The Law Codes and Late Roman Law

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Histories of late Roman law normally begin with Constantine. The *Theodosian Code* and its successors present a series of legal texts which are marked by a verbosity, high-handedness and intellectual sloppiness largely alien to the laws of second and third century emperors. If the starting date of the *Theodosian Code* were treated simply as a convenient place to begin, the present paper would be unnecessary. But scholars in fact seem to have assumed that the chronological arrangement of our sources corresponds in some way to historical reality. The introduction of those features characteristic of Late Roman legislation are ascribed, time after time, to the reign of the emperor for which they are first attested. This paper will argue, however, that the accession of Constantine had in fact relatively little impact on Roman law; Constantine was the starting point for the *Theodosian Code* simply because Theodosius II was not interested in collecting the legislation of his pagan predecessors. This one decision, extra-legal though it was, interacted with more strictly legal decisions to produce a profound distortion in our picture of Roman law.

The Diocletianic Codes (1)

The legal remains of the third century are not, after the great age of Severan jurisprudence, very impressive. The most common

(1) See esp. G. ROTONDI, « Studi sulle fonti del codice giustinianeo », *BIDR* 26 (1914), rpt. in IDEM, *Scritti Giuridici*, I, 110-265. See also L. WENGER, *Die Quellen des römischen Rechts* (1953), 534-535. For bibliography see A. CENDERELLI, *Ricerche sul « Codex Hermogenianus »* (1965), 1-2.

legal texts from this period are imperial subscriptions to *libelli*: petitioners would receive replies issued in the emperor's name and entered at the bottom of their petitions. For obvious reasons the documents produced by this procedure were usually short, to the point, and dull. The procedure itself, at least in its « classical » form, seems to have been instituted by Hadrian, and was changed very little in the third century (2). What did change was the quantity in which these documents survive. Of the 2,500 or so subscriptions preserved in our sources more than half — some 1300 — date from the reign of Diocletian (3).

This striking distribution is not difficult to explain. To Diocletian's reign date two major collections of legislation, the *Codex Gregorianus* and the *Codex Hermogenianus,* which, although they have not survived, were nonetheless of fundamental importance to the Roman legal profession down to the time of Justinian. Moreover, these two codes were, along with the *Codex Theodosianus,* the two most important sources for the *Codex Justinianus* itself; Justinian ordered his codifying commission to begin the project by looking at the mass of constitutions « which were contained in the three codes of Gregorius, Hermogenianus and Theodosius » (4). We also have good information, derived in large part from documents preserved outside the Justinianic corpus, about the probable dates and scope of each of the two Diocletianic codes. The *Codex Gregorianus* seems to have included material from as far back as the reign of Hadrian and to have continued down to the year 291; it probably dates to 292 or the years immediately thereafter. The *Codex Hermogenianus* seems to have been a sort of supplement to this: it evidently consisted entirely of legislation from the years 293 and 294. The two collections also received later supplements, but this does not affect the facts essential here; what matters is that all the material preserved in the *Codex Justinianus* from Hadrian to the year 294 (and probably, in fact, to the end of the

(2) See esp. Tony HONORÉ, *Emperors and Lawyers* (1981), ch. 2.

(3) See the convenient list in Paul KRÜGER's edition of the *Codex Iustinianus,* pp. 494-497.

(4) *C. Haec, praef.* See also *C. Summa,* 1.

Tetrarchy) can safely be attributed to the *Codex Gregorianus* and the *Codex Hermogenianus*.

These facts are not in dispute, but they are sometimes ignored. Some scholars, for example, have pointed to the large number of surviving Diocletianic inscriptions as evidence for the massive use by Diocletian's government of the procedure for petition and response (5). Others speak more generally of the imperial subscription as being the « typical » document of the third century (6). The first of these deductions is demonstrably wrong; the number of Diocletianic subscriptions attests only to an interest in having imperial subscriptions collected into law codes. The second statement is more justifiable, but it can also be misleading. Subscriptions are indeed what typically survive from the third century, but it cannot be inferred from this that they were particularly typical at the time; the compilers of the Diocletianic codes preserved for us only those documents in which they had a particular interest.

The codification projects of Theodosius II (7)

The role of the lost Diocletianic codes in shaping our sources, although sometimes ignored, is generally accepted. By contrast, a comparable role for the *Theodosian Code* has been not only ignored but even denied. The primary purpose of this paper is to show that Theodosius, by ordering his compilers to begin with the legislation of Constantine, introduced a significant dis-

(5) Ramsay MacMullen, *Roman Government's Response to Crisis* (1976), 94-95: « ... with Diocletian we have evidence for enormous activity — many hundreds of rescripts by chance preserved from 293-294 — to take care of the backlog of business ».

(6) Mario Amelotti, *Per l'interpretazione della legislazione privatistica di Diocleziano* (1960), 29: « Non è un caso che i Codici Gregoriano ed Ermogeniano abbiano raccolto ... essenzialmente rescritti ... I Codici Gregoriano ed Ermogeniano non potevano avere contenuto diverso, in quanto fino al loro tempo il rescritto era stato il mezzo più frequente mediante cui gli imperatori erano intervenuti nel campo del diritto, specie privato ».

(7) The basic information can be found in Wenger, (*op. cit.*, n. 1), 536-541 or Jean Gaudemet, « Théodosien (code) », *Dictionnaire de droit canonique* 7 (1965), 1215-1246.

tortion into our picture of Roman law. The *Theodosian Code* collected documents which were very different from the subscriptions collected under Diocletian. But this choice of material, though it reveals much about fifth century attitudes to the different types of legal texts, has nothing to do with the nature of Constantine's own legislation.

The *Theodosian Code* produced in 438 had a rather complicated background. Theodosius had originally ordered, in 429, a more ambitious project, of which the code eventually published was to have been only a preliminary part. The letter in which Theodosius outlined his original project has been preserved for us in the *Codex Theodosianus* of 438; the preliminary project was doubtless seen as essential background for understanding the later work. Its opening, indeed, contains the essential elements of the present argument:

> *Ad similitudinem Gregoriani atque Hermogeniani codicis cunctas colligi constitutiones decernimus, quas Constantinus inclitus et post eum divi principes nosque tulimus, edictorum viribus aut sacra generalitate subnixas...* (CTh. 1.1.5; 429).

The two Diocletianic codes were of course obvious models for Theodosius; he nevertheless ordered a very different sort of collection. By specifying that the documents to be included be « supported by the force of edicts or by royal generality » Theodosius specifically excluded certain types of documents. Subscriptions to *libelli,* which had formed the basis for the two Diocletianic codes, were not general legislation. The *lex generalis* — a concept which seems to have received particular attention from legislators of the early fifth century — was a law specifically designated as having an empire-wide or province-wide applicability; it was thus similar to the other type of legislation explicitly mentioned by Theodosius here, the edict (8). The most common sort of *lex generalis* was probably the imperial epistle,

(8) See, in general, L. WENGER, (*op. cit.*, n. 1), 431-432. Most recently, N. VAN DER WAL, « *Edictum* und *lex generalis*. Form und Inhalt der Kaisergesetze im spätrömischen Reich », *RIDA* ser. 3, 28 (1981), 277-313.

addressed usually to a government official; certainly it is this kind of document which makes up the bulk of the *Theodosian Code*.

The reasons for Theodosius' preoccupation with general legislation need not unduly detain us. Other texts of the period suggest that what was at stake was authenticity; too many petitioners had elicited special privileges, and a collection of such idiosyncratic pronouncements would have been wildly incoherent (9). The contrast with the situation under Diocletian, when subscriptions had been collected with great industry, is very instructive. But the crucial question here is not why Theodosius chose to collect the type of legislation he did, but why he chose to begin this collection with the legislation of Constantine.

Theodosius never explains why the starting point for his own law codes was to be provided by Constantine. In one way, of course, the choice was natural enough; the *Codex Gregorianus* and the *Codex Hermogenianus*, explicitly cited as models and companions for the new collection, were Diocletianic, and a sequel to them might reasonably have begun with the legislation of Diocletian's most memorable successor.

This cannot, however, be the whole explanation. The two Diocletianic codes were completed little more than midway through Diocletian's reign. The later years of the First Tetrarchy, and the confused decade which followed, are almost entirely ignored by the legal collections. More important, however, is the fact that the Diocletianic codes contained little of the material in which Theodosius was interested, since they consisted almost entirely of subscriptions to *libelli*. Although Theodosius could usefully have ordered his commissioners to look again at the Diocletianic and the pre-Diocletianic evidence in their search for general legislation, he chose instead to begin with Constantine (10).

(9) I hope to discuss elsewhere the importance of these procedural difficulties for understanding the purpose of the Roman Law Codes.

(10) Otto SEECK, *Regesten der Kaiser und Päpste für die Jahre 311 bis 476 n. Chr.* (1919), 1-18 shows that the Theodosian compilers used not

The explanation is not difficult to find; Theodosius surely began with Constantine because Constantine was a Christian (11). Theodosius' own commitment to Orthodox Christianity is well documented, and that of his womenfolk is notorious (12). Moreover, Theodosius clearly viewed governing as an activity inseparable from his faith. Modern scholars, especially legal scholars, may find it difficult to remember that religious considerations could influence something as mundane as a law code, but Theodosius made no such distinction. Book Sixteen of the *Theodosian Code* provides an obvious illustration: the compilers created titles like *De fide catholica* (16.1) in precisely the same way as they dealt with more secular legislation (13).

Theodosius' religious preoccupations also have a particular relevance to his overall codification project. The plan originally envisioned in 429 had called for more than just the collection which was eventually produced. Along with a simple source-book, similar to the two which had already been produced under Diocletian, Theodosius had planned a second code, which would eliminate obsolete legislation and resolve contradictions. The influence of this contradiction-free code was to have extended beyond the normal legal and administrative spheres; it was to « show everyone what things are to be done, and what are to be avoided », and would « undertake the regulation of life » (14).

The explicitly ideological orientation in the original codification project makes Theodosius's choice of starting date easier

one central archive but a number of provincial ones. It is therefore unlikely that there could have been a effective Christian « purge » of the pagan records prior to the Theodosian project.

(11) The religious orientation of the *Codex Theodosianus* was obvious to Alois Dempf, *Geistesgeschichte der altchristlichen Kultur* (1964), 137, and to Edward Gibbon, *The History of the Decline and Fall of the Roman Empire*, ed. J. B. Bury (1897-1902), IV, 453, where the choice of starting date is attributed to « the narrow distinction between Paganism and Christianity, introduced by the superstition of Theodosius ».

(12) Kenneth G. Holum, *Theodosian Empresses* (1982).

(13) See also *NTh.* 1.3 (438), « *De Iudaeis, Samaritanis, Haereticis et Paganis* ».

(14) *CTh.* 1.1.5, with G.G. Archi, *Teodosio II e la sua Codificazione* (1976), 6-37.

to understand. Constantine was already a central figure in the Byzantine consciousness by the time of Theodosius II; an official cult is attested as early as the fifth century (15). Constantine was not, of course, important just because he was the first Christian emperor; he had founded the new capital and presided over the first ecumenical council. But from a political point of view Constantine's most important act was the establishment of a line of Christian emperors. The importance of this fact for the history of Roman legislation was not lost on a near-contemporary of Theodosius II. Writing in the mid-fifth century, the author of the *Syro-Roman Lawbook* ascribes to Constantine a central role in legal history: « But all laws became as nothing because of the Messiah's coming, and the one law of the Messiah was given for all people by the Christian kings, of whom the first was the chosen, saintly and victorious king Constantine » (16).

Moreover we possess two texts which, referring explicitly to the *Codex Theodosianus,* seem to confirm that Theodosius' choice of starting date was an ideological one. A Gallic chronicler of 452, known as pseudo-Prosper Tiro, records that in 438 *Theodosianus liber omnium legum legitimorum principum in unum conlatarum hoc primum anno editus* (17). This « collection of all the

(15) Philostorgius, *HE* 2.17, paraphrased by Photius. See, in general, E. Ewig, « Das Bild Constantins des Großen in den ersten Jahrhunderten des abendländischen Mittelalters », *HJ* 75 (1956), rpt. in H. Hunger, ed., *Das byzantinische Herrschersbild* (1975), 133-192; A. Linder, « The Myth of Constantine the Great in the West », *Studi Medievali*, ser. 3, 16 (1975), 43-95.

(16) Text and translation in K. G. Bruns and E. Sachau, *Syrisch-römisches Rechtsbuch aus dem fünften Jahrhundert* (1880), 41-42; see also 45 and 76. For the date of the original Greek text see idem, 317-319. For similar views, though without reference to laws, see Anon. Val., *pars prior*, 6.33: *A Constantino autem omnes semper Christiani imperatores usque in hodiernum diem creati sunt, excepto Iuliano*; also the « dedication » to Constantine inserted into Lactantius, *D.I.*, at 1.1.13. Both texts probably date to the late fourth century.

(17) Text ed. Mommsen, *MGH*, *AA*, IX, 660. We can ignore the report of Isidore, *Orig.* 5.1.7: *Novae [sc. leges] a Constantino Caesare coeperunt et reliquis succedentibus, erantque permixtae et inordinatae.* This seems to be a mere paraphrase of *CTh.* 1.1.5, which is echoed in the rest of Isidore's entry.

laws of legitimate princes » has been understood to be a collection of « all the laws of the non-usurping emperors » ([18]). But although there are not, in fact, any laws attributed to usurpers in the *Codex Theodosianus,* it is hard to see how *legitimus* can have this sense here. « All the laws » of legitimate princes ought, on this view, to include the laws issued by Constantine's predecessors. But the *Codex Theodosianus* did not extend to Constantine's predecessors, and it is difficult to imagine that our chronicler was not aware of this. We should, instead, understand *legitimus* as implying a religious judgment rather than a constitutional one ([19]). The « legitimate princes », in the fifth century, seem to have begun with Constantine.

Pseudo-Prosper, if I have interpreted him correctly, provides a useful clue to interpreting the one passage in which Theodosius himself seems to allude to the rationale behind his starting date. In 447 Theodosius sent to Valentinian III a supplementary collection of laws, issued after the appearance of his original code, which he felt would be suitable for publication in the West. In his covering letter to Valentinian he has occasion to allude to the *Codex Theodosianus,* in words not unlike those used by Pseudo-Prosper: *Postquam in corpus unius codicis divorum retro principum constitutiones nostrasque redegimus...* (*NTh.* 2 pr.). This could mean « after I collected my laws and the laws of *some* of the previous emperors into a single work » but I doubt if it does; surely what Theodosius means is that he had collected his own laws and those of his predecessors. If so, what this passage suggests is that he regarded as real predecessors only those emperors who had ruled over Constantine's Christian empire.

(18) So Iacobus Gothofredus, *Codex Theodosianus,* ed. of 1740, I, ccxi, who interprets *legitimi principes* as those « qui ... vera fide legeque Christiana imbuti sunt ». MOMMSEN, *Theodosiani Libri XVI* (1905), I, pt. 1, xxix, suggests that the non-legitimate emperors are both usurpers and Constantine's pagan predecessors; but Pseudo-Prosper can only mean one of these things.

(19) *Tyrannus,* the direct opposite of a *legitimus princeps,* can have the particularly Christian meaning of « persecuting emperor ». See T. D. BARNES, « The Beginnings of Donatism », *JTS* n.s. 26 (1975), 13-22, at 18-19.

Thus the *Theodosian Code* was, in one important way, organized according to religious rather than legal criteria. It follows from this that the accession of Constantine is, for our purposes, a virtually arbitrary starting date. In coming to terms with material preserved for us in the *Theodosian Code* it is necessary to imagine what might have been: Theodosius *could,* had he wished, have collected something other than general legislation, and he could have collected general legislation from the period before Constantine.

Constantine in Legal Scholarship

Although the religious motivation for Theodosius' decision has not gone unnoticed, it has been ignored by the specialists most concerned with these texts (20). The few scholars who have recognized that the starting date of the *Theodosian Code* is a problem have simply tried to reassure themselves that Theodosius' decision, instead of being arbitrary, was based on genuinely legal considerations.

In its simplest form, this argument uses literary sources which describe Constantine as a legislative innovator, and suggests that it was Theodosius' awareness of this which prompted him to begin his collection with Constantine. But it is difficult to believe that the texts in question actually tell us anything of value about the nature of Constantine's legislation. Mitteis cites a passage of Ammianus, allegedly reporting Julian's evaluation of Constantine as « an innovator and a disturber of ancient laws and the received custom of antiquity » (21). But this is demonstrably too general a comment to have any relevance to the present argument; the only example given in Ammianus' account is that Constantine was the first to bestow the consulship on a barbarian. We should, in general, be suspicious of judgements of this sort. When Eutropius tells us that one of Constantine's principal achievements was to have issued a great

(20) See above, n. 11 and below, nn. 33 and 34.

(21) Ammianus 21.10.8; Ludwig Mitteis, *Reichsrecht und Volksrecht* (1891), 548.

deal of legislation, he is merely following standard rhetorical practice (22). Menander Rhetor, in his handbook on how to write panegyric of an emperor, specifically recommends the inclusion of legislative achievements (23). Thus these passages on Constantinian legislation have to be seen in context; similar things were said about emperors who did not impress Theodosius nearly so much (24).

A more sophisticated form of this argument, however, is based on contemporary legal documents. Certain laws of Constantine seem, when taken out of context, to indicate a radically different attitude toward the status of rescripts as sources of law; this attitude is assumed to be one with which Theodosius was sympathetic, and his choice of a starting date for his code is thus justified on technical grounds. In fact, however, the laws in question attest no Constantinian innovation whatever.

The text most commonly cited in this context is an edict of 315:

> *Contra ius rescripta non valeant, quocumque modo fuerint inpetrata. Quod enim publica iura perscribunt, magis sequi iudices debent* (*CTh.* 1.2.2).

This has been understood to mean that imperial rescripts (i.e. replies to petitions) are no longer to have more authority than Classical jurisprudence (= *ius*) (25). Constantine would, on this

(22) Eutropius 10.8.1: *Multas leges rogavit, quasdam ex bono et aequo, plerasque superfluas, nonnullas severas, primusque urbem nominis sui ad tantum fastigium evehere molitus est, ut Romae aemulum faceret.* Contra, A. Alföldi, *The Conversion of Constantine and Pagan Rome* (1948), 31; for the place of this passage in pagan polemic see A. Ehrhardt, « Constantin d. Gr. Religionspolitik und Gesetzgebung », *ZRG* 72 (1955), 127-190, at 132.

(23) Text in L. von Spengel, *Rhetores Graeci*, III, 375.24 - 376.2 = D. A. Russell and N. G. Wilson, eds., *Menander Rhetor* (1981), 90.

(24) Thus Nazarius' panegyrical description of Constantine's recent legislation (*Pan. Lat.* 4 [10] 38.4) is paralleled in Libanius' oration to Theodosius II (*Or.* 50.13, ed. Foerster, III, 477. 14-15). See also Augustus, *Res Gestae* 8.5.

(25) Contra Amelotti, (*op. cit.*, n. 6), 31, where these texts are cited as evidence that Constantine, and not Diocletian, was suspicious of private rescripts.

view, be making a dramatic break with his predecessors, who (like Diocletian) had given full weight to the products of the *libellus/subscriptio* procedure.

This interpretation cannot be right, for two reasons. In the first place, what Constantine means by *ius* is not « the Classical jurisprudence », but something much more general (26). This is shown by, if nothing else, the fact that Constantine can gloss *ius* as *quod... publica iura perscribunt*. Terms of this sort — *ius, ius publicum, leges publicae* etc. — were used by the Late Roman legislators to mean simply « the general law » (27). All that Constantine is saying is that laws issued in individual cases are not to take precedence over existing general legislation. Thus in a clarification of *CTh.* 1.2.2 issued two years later Constantine says essentially the same thing, but opposes rescripts not to *ius* but to *leges publicae* (28).

Secondly, the historical context in which Constantine issued these laws shows that they were not theoretical pronouncements on the relative value of sources. In 315 Constantine was busy dealing with the legacy of Maxentius, and he had to come to terms with the legislation of his predecessor. It therefore made sense to announce formally — and *CTh.* 1.2.2 is an edict — that individual privileges would be valid if and only if they were not in conflict with the general law, which was defined by the new

(26) So, e.g., Franz Wieacker, *Textstufen klassischer Juristen* (1960), 40: « ... aus der Gleichsetzung des *Ius* mit dem (klassischen) Kaiserrecht (*leges*) folgte derselbe offizielle Anspruch auf Texttreue wie für die Konstitutionen. Daher erklärt Konstantin Reskripte, die das *Ius* durchbrechen, für kraftlos ».

(27) Legal scholars have been misled by their own tendency to speak of the Classical jurisprudence as *ius* and imperial legislation as *leges*, and to see these as naturally contrasted. J. Gaudemet, « 'Jus' et 'leges' », *Jura* 1 (1950), 223-252 has shown this usage to date only to the Visigothic period, and its inappropriateness in interpreting texts like *CTh.* 1.2.2 was emphasized by G. G. Archi, *Giustiniano legislatore* (1970), 11 ff. and 43 ff.

(28) Cfr also *CTh.* 15.14.12 (395), where the same notion appears as *ius commune*, and *CJ.* 1.22.6: *quae generali iuri vel utilitati publicae adversa esse videatur*. Contrast *Dig.* 1.1.1.2 (Ulpian): *Publicum ius est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem.*

emperor. Later laws issued in similar circumstances make similar provisions; if taken out of context, they too could wrongly be interpreted as impugning the *libellus/subscriptio* procedure (29).

Conclusions

If the starting date for the *Theodosian Code* cannot, in fact, be justified on purely technical grounds, it follows that the pattern of our surviving sources is misleading in a number of important ways. A collection of legal subscriptions, issued to individual petitioners on particular subjects, will present a very different picture of the legal system than will a collection of *leges generales*. The latter were issued only when an emperor wanted to communicate rules that were to be applicable generally, and which therefore tended to be more innovative or at least more categorical.

The point is nicely illustrated in the problems presented by Constantine's laws about rescripts. A law like *CTh.* 1.1.2 has been so often misunderstood simply, I think, because it has survived. But although it is only from Constantine on that we have edicts and epistles about rescripts issued by a rival emperor, this merely reflects the state of our source material; it is only for Constantine and his successors that we have, in the *Theodosian Code*, a good collection of edicts and epistles. We cannot assume that statements similar to *CTh.* 1.1.2 were not issued in similar circumstances by Constantine's predecessors (30).

To get even a rough idea of the range and extent of Late Roman legislative activity requires considerable imagination.

(29) See *CTh.* 15.14.1 (324) etc. and G. SAUTEL, « Usurpations du pouvoir impérial dans le monde romain et 'rescissio actorum' », in *Studi Pietro de Francisci* (1956), III, 463-491, esp. 480.

(30) Claudius Gothicus, explaining that the authority of rescripts was not to lapse with time as long as they were legal, refers in passing to the same distinction between *ius* and individual rescripts: *cum ea, quae ad ius rescribuntur, perennia esse debent*, CJ. 1.23.2 (270).

We must imagine, first, that governments continued to issue subscriptions in at least the quantities attested for the reign of Diocletian. Secondly, we must imagine that governments prior to that of Constantine had for some time been issuing legislation of the kind and quantity attested by the *Theodosian Code*. Finally, it is important to remember that although Theodosius' interest in general legislation resulted in an impressive collection of edicts and epistles, even this collection is not complete; Theodosius excluded epistles which were not generally applicable. Governments both before and after Constantine had regularly sent to individual administrators « private » letters of the kind attested by Pliny's Tenth Book of Epistles, and presumed by Symmachus' collection of *Relationes* (31).

The importance of this argument is not confined to the question of Roman bureaucratic output. Ignoring the original context of the legal sources has resulted in serious misconceptions about how various emperors influenced the form and content of legislation. Paul Krüger for example, regarded Diocletian as the last emperor to produce laws with a « Classical » style comparable to that of the legislation of the second century, and he held Constantine responsible for introducing into legislation « le verbiage le plus stérile et la rhétorique la plus ampoulée » (32). He does not seem to have considered that collections of general legislation by Diocletian, or of subscriptions issued by Constantine, would have produced a different impression.

Not all scholars have ignored this problem. In 1913 Eugène Vernay observed that the *Codex Theodosianus* had collected documents very different from those included in the Diocletianic codes, and his observations have been developed by Edoardo Volterra (33). More recently, Dietrich Simon has argued convinc-

(31) See, in general, A. Steinwenter, « Die Briefe des Qu. Aur. Symmachus als Rechtsquelle », *ZRG* 74 (1957), 1-25.

(32) Paul Krüger, *Histoire des Sources du Droit Romain* (1894), 367 (= 274 of the German edition).

(33) E. Vernay, « Note sur le changement de style dans les constitutions impériales de Dioclétien à Constantin », in *Études Paul Frédéric Girard* (1912-1913), II, 263-274; E. Volterra, « Il problema del testo delle costi-

ingly that laws within the *Codex Theodosianus* which refer to the *libellus/subscriptio* procedure are good evidence for the survival of that procedure into the fourth century, in spite of the fact that few subscriptions actually survive from the period after Diocletian (34). None of these authors, however, offers a satisfactory account of how and why the codes of Diocletian and Theodosius so thoroughly distorted our sources.

More important is the fact that the problem has never been addressed satisfactorily by the scholars responsible for the fundamental work on Roman law in the Late Empire. Savigny assumed that Constantinian legislation was the obvious place to begin the study of law in the Middle Ages; the abundance of Constantine's *leges generales* was taken as symptomatic of the new Christian order (35). Mitteis regarded Constantine as the first emperor to permit wholesale acceptance of foreign legal concepts into Roman law; like Savigny, he assumed that what has been preserved of Constantinian legislation was indicative of a new attitude to the law (36). Ernst Levy saw Diocletian as the last bastion of Classicism in the Roman Law, and assumed that it was Constantine who allowed the introduction of « vulgar law » concepts into Roman legislation (37). Levy has been followed in his chronological assumptions by more recent stu-

tuzioni imperiali », in *La Critica del testo* (1971), II, 821-1097; see also IDEM, « Quelques remarques sur le style des constitutions de Constantin », in *Droits de l'antiquité et sociologie juridique: Mélanges Henri Lévy-Bruhl* (1959), 325-334.

(34) Dietrich V. SIMON, *Konstantinisches Kaiserrecht* (1977), esp. 5ff.

(35) Friedrich Karl VON SAVIGNY, *Geschichte des römischen Rechts im Mittelalter* (1834), 2nd ed., I, p. 6: « Aber unter Constantin nahm die Gesetzgebung einen neuen Character an. Von nun an wurden die Edikte, d. h. neue Verordnungen der Kaiser, sehr häufig, und diese waren oft sehr durchgreifend, da die Herrschaft des Christenthums so viele alte Ansichten der Nation völlig vernichten mußte ».

(36) MITTEIS, (*op. cit*, n. 21), 204: « ... die zahlreichen Reformgesetze Constantin's einen sehr heftigen Vorstoß des griechischen Rechtsbewußtseins gegen das römische bilden ». See also pp. 548-552.

(37) Ernst LEVY, *West Roman Vulgar Law* (1951), 6-7.

dents of the « vulgar law », notably Gudrun Stühff ([38]), Franz Wieacker ([39]), and Max Kaser ([40]).

The realities of Roman law, however, are less convenient. If Theodosius' choice of a Constantinian starting date was dictated by religious considerations instead of legal ones, it follows that our surviving evidence does not by itself present an accurate picture of Roman Law. Any feature seen as characteristic of legislation issued by Constantine and his successors must be placed into a context; we need to distinguish between a genuine innovation and one due merely to differences among the sources available. Dietrich Simon's study of the law of donation is a model of what can be achieved on these principles ([41]). It is the contention of this paper that similar reappraisal is required before we can understand the rest of law and legislation in the Late Empire.

(38) Gudrun Stühff, *Vulgarrecht im Kaiserrecht* (1966), 91: « Die Gesetze Konstantins sind als Quelle für die Erkenntnis des Vulgarrechts anerkannt. Die Bedeutung seiner Gesetzgebung für das Vulgarrecht wird vornehmlich dahin beschrieben, daß sie den vulgaren Tendenzen Einlaß gewährte, ihnen zum Durchbruch verhalf, daß mit ihr die Epoche des robusten Einbruchs vulgarer Anschauungen in das Kaiserrecht begann ».

(39) F. Wieacker, *Allgemeine Zustände und Rechtszustände gegen Ende des weströmischen Reichs* (1963), 22: « Daß die Kaisergesetzgebung seit Konstantin weit stärker durchdrang, kann nicht verwundern; sie allein war unmittelbarer, oft gegenwärtig ergangener Befehl des absoluten Monarchen; sie, die sich mehr als dem zurücktretenden Privatrecht dem Prozeß-, Strafrecht, Verwaltungs- und Wirtschaftsrecht mit Einschluß des Rechtes der Berufsstände und Korporationen zuwandte, spiegelte die neue Rechtswirklichkeit des Absolutismus ... ».

(40) For a clear statement of Kaser's position, see his article on « Vulgarrecht », *RE* 9A2 (1967), esp. 1295: « Die älteste Quelle, in der uns dieses echte Vulgarrecht entgegentritt, sind die Kaiserkonstitutionen Konstantins, die sich auf vulgare Rechtsauffassungen stützen und sie als Stücke der geltenden Ordnung voraussetzen. Das plötzliche Auftauchen dieser vulgarrechtlichen Erscheinungen an solcher offiziellen Stelle wird begreiflich, wenn man mehrere Vorgänge unterstellt, die sich nur zum Teil übersehen lassen ... ».

(41) Simon, (*op. cit.*, n. 34).