legal regulation before 506 and then again after the date of publication of the CR – in which the laws reappear, to remain also in the later codes – but not during the intervening period? No

[12] Thus also d'Ors, 'Territorialidad', p. 119, and P. Merêa, 'Uma tese revolucionária', *Anuario de historia del derecho español*, XIV (1942–3), p. 597.

great critical acumen is needed to recognise the force of this point alone as an argument against the 'abrogation' thesis. Just as the laws of the Breviary ignore certain matters handled in the CE and CR, so, it may be added, such basic Roman institutions as the colonate, the *curia* and the *dos ex muliere*, all of them figuring prominently in the CT and LRV and certainly still surviving in practice, find not a single mention in any of the Eurician or Leovigildian laws. Is it really credible that a legislator concerned to produce an exclusive territorial code could have omitted them, given that Romans formed the great bulk of the population?

Perhaps an even more fundamental objection to Professor García Gallo's interpretation lies in an associated matter: the sharp contrasts between the treatment of one and the same topic in the CE (and CR) on the one hand, and the LRV (and CT) on the other. It is clearly not feasible to examine these contrasts here,[13] but some of those which appear in the fields of matrimonial and successory law should be briefly noted. In the first place, the CE and CR freely allowed, as the Roman codes did not, donations between spouses during marriage.[14] Second, the rights of the Eurician or Leovigildian widow over property which had come to her from her husband were very much more extensive than those of the *vidua* of the LRV. Provided that she was not guilty of sexual misbehaviour, the widow of the CE enjoyed total liberty to dispose at will of all such property, whether or not she had issue; and even when Leovigild introduced restrictions on this liberal regime in the interests of the children of the union, the widow's freedom to do as she wished with her *dos*, or dowry, remained unaffected.[15] The widow of the Breviary, on the other hand, was limited to a simple usufructuary right over property which had devolved upon her *ex marito* – normally by way of *donatio ante nuptias*, the Roman equivalent of the Visigothic *dos*, or at her husband's death – when there were children born of the marriage.[16] Third, the CE and CR, in

[13] Some are dealt with in King, 'Legislation', pp. 183–233 – though much remains to be said.

[14] Compare especially CE 307 and 319 and the *Antiquae* v.2.4, v.2.5 and v.2.7 with LRV.P.Sent. II.24.2 (with *Interpretatio*), II.24.3, II.24.4 and LRV.Cod.Theod. III.13.3 (with *Int.*). Against the view of A. d'Ors, *El código de Eurico. Edición, palingenesia, índices*, Estudios visigóticos, II (Rome–Madrid, 1960) pp. 236–8, that the Eurician texts refer only to donations *mortis causa*, see King, 'Legislation', pp. 186–90. On Chindasvind's later compromise position in III.1.5, *idem*, *Law*, p. 236.

[15] All this emerges from a comparison of CE 319, the *Antiquae* v.2.4 and v.2.5 and the Chindasvindian laws IV.5.1 and IV.5.2: King, 'Legislation', pp. 192–5. For Chindasvind's amendment of the Leovigildian regime, see *idem*, *Law*, pp. 246–7.

[16] LRV.Nov.Sev.I.1, LRV.Nov.Theod.VII.1 (*Int.*) and King, 'Legislation', pp. 195–8.

contrast to the CT and LRV, allotted the widowed mother a usufructuary share, equal to that of each of the children, in the intestate estate of her husband.[17] Fourth, the Breviary provided that a widowed mother should be either partially or wholly excluded from succession to a child who had died *sine prole* by the brothers or paternal uncles of the deceased:[18] in the CE and CR her right to inherit took precedence over theirs.[19] Despite the scanty remains of the CE, there are a number of other differences between its regime and that of the LRV which can be pointed to and which concern matters as diverse as the successory claims of an unmarried daughter, the penalty for making a loan at an illegal rate of interest, the period of prescription applicable in the case of runaway slaves, the rights of a widower in the *res maternae* and so on, but these cannot be detailed here.[20]

Enough will have been said, however, to show the impossibility of accepting the 'abrogation' thesis. Quite apart from the difficulty of explaining why Euric should have chosen to impose on his Roman subjects a set of legal rulings which differed in certain vital regards from those to which they were accustomed – an action bringing no detectable advantages but likely to engender resentment at a time when the Goths were dangerously over-extended – or why the Goths, if these rulings had been what they wanted in 476(?), should have elected not only to place themselves under a distinct regime in 506 but also to remain ruled by this for a lifetime, or why then, suddenly and without known reason, Leovigild should have decided to revive the laws apparently found unsatisfactory seventy years before[21] – quite apart from this, we are asked to believe that within just about a century the Romans of the Visigothic kingdom were ruled by four separate codes of law, the first and third of which were very much the same and wholly Roman, the second and fourth of which were again much the same but distinct in their provisions from the other two. The property rights of a Roman widow would have been one thing before 476(?) and between 506 and the year of publication of the CR, another altogether between 476(?) and 506 and after the publication of Leovigild's code! How often are legal developments, especially in the private sphere, marked by revolution rather than evolution? Yet to

[17] CE 322 and the *Antiqua* IV.2.14.
[18] LRV.Cod.Theod. V.1.1 (*Int.*), V.1.2 (with *Int.*), V.1.7 and King, 'Legislation', pp. 200–6.
[19] CE 336 and the *Antiqua* IV.2.2: cf. CE 327, IV.2.18 and King, 'Legislation', pp. 207–11.
[20] For those mentioned, *ibid.*, pp. 212–32.
[21] Wholly unconvincing is García Gallo, 'Nacionalidad', pp. 260–3.

postulate that the CT was abrogated by the CE, this by the LRV and this in its turn by the CR is to postulate no less than three successive revolutions – or more accurately, a revolution and two counter-revolutions. It is frankly unbelievable that such violent *bouleversements* of the legal scene, involving reversions to previously abrogated regimes at that, could have taken place.

Although the various arguments above add up to what may be considered an impregnable case against the 'abrogation' interpretation, they do not serve to disprove the alternative 'coexistence' thesis. While this has the merit of accepting the evidence of the *Commonitorium*, Isidore and the councils that first the CE and the CT, then the CE and the LRV, and finally the CR and the LRV ruled alongside each other, it proposes that the two sets of laws in force at any one time did not govern one the Goths, one the Romans, but rather enjoyed conjoint rule over both peoples. 'Compatibility' is here the keyword.[22] Now, if all the codes concerned are held to be collections of positive law–law, that is, intended and able to be applied in practical fashion in the courts – there can quite certainly be no question of compatibility in the strict sense: juristically, as we have seen, the CE/CR and the CT/LRV went their separate ways. But Professor d'Ors rather regards the Breviary as a didascalic collection.[23] As a general characterisation, this cannot be sustained.[24] There is abundant evidence that the LRV was both intended as a code of real, applicable, law and later so treated. The *Commonitorium* makes it plain that the obscurities of the existing Roman *leges* and *ius* are not at all the subject of simple academic concern; they are the cause of constant practical problems for litigants: 'ac nihil habeatur ambiguum, unde se diuturna aut diversa iurgantium inpugnet obiectio'. The code produced to remedy this state of affairs is approved by a council of leading figures, called at a time of crisis – a circumstance hardly consonant with a view of the Breviary as a didascalic authority – and sent out so that all (Roman) cases may be judged according to its rulings: 'librum . . . pro discingendis negotiis nostra iussit clementia destinari, ut iuxta eius seriem universa causarum sopiatur intentio'. The text is quite explicit: the code is to be *used* for the resolution of cases. Indeed, nothing else will do: 'nec aliud cuicumque aut de legibus aut de iure liceat in disceptatione proponere nisi quod directi libri . . . ordo conplectitur'. The *disceptatio* itself is

[22] Thus d'Ors, 'Territorialidad', pp. 119, 121.
[23] *Ibid.*, pp. 121, 122 etc.
[24] Cf. A. García Gallo in discussion of d'Ors, *Settimane di Studio* (as n. 1), pp. 467–8, and E. Levy, *Gesammelte Schriften*, I (Cologne–Graz, 1963), p. 306, n. 10.

envisaged as a real dispute in the courtroom, not an academic one: 'ut in foro . . . nulla alia lex neque iuris formula proferri vel recipi praesumatur'. Failure to obey Alaric's instructions may be punished by death – grotesquely over-severe as a penalty if the LRV is simply a didascalic authority. Certainly the code was not regarded in this light by King Theudis, who, in 546, ordered his new law concerning court costs – without question a law of positive application – to be incorporated into it,[25] or by the inhabitants of southern Gaul, whom it continued to serve, as their personal law, for centuries to come.[26]

Despite his frequent general designation of the LRV as didascalic, however, Professor d'Ors does in fact admit that its laws were intended to assist the judges in cases not covered by the provisions of the CE:[27] the Breviary is to be regarded, this must mean, as of amphibious character, partly positive, partly didascalic – the one when it is not the other. Regretfully, one is obliged to say that this interpretation has all the air of a hypothesis of convenience, devised as the only way of resolving the problems caused by the inviability of the 'abrogation' argument, the patent incompatibility of the laws of the CE and the LRV and the impossibility of considering the Breviary a didascalic collection pure and simple, when it is a precondition that the solution be reconcilable with a territorialist conception of Visigothic legislation. The hypothesis is to be rejected as arbitrary, not to say fanciful. Not a single argument is adduced in its favour, and none can be, so far as the writer can see. The great majority of the laws of the Breviary were laws capable of application: Professor d'Ors may know that only some of these were in fact meant to be applied, but how are the judges supposed to have been let in on the secret? Reference to the superior authority of the CE would have been quite indispensable, one might think, yet nowhere does even the most heavily veiled hint of this appear. On the contrary, the language of the *Commonitorium* offers decisive opposition to the thesis. *All* cases are to be judged in accordance with the provisions of the Breviary: 'ut iuxta eius seriem universa causarum sopiatur intentio'. Now, it is possible, though wrong, to interpret this phrase as witnessing the sole and territorial application of the LRV; it is equally possible – and this time correct – to maintain that it shows the LRV to have been the exclusive code of law for the

[25] *Lex Theudi* (pp. 467–9 in MGH, LL, I, i: Leges Visigothorum), lines 72–4.
[26] Generally on the career and influence of the Breviary, see A. de Wretschko, 'De usu Breviarii', in T. Mommsen and P. M. Meyer, *Theodosiani libri XVI* (etc.) (3rd edn, Berlin, 1962), I, part i, pp. cccvii–ccclx, esp. cccxiiiff. (Gaul).
[27] D'Ors, 'Territorialidad', p. 121.