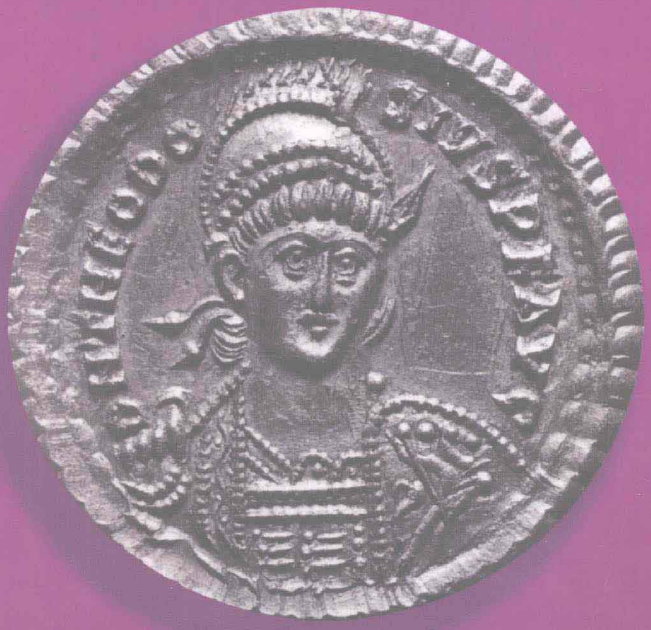
THE THEODOSIAN CODE

Studies in the imperial law of late antiquity

Edited by Jill Harries & Ian Wood

SECOND EDITION



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Jill Harries & Ian Wood

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Preface to the Second Edition

When this book first appeared in 1993, we were agreed that the contents were 'not the last word on the compilation of the Code' (p. 18) – or indeed on any other Code-related question. Subsequent scholarly activity has proved us right. The text is receiving fresh attention in its own right, through the Projet Volterra, based at University College London; and an ongoing French project aims to publish a French translation, based on Mommsen's text, and commentary in a series of volumes, under the overall editorship of S. Crogiez-Petrequin and P. Jaillet.

The essays contained in this volume address questions of fundamental importance as to what the code was, what it says about the nature of late Roman law and its impact on mediaeval Europe and beyond. A number of significant publications since, many by contributors to this volume, have improved understanding and stimulated further debate, both on the text itself (discussed in Part 1), its use as evidence for the history of Late Antiquity and its later place in the history of law.

On the origins of the Code, John Matthews[1] and Boudewijn Sirks[2] still adhere, in general terms, to the positions outlined in their contributions to this volume on the archival and other sources for the constitutions, which the compilers would abbreviate and rearrange in (supposedly) chronological order. The Matthews study is especially wide-ranging: although much space is devoted to more technical matters, such as the sources, editing and what to do about the seriously incomplete state of Mommsen's text (1905), he also captures the 'historical moment', when the Theodosian Code came into being (pp. 1-9), offers insights on numerous individual constitutions and (pp. 121-67) develops ideas on the Sirmondian Constitutions also addressed by Mark Vessey in this volume (below, 178-99). Since then, the *Gesta Senatus* have received detailed treatment from Lorena Alzeri,[3] who, *inter alia*, suggests that the Senate meeting at Rome, where the Theodosian Code was presented by the prefect Anicius

[1] *Laying Down the Law: A Study of the Theodosian Code* (Yale 2000).
[2] *The Theodosian Code: A Study* (Amsterdam 2007, revised 2008).
[3] *Gesta Senatus Romani de Theodosiano Publicando: Il codice Teodosiano e la sua diffusione ufficiale in Occidente* (Berlin 2008).

Acilius Glabrio Faustus, took place, not on 25 December, but 25 May (amending *VIII. K. Ian.* to *VIII.k. Iun.*). An aspect perhaps underplayed in the present volume is the importance of adducing the Code of Justinian, not merely to plug gaps, as Krueger's edition sought to do, but also to provide a setting for the Theodosian compilation in the broader framework of the Roman legal tradition.

Tony Honoré's contribution to this volume is one in a line of articles and books, notably his study of the quaestors of the Theodosian dynasty,[4] which bring to life the draftsmen of the texts, the 'mouths' of the emperor. By identifying divergences in style and legal agendas, Honoré supplements what is known already of careerists at the imperial court, who held the office, while adding, on the basis of style, several more 'anonymous' individuals, who also contributed their learning and eloquence to imperial legislation. Thanks to him, the central position of the quaestor in the legislative process is increasingly accepted as a given, although some, like one of the present editors, might quibble that some of the shorter-lived 'quaestors' identified by Honoré may in face have been *magistri memoriae*, deputising while there was a vacancy.

Increased understanding of how the texts came into being has rightly affected their use as sources by historians of Late Antiquity. For imperial constitutions were not dreamed up by emperors in isolation. They were the product of a process of dialogue and negotiation between emperors, officials and subjects. They reflect, in varying degrees, imperial preferences (even when edited, Julian the Apostate is allowed to refer to the temples and the gods in the plural): juristic tradition; and the self-interested suggestions or proposals of ambitious courtiers, provincial power-brokers and pressure-groups – even bishops. The situations on the ground, which generated the constitutions, and which were in turn affected by what the emperor decided, had their own dynamic; enforcement (e.g. of tax legislation or the criminal law) was only a small part of the emperor's legislative role.[5] Much of the *ius civile*, the law as it applied to Roman citizens, concerned dispute settlement; what emperors were asked to decide related, still, to problems faced by judges dealing with civil litigation in the courts.

Much work remains to be done on the implications of the responsive character of imperial legislation. A decision which appears, in isolation, to be radical, such as Constantine's ruling on one aspect of

[4] *Law in the Crisis of Empire, 399-455 AD* (Oxford 1999). His study of *Tribonian* (London 1978) is definitive for the most influential of all quaestors, the man behind the *Corpus Iuris Civilis* of Justinian.

[5] J. Harries, *Law and Empire in Late Antiquity* (Cambridge 1999). For the collective contribution of Harries (1999), Honoré (1999) and Matthews (2000), see A.D. Lee, 'De-Coding Late Roman Law', *Journal of Roman Studies* 92 (2002), 185-93.

episcopal legal hearings (*CT* 1.27.1), becomes less so, once it is appreciated that the decision was a response to a question about an existing situation. In other words, Constantine did not found or legalise bishops' judicial hearings; he merely offered assistance when problems arose. The same applies to his decisions on manumission in churches, and whether this could be done on a Sunday. Constantine did not institute manumission before bishops, nor did he make Sunday a holiday; he merely answered questions about regulations and how the holiday should be observed. The work of Caroline Humfress has analysed the importance of the responsive and negotiated nature of imperial law in relation to Christianity, heresy and court procedure;[6] she is also a leading analyst of the place of imperial law in the juristic tradition. The importance of the courts and of church councils in the formation of questions, referrals, proposals and decisions is becoming increasingly clear. Fergus Millar's work on the 'legislative' processes of the Church Councils under Theodosius II shows in detail the working of proposal and response as a means of 'persuading' (and being persuaded by) the powerful elite at the court of Constantinople.[7]

The presence of the proposer, the *consistorium*, which debated legal decisions, the quaestor who drafted them and emperors, who might have views of their own, complicates the issue of authorship; we cannot be sure whose views a given text in fact reflects (although, formally, they are those of the emperor). The Theodosian Code, therefore, is not a single text but an anthology of texts, reflecting divergent agendas and providing a snapshot of only one stage in the negotiated process of producing a 'law'. The missing voices should be acknowledged, even if we cannot identify them for sure. Nor can we be sure of the scale of the problems addressed. Large numbers of entries on a topic indicate, not that the problem was necessarily widespread, but that it was in the interest of a lot of people that the imperial line on it should be known. Still, the Code reflects the end-product of imperial decision-making and, working on that basis, two recent collections of essays on Late Antiquity drawing on the Theodosian Code as a 'source' provide diverse examples of how the Theodosian Code can be used to illuminate the history of late antiquity.[8]

As for the afterlife of the Code, that too has been the subject of

[6] *Orthodoxy and the Courts in Late Antiquity* (Oxford 2007).

[7] F. Millar, *A Greek Roman Empire: Power and Belief under Theodosius II (408-450)* (Berkeley, California 2006).

[8] S. Crogiez-Petrequin and P. Jaillet, with O. Huck (edd.), *Le Code théodosien: diversité d'approches et nouvelles perspectives* (École française de Rome 2009) is issued in conjunction with the French translation project. See also J.-J. Aubert and P. Blanchard (edd.), *Droit, Religion et Société dans le Code Théodosien* (Geneva 2009).

increased interest. In particular the 1500th anniversary of the promulgation of the Breviary of Alaric prompted reconsideration of the breviary itself, of its relations with the Code, and of its manuscript history – which, given the textual problems of the Code, itself casts light on the Theodosian compilation.[9]

[9] M. Rouche and B. Dumézil (edd.), *Le Bréviare d'Alaric. Aux origines du Code civil* (Paris 2008).

Contents

Introduction

The Background to the Code

Jill Harries

In AD 369, an anonymous petitioner to the emperors Valentinian I and Valens concluded a list of suggestions on financial, administrative and military policy with a proposition that the emperors codify the law: 'there remains one remedy needed from Your Serenity to cure the evils of the Roman state, that by the judgment of your imperial will you should reject the legal confusions caused by wicked men and cast light on the confused and contradictory pronouncements of the laws' (*De Rebus Bellicis* 21.1). The possibility that the petition may have been received and stored as part of a bureaucratic file in the imperial archives suggests that, even in the rigid and formalised structure of the Later Empire, the tradition of individual subjects' direct access to the emperor was not yet dead. However, it must be admitted that the Anonymous had no discernible influence on imperial policy. Although a precedent for a codification of imperial laws already existed in the Diocletianic compilations of Gregorian and Hermogenian in the 290s, no progress would be made with the idea for a further sixty years after the Anonymous' petition until, in March 429, Theodosius II, the Roman emperor in the East, set up the first Code commission (*CTh* 1.1.5). Eight years later, in 437, the work of compilation and arrangement had been completed and the wedding of Theodosius' cousin Valentinian III with his daughter Eudoxia was made the occasion of a formal presentation of the Code to the praetorian prefects of Italy and the East. On 15 February 438, Theodosius issued his first 'new law', *novella*, validating the Code in the East, while, in the West, the praetorian prefect who had received the Code from Theodosius presented it to the Roman Senate on 25 December of that year.[1]

The initiative was arguably long overdue. In a society governed by an autocratic emperor accountable to no one, the outcome of all legal

[1] Proceedings described in the *Gesta Senatus*, printed at the start of Mommsen's edition of the Theodosian Code, 1-4 and translated by C. Pharr, *The Theodosian Code* (1952), 3-7.

disputes and the character of much of the running of the Empire itself depended on an accurate knowledge of the emperor's will. Litigation was resolved in favour of the party which could produce the most recent imperial opinion, often in the form of a rescript which was relevant to their case. The incentive for forgery was always present; even if a rescript were genuine, its authenticity could be questioned and a case thus prolonged.[2] *Iudices* also suffered from the uncertainty and insecurity engendered by the absence of an independent judiciary. A judge was liable to be appealed against to the emperor, with embarrassing consequences to himself, if he was wrong.[3] In cases of doubt, therefore, the *iudex* might opt to consult the emperor before passing judgment, through a *consultatio*. Constantine impatiently objected to this, observing that *iudices* should only consult him on a few matters, which could not be resolved by judicial sentence, as he was a busy man who did not like being interrupted – and there was always the option of appeal (*CTh* 9.30.1). A similar attitude was adopted by Valens (AD 365-378), apparently at the prompting of the praetorian prefect, Modestus; Valens avoided the hearing of legal cases 'believing that the investigation of swarms of legal disputes was designed to humble the loftiness of imperial power' (Amm. Marc. 30.4.2),[4] a case of negligence which, according to Ammianus, vastly increased the incidence of corruption and collusion in the system. The problem, however, was not of Valens' creation, but derived from the fear of the emperor's underlings over the consequences of being wrong. The emperor, if he handled everything himself, was bound to be overworked. Although a reduction in the number of appeals was not made an explicit aim of the Theodosian Code project, it may well have been a motive; only two years after its promulgation, Theodosius II delegated his hearing of appeals from *spectabiles iudices* to a two-man court, consisting of the praetorian prefect of the East and the imperial quaestor (*CJust* 7.62.32).

The establishment of the dynasty of Theodosius I in the eastern capital at Constantinople from 395 created conditions for a stable and settled administration capable, at last, of taking a considered look at

[2] Courts could also reject rescripts that were 'against the law'. *CTh* 1.2.2 (29 Aug. 315) implies fraudulent grants, 'contra ius rescribta non valeant, quocumque modo fuerint impetrata. Quod enim publica iura perscribunt, magis sequi iudices debent.' Examples occur at *CTh* 1.2.8 (22 Feb. 382) rescinding rescripts postponing debt repayment and 1.2.9 (24 Sept. 385), cancelling tax exemptions gained through rescripts 'elicitum damnabili subreptione'.

[3] The section at *CTh* 11.30, *De Appellationibus et Poenis Earum et Consultationibus* contains 68 constitutions reflecting the importance of the subject to emperors and *iudices*. The latter also risked being appealed against for political reasons, hence Symmachus' caution in his *Relationes*, state papers addressed to Valentinian II in 384.

[4] 'ille ad humilitandam celsitudinem potestatis negotiorum examina spectanda instituta esse arbitratus (ut monebat), abstinuit penitus, laxavitque rapinarum fores, quae roborabantur in dies ...'

the question of imperial law in the Empire. A long-standing tendency to accept rescripts, which were issued in response to specific queries, as in practice having universal application, which had been enshrined in the Diocletianic Codes of the late third century, was overturned by Arcadius, father of Theodosius II, in 398; thereafter, rescripts issued in reply to *consultationes* should apply only to the lawsuits for which they were issued (*CTh* 1.2.11).[5] This constitution would have had the beneficial result of cutting back on the proliferation of material, genuine or otherwise, which could be cited in trials, but did not remove the basic problem of ignorance of the state of the law itself. It also set a precedent for the Theodosian Code, which, unlike its Diocletianic predecessor, avoided the inclusion of rescripts, resorting instead to the *edicta* and *epistulae*, which could be categorised as 'general laws'.

The Code project also grew out of the character of the young Theodosius' administration in the 420s. Although much is made of Theodosius' apparent lack of personal drive, and his tendency to be dominated by the female members of his family,[6] his reign witnessed a cultural renaissance in Constantinople for which he must take some of the credit. Not only was he the dedicatee of two great historians, the pagan Olympiodorus in 425 and the Christian Sozomen in the 440s,[7] but his court was a magnet for cultured men, including those learned in the law. The same cultural interest motivated Theodosius' reorganisation of teaching in Constantinople in 425, restricting the numbers of professors in named subjects who were allowed to practise officially and allowing improved facilities to recognised teachers (14.9.3 & 15.1.53). Similar priorities emerge in the Code. The first commission, set up in 429, was instructed to preserve constitutions which had fallen into disuse and been superseded by others 'valid for their own time only' ('pro sui tantum temporis negotiis valituri'), because of the interest of learned, antiquarian *diligentiores*. In his *novella* validating the Code in the East in 438, Theodosius returned to the theme, observing that, despite the incentives available to encourage the arts and scholarly pursuits, few people existed with a full knowledge of the *ius civile*, and ascribing this dearth to the excessive numbers of books, cases and imperial constitutions.[8] Such scholars' problems were now behind them, thanks to the

[5] 'Rescripta ad consultationem emissa vel emittenda, in futurum his tantum negotiis opitulentur, quibus effusa docebuntur.'

[6] E.g. by K. Holum, *Theodosian Empresses* (1982) *passim*. The sources' focus on Pulcheria and theological disputes can be somewhat corrected by concentrating on the male, secular office-holders who actually ran the Empire.

[7] Phot. *Bibl.* 80; Soz. *HE praef.* For the date of Sozomen's *History*, see C. Roueché, 'Theodosius II, the Cities and the Date of the "Church History" of Sozomen', *JTS* 27 (1896), 130-2.

[8] *NTh* 1 *praef.* 'Saepe nostra clementia dubitavit, quae causa faceret ut tantis propositis praemis, quibus artes et studia nutriuntur, tam pauci rarique extiterint, qui plene iuris civilis scientia ditarentur ...'

'light of brevity' shed on previous obscurities by the Theodosian Code.[9] The emphasis on scholarship was not incompatible with Theodosius' other stated aim, that the Code was to be valid for all law-suits and legal transactions ('codicis in omnibus negotiis iudiciisque valituri', *CTh* 1.1.6, of 20 December 435), as jurisconsults were expected to put their learning at the service of advocates and *iudices* involved in the conduct of trials, whose own knowledge might be insufficient. Nevertheless jurisprudence was an acknowledged separate discipline: two official law-teachers were set up in Theodosius' reorganisation of teaching in the capital and both Code commissions, in 429 and 435, contained a legal expert, the *scholasticus* Apelles in the first and, in the second, Erotius, a *iuris doctor*.

The interest of the Theodosian government in law went far beyond its academic aspect. In November 426, an *oratio* was sent to the Roman senate, emanating, nominally, from the four-year-old Valentinian III; in fact, it is more likely to be of eastern inspiration. Valentinian had been restored to the throne of the West in the previous year by his cousin, Theodosius II, many of whose following would still have been present at Ravenna at the time. No doubt the men from the East noted the contrast between the disarray and disorder in the West and the new imperial system emerging in Constantinople. Their urge to impose order, already shown in the new rules for teaching in Constantinople, found expression in the *oratio* of November 426. Although preserved only in the extracts included in the Theodosian and Justinianic Codes, it was of considerable length. As far as we know, it covered two apparently unrelated topics: the administration of justice and the definition and categories of imperial law;[10] and the law of succession. Not only is the former topic a mini-code in itself and of direct relevance to the Theodosian Code three years later, but the procedure of addressing it to the senate is also paralleled in the setting up of the commissions for both the Theodosian and the first Justinianic Codes, as well as in the formal publication of the former in the West in December 438.

In its sections on the administration of the law, the *oratio* discussed the citation of jurists in court, the so-called 'Law of Citations', which gave pre-eminent authority to Papinian, Paulus, Gaius, Ulpian and Modestinus and included various provisions about the authentication of other jurists cited by the five[11] and guidance to *iudices* about how to

[9] Ibid. 1, 'verum egimus negotium temporis nostri et discussis tenebris conpendio brevitatis lumen legibus dedimus'.

[10] On administration of law: *CTh* 1.4.3, the 'Law of Citations'; *CJust* 1.14.2 and 3 (rescripts and *leges generales*); 1.19.7 (rescripts); 1.22.5 (fraudulent rescripts).

[11] The validation of Paulus' *Sententiae* at *CTh* 1.4.3.5 confirms the judgment of Constantine at 1.4.2 (27 Sept. 327/8) that the *Sententiae* were 'libros plenissima luce et perfectissima elocutione et iustissima iuris ratione succinctos', a pithy demonstration of the close connection of law with *eloquentia*.

proceed, if the jurists did not agree with each other. The purpose of the law was administrative, to ensure that *iudices* knew which authorities could be cited in their courts and which could not. Such guidance was very necessary, given that *iudices* had no authority to interpret, still less to make, laws for themselves. The law should have ensured that a *iudex*, provided he acted within the rules, could not be taken to task by litigants, or a superior. Of course, the ruling that a decision should be reached by majority vote of the Big Five, rather than by considering who was right, is hardly a model of legal principle, but the aim of the law was not to establish principle but simplify the operation of the courts and, it may be inferred, reduce the volume of appeals.

The *oratio* also offered clarification on how *leges generales* issued by the emperor were to be observed and identified (*CJust* 1.14.3). What concerned the drafters of the *oratio* was the form and appearance of the constitution in question, not its content. A *lex generalis* was either (1) sent to the senate as an *oratio* or (2) qualified by the inclusion of the word *edictum*. These two principal forms of general law were not affected by the occasion to which the *lex* was a response, be it imperial initiative, petition, referral or legal dispute. Both *oratio* and *edictum* would have originated at the highest level, in the imperial consistory, where the form of the law, as well as its content, would have been decided by the emperor and his counsellors.[12] All this was also consistent with the criteria used by the Theodosian Code compilers in their selection of appropriate constitutions, as both addresses to the senate and *edicta* (or 'leges edictales') to a general audience, the People, or the Provincials, are contained therein.

Thus far, however, the authors of the *oratio* had not covered one of the most extensively used forms of legal source to be present in the Code, imperial *epistulae* addressed to various recipients informing them of the new regulation.[13] This is covered in what follows. Having repeated himself on the *edictum* label, the author of the *oratio* added further qualifications, namely that a *lex* was *generalis* also if it was published throughout the Empire, or if it was explicitly stated that decisions made in one case should apply in the resolution of all similar cases. This allows for *epistulae*, the means by which laws were communicated to the officials charged with the responsibility of their publication. There was still one snag. Not all the definitions offered would apply to every *lex generalis* issued. Thus it was possible to issue a *lex generalis*, which did satisfy some of the criteria but which had limited territorial application. Such a law was not published 'per

[12] Procedure discussed by Tony Honoré, 'The Making of the Theodosian Code', *ZSS RA* (1986), 136-7 and by Jill Harries, 'The Roman Imperial Quaestor from Constantine to Theodosius II', *JRS* 78 (1988), 165-6.

[13] On *epistulae* and their composition by the *magister memoriae* and in the *scrinia*, see Harries, art. cit. in n. 12, 150 and 159-64.

omnes populos', throughout the Empire, but designated as valid only in particular provinces or areas, as in, for example, the obvious cases of Rome and Constantinople, where special conditions applied. Laws therefore could be 'general' without being universal.[14]

Leges generales could also be clearly differentiated from *rescripta*. The *oratio* of November 426 (*CJust* 1.14.2) stated that *rescripta* were prompted by the *relationes* or the *suggestiones*, referrals or reports, of *iudices* (as general laws might also be) but that they were to apply only to the bodies to which they were addressed.[15] This was in accordance with Arcadius' ruling in 398, and followed him in seeking to tighten up the categorisation of laws and thus to sharpen the definition of *leges generales*, by indicating what *rescripta* were – and were not. Rescripts were not *orationes* or *edicta* and, crucially, could not be sent to provincial governors in the form of *epistulae* to be brought to the attention of all whom he governed by widespread publication. It also followed that rescripts, provided they were recognised as such, would not be included in the Theodosian Code.

The Code, then, was a natural product of its environment and of a government consistently preoccupied with seeking to systematise and to simplify the process of government, with admittedly only partial success, streamlining the teaching of the arts at Constantinople, the citation of jurists in courts and the categorisation of imperial constitutions. The compilers, part of whose task was to arrange constitutions under headings in chronological order, were concerned about the evolution of law from Constantine onwards on specific issues, but they were not worried about the possibility that they might themselves impose anachronistic concepts on their material, some of which went back more than a century. The very idea of 'general law' although it existed in practice, had not achieved the refinement of definition accorded to it in 426 for much of the fourth century; despite the theory that rescripts were specific and other forms of imperial constitution were general, the distinction was blurred in practice, until reinstated by Arcadius.

The people who were involved with the construction of the Code itself are discussed by Tony Honoré elsewhere in this volume and the

[14] See remarks of B. Sirks, 'From the Theodosian to the Justinian Code', *Atti dell'Accademia Romanistica Costantiniana* (1986), 273-5. He notes also double enactments with separate territorial application, e.g. *CTh* 6.23.2 (Ravenna, 9 March 423) applying to the West, and 6.23.4 (Constantinople, March 17, 437), confirming the law in the East; in *CTh* 10.19.7, Valentinian I confirms for Illyricum and Macedonia a law passed by Valens and applicable to the East; cf. also *CTh* 13.5.23 (East, 393) and 24 (West, 395), but note the complication caused by the usurpation of Eugenius in the West from 392 to autumn 394 and the possibility that *CTh* 13.5.24 is part of an edict to the provincials of Africa containing assurances that the policy of the new western emperor, Honorius, was a continuation of that of Theodosius.

[15] 'nec generalia iura sint, sed leges fiant dumtaxat negotiis quibus fuerint promulgata.'

difficult problems of the making, purpose and sources of the Code are considered in full, from different standpoints, by John Matthews and Boudewijn Sirks. What follows considers the texts as the products of a distinctive and complex administrative system, which requires some analysis in order to appreciate some of the true significance of the Code as an historical source.

The purpose of constitutions was two-fold, to regulate and to communicate. Students of legal history are naturally more concerned about the former, and the nature of the content of the regulations contained in the Code. However, the aim to communicate not only the will but also the character of the emperor to his subjects was an essential part of the methods by which an area extending from Hadrian's Wall to the Euphrates was kept together by concentrating attention and (it was hoped) loyalty on the central power, as personified by the emperor. The language of the constitutions was therefore expected to be, at the very least, correct and to conform to the literary criteria employed by the rhetors of Late Antiquity; thus the language of law was influenced by considerations which were not strictly legal but which derived from the nature of imperial rule.[16]

It is uncertain who composed the wording of what were technically always the emperor's pronouncements in the early part of the fourth century. However, the role of the imperial quaestor,[17] a distant descendant of the senatorial *quaestor candidatus*, who acted as the emperor's spokesman in the Senate, evolved in the reign of Constantius II (337-361) and Valentinian I (364-375) into that of the emperor's legal adviser who drafted or 'dictated' his laws, a function which was entirely his own by the time of the *Notitia Dignitatum* in the early fifth century. Analysis of known holders of the post in the fourth century suggests a considerable disparity of legal expertise as the two facets of the quaestor's persona, as imperial spokesman or legal expert, struggled for prominence: the former is well represented by Ausonius (quaestor 375-6/7), the eloquent poet from Bordeaux, whose legal knowledge seems to have been minimal,[18] the latter by Valentinian I's quaestor, Eupraxius (367-70), who had the courage to correct the irate emperor on the law of treason (Amm. Marc. 28.1.25). By the fifth century, there are signs of some divergence in this, as in so much else, between East and West. In the West, the emphasis on eloquence as the prime qualification for the emperor's spokesman was retained, to culminate in the early sixth century with Cassiodorus'

[16] Discussed by W.E. Voss, *Recht und Rhetorik in den Kaisergesetzen der Spätantike. Eine Untersuchung zum nachklassichen Kauf- und Übereignungsrecht (Forsch. zur Byzantinischen Rechtsgeschichte* 9, 1982).

[17] Harries, art. cit. in n. 12 *passim*.

[18] Ausonius is taken apart by Tony Honoré, 'Ausonius and Vulgar Law', *Iura* 35 (1984, publ. 1987), 75-85.

highly literate rendering of the wishes of the Ostrogothic king in Italy. In the better-documented East, the picture, as Tony Honoré's study below reveals, is more varied, but the primacy of the legal role of the quaestor was well-established and a group of them, drawn from the increasingly professional bureaucracy of the Eastern court, were instrumental in the creation of the Code.

The effect of the quaestor on the content of law was probably limited by the convention that officials made proposals about their own sphere of administration and did not trespass on those of others. This meant that court officials would put up proposals on matters to do with the running of the court bureaucracy, but the main source of *suggestiones* on the running of the Empire in general would be the praetorian prefects, the authorities to which all provincial governors and *vicarii* ultimately looked. This is what one would expect from the hierarchical principles on which operated the system of filtering upwards proposals that originated lower down. This consideration tends to diminish the role of the quaestor, whose legal expertise would qualify him as the maker as well as the drafter of laws. The quaestor had no *officium* or office-staff belonging to him,[19] nor was he associated with provincial government (although many quaestors went on to hold praetorian prefectures). Apart from the *laterculum minus*, the lesser register of offices (*CTh* 1.8.1-3), the quaestor had nothing to originate laws about, before he acquired appellate jurisdiction under Theodosius II in 440. This isolation also ensured neutrality: the quaestor had no departmental axe to grind.

Communication between the government and the governed was a two-way process, of which the contents of the Code reflect only the latter part, the pronouncements of the emperor to his subjects. But although emperors allowed for the operation of their own initiative ('spontaneous motus' *CJust* 1.14.3) in formulating constitutions, laws were not in fact made by emperor and consistory in splendid isolation from the world outside. The relationship between emperor at the centre and provincial officials was symbiotic. A *suggestio*, proposal, from the official backed by a report was the most common means of supplying information from below and prompting an imperial decision. 'When ambiguity emerges about a new law', states a constitution of 474 (*CJust* 1.14.11), 'which is not established by long usage, there is need both for a *suggestio* and for the the authority of the emperor's decision.'[20]

The arrival of a *suggestio* at court signalled the first stage in the production of a constitution. The document would be discussed by the

[19] *Not. Dig. Or.* 12 'officium non habet sed adiutores de scriniis qua voluerit' and *Oc.* 10 'habet subaudientes adiutores memoriales de scriniis diversis'.

[20] 'Cum de novo iure, quod inveterato usu non adhuc stabilem est, dubitatio emergat, necessaria est tam suggestio iudicantis quam sententiae principalis auctoritas.'