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#### **Journal Article**

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Version: Accepted (Refereed)

#### **Citation:**

Humfress, C. (2006) Cracking the codex: late Roman law in practice <i>Bulletin of the Institute of Classical Studies</i> 49(1), pp.241-254
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Cracking the Codex: Late Roman Legal Practice in context.

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Introduction.

Sometime between the second and fourth decades of the fourth century AD (probably shortly after the year 324, but just possibly as late as 348) the advocate Ammon wrote a letter home to his Mother in Panopolis, a major city of the Thebaid.<sup>1</sup> Despite his own stated preference for a ‘...quiet life free from intrigue (as) befits those educated in philosophy and rhetoric...’<sup>2</sup>,

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<sup>1</sup> *P. Ammon I 3 = The Archive of Ammon Scholasticus of Panopolis I: The Legacy of Harpocraton* (Pap. Colon. XXVI/1), edd. W.H. Willis and K. Maresch (Opladen, 1997), 19-46, dating *P. Ammon I 3* to AD 348. For full discussion of the letter and its literary context see P. Van Minnen, ‘The Letter (and Other Papers) of Ammon: Panopolis in the Fourth Century AD’ in *Perspectives on Panopolis. An Egyptian Town From Alexander the Great to the Arab Conquest* (P.L. Bat. XXXI), edd. A. Egberts, B.P. Muhs, J. Van Der Vliet (Leiden, 2002) 177-199, esp. 188-195; Van Minnen argues for a date shortly after AD 324 for Ammon’s letter home. R.S. Bagnall, *Egypt in Late Antiquity* (Princeton, 1993) 272-273 expresses doubts about the dating of Ammon’s letter to AD 348. The earliest published edition of the letter by W.H. Willis, ‘Letter of Ammon of Panopolis to his Mother’ in *Actes du Xve Congrès International de Papyrologie 2* (Bruxelles, 1979), 98-115 argues for a date pre-337. On the (family) archive of Ammon Scholasticus in general, including a comprehensive description of all 124 texts, see K. Geens, ‘Archive of Aurelius Ammon, scholasticus, son of Petearbeschinis’, *The Leuven Homepage of Papyrus Collections* at [http://lhpc.arts.kuleuven.ac.be/archives/sample\\_arch.php?id=31](http://lhpc.arts.kuleuven.ac.be/archives/sample_arch.php?id=31) (2004-01-08).

I would like to thank Michael Crawford, Simon Corcoran and Benet Salway, directors of the *Projet Volterra* (Department of History University College London), for the opportunity to present a version of this paper at the 2005 Colloquium that marked the completion of Phase I of the project: *Law and Empire AD193-455*.

<sup>2</sup> *P. Ammon I 7*, l 3 and *P. Ammon I 13*, ll 9-10.

Ammon was writing from the metropolis of Alexandria where his Mother herself had sent him to settle several legal problems of family concern. The most important of these disputes, or at least the one that weighed most heavily on Ammon's mind, was securing the appointment of his nephew Horion II to a high-ranking hereditary priesthood in the Panopolite nome. The appointment of Horion II should have been relatively straightforward: his father Horion I (Ammon's elder half-brother) had held the office of *archiprophetes*, and on his death this priesthood should have devolved to his son by hereditary right, secured by the payment of a nominal fee to the high-priest in charge of the Egyptian public cults, the *archiereus* (actually a high ranking Roman civil official).<sup>3</sup> The high-priest, however, for reasons not specified, had frustrated Ammon's attempts to secure the post for his nephew. As luck would have it Ammon had another brother, Harpokration, who was especially well connected: a public sophist at Panopolis, Harpokration was also employed as an imperial panegyrist.<sup>4</sup> At the time when Ammon wrote his letter home, Harpokration had apparently left Egypt for a position with the imperial *comitatus* (*P. Ammon* I 3 line 25). Ammon informs his Mother in the letter that just before Harpokration had departed for the imperial court, he had suggested an alternative means of action for securing Horion junior's career prospects (as well as the lucrative income from temple-lands which came automatically with the post). Harpokration had asked Ammon: ‘ ‘Why

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<sup>3</sup> The background is given in *P. Ammon* I 4: the draft of Horion II's petition to the Prefect of Egypt concerning his succession to the *propheteia*. Van Minnen, ‘The Letter (and Other Papers) of Ammon’ (n.1 above) 191-192, astutely notes that “Ammon and his family were interested in this position [the *propheteia*] because of the prestige (*philotimia*) involved...In addition there were the financial perquisites traditionally enjoyed by officially appointed priests to consider...if one member of Ammon's family would lose the immunities offered to priests, this could have grave consequences for the family as a whole.”

<sup>4</sup> See Van Minnen, ‘The Letter (and Other Papers) of Ammon’ (n.1 above) 183-184. Also G.M. Browne, ‘Harpokration Panegyrista’, *Illinois Classical Studies* 2 (1977), 184-196 at 184-6.

are you spending still more money with the high-priest in order to get the office for the boy, why in short... do you continue to approach the high-priest's office about this ? For I ought to get it abroad from the emperor for him'...'. Ammon then reassures his Mother that: '...at the sea when he was about to embark on the boat he [Harpokration] swore, 'Whether you receive it from the high-priest or not, I (will) get the office for the boy from the emperor; and after Horion's death no other person will be appointed prophet in Panopolis except the son of Horion' (*P. Ammon* I 3 col. iv, ll 15-21). In seeking to fulfil this promise, Haropkration set out on a time-honoured path, well-trodden by innumerable private petitioners who sought specific *beneficia* direct from the emperors themselves. Why get frustrated with the monkeys when you could have access to the munificence of the organ-grinder ? Ammon, however, had an ace up his own sleeve: he had copies of an imperial letter issued by the emperor Diocletian (at least twenty years earlier, possibly nearer fifty) concerning the office of *archiprophetes*.<sup>5</sup> Ammon states that he gave Harpokration a copy of Diocletian's rescript, presumably so that it could be cited in Haropkration's petition to the current (unspecified) emperor. With more than a hint of fraternal competitiveness, however, Ammon goes on to assure his mother that: 'I myself meanwhile shall get the position from the high priest in accordance with Diocletian's rescript, and already I am receiving it. For the high priest himself has sent to me after changing his mind...' (ibid. ll 24-26). As Ammon categorically spelt out for his mother's benefit: 'Nothing prevails against Diocletian's rescript' (ibid. ll 24).

At first sight, Ammon's unabashed confidence in digging out a Diocletianic rescript and using it to sway a mid-fourth century dispute may seem surprising, or at the very least striking. One reason is that we are accustomed to thinking of fourth and early fifth century imperial

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<sup>5</sup> See n.24 below on Diocletianic material in the Ammon archive which may provide a context for Ammon's possession of this Diocletianic rescript.

constitutions through the framework of Theodosius II's *Codex* (promulgated in 438, operative from January 1, 439): a *Codex* that pointedly contains no imperial constitutions with a transmitted date before 1 January 313, the year following the 'Christian' Constantine's routing of the 'pagan' Maxentius at the Battle of the Milvian bridge. In this sense, Theodosius II's compilation effectively sidelines the question of continuity between Constantine and his imperial predecessors. The perception of a qualitative divide between pre and post-Constantinian imperial constitutions, however, also rests on the nature of the surviving evidence. Simon Corcoran has succinctly stated the problem thus :

The problem in the past was an excessive emphasis given to the change in style between Diocletian and Constantine, a result of the distortion in our surviving evidence. Thus the private rescripts of Diocletian were compared to the letters and edicts of Constantine, with little regard to differences in the nature of the documents as to their genesis, authorship, and audience. A more realistic picture emerges, once it is appreciated that the rhetoric considered appropriate to imperial letters and edicts displaces in the evidence the briefer and more functional style of the private rescripts (although rescripts too can become rhetorical). In the letters and edicts, the tendency is for the underlying law and its terminology to be obscured by the language, but not destroyed. Recent studies have shown how changes under Constantine are not a violent wrench away from classical principles, but a development originating from them.<sup>6</sup>

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<sup>6</sup> S. Corcoran, *The Empire of the Tetrarchs, Imperial Pronouncements and Government AD 284-324* Revised Edition (Oxford, 2000) 3.

As the example of Ammon Scholasticus demonstrates, to a mid-fourth century advocate any abrupt shift in the authority of imperial texts between Diocletian and his successors was neither apparent nor real.

### Cracking the *Codex*: Imperial Constitutions and the Late Roman Lawcodes.

Ammon's letter home reminds us that whilst we are accustomed to finding the law in force in the fourth century in the pages of the *Codex Theodosianus* or Justinian's *Codex Repetitae Praelectionis* (AD 534), Ammon and his contemporaries were obviously not. Historians interested in law and legal practice before 439 tend to find it difficult to avoid reading the individual constitutions collected within the Theodosian or Justinianic *Codes* outside of their form, content and context within those compilations. With regard to context, we have to reckon with the placing of individual constitutions within the given structure of Theodosius' and Justinian's *Codices*: their arrangement into sixteen or twelve books (respectively) of supposedly discrete subject matters, each book subdivided into thematic titles under which the individual constitutions themselves, or rather extracts from them, were grouped chronologically. The particular title under which the compilers chose to place a given extract can affect the way in which it was interpreted after 439 or after 534, and can also affect the way we read it today. A clear example is provided by a constitution of the Emperor Theodosius I, issued at Thessalonica on February 28, 380. Theodosius I's constitution was originally drafted as a specific measure addressed to the people of the city of Constantinople: its particular definition of the Catholic faith (specifying communion with the then Roman Pontiff Damasus and his contemporary Peter, Bishop of Alexandria) was made in the wake of Constantinople's bitter 'Arian' struggles. In 439 an excerpt from the 380 text became operative via the *Theodosian Code* under a specific title 'de

*fide catholica*' (CTh 16.1.2); the constitution thus acquired a new empire-wide application, and its general significance as a touchstone of the Catholic Faith was established. In 529 the emperor Justinian began his project of renovating Roman law, proclaiming that his authority to do so was given directly by God. Justinian's commissioners chose none other than Theodosius' 380 decree to head their new *Codex* of Imperial constitutions (thus CTh 16.1.2 = CI 1.1.1). The original Theodosian constitution, albeit in an excerpted form, now took its place within a thoroughly overhauled and indeed structurally 'Christian' legal system. Most modern historians have assumed that Theodosius' constitution settled the official question of the relationship between religion and citizenship in the year 380. However, it took 150 years for this text to acquire the wide legislative significance which historians now tend to attribute to its original promulgation. All of which raises the question of how an interested litigant, advocate, legal expert or judge would have handled this Theodosian constitution either before or after 439, or indeed after 529/534.

Numerous examples of imperial constitutions contained within the Theodosian and Justinianic *Codes* highlight a rather different effect of late Roman codification: the impact of the compilers' policy of excerpting single sections from a constitution and including these excerpts under different books and titles within the Codes. In 435 the (second) Theodosian commission received the following instruction:

All the edictal and general constitutions that have been ordered to be valid or to be posted in specific provinces or districts and that have been issued by the sainted Constantine and the later emperors and by Us shall be distinguished by titles indicating their contents...If any of the constitutions should be divided into several headings, each heading shall be separated from the

rest and shall be placed under the proper title, the words which do not pertain to the force of the sanction shall be removed from each constitution, and the law alone shall be left.<sup>7</sup>

Leaving to one side (for the moment) the order to remove ‘the words which do not pertain to the force of the sanction’, we should note that Theodosius II’s compilers were instructed to separate and re-group discrete sections of texts within the Code, according to the title headings which had originally divided up any single given constitution. In practice, however, the compilers also excerpted material from *within* the internal subject headings of their original text (often noting this practice with the annotations *post alia* and/or *etc.*) Whilst this practice must have made it easier to locate imperial constitutions relevant to any given topic after 439, it nonetheless can obscure our sense of what was being legislated on any given occasion before 439.

For example, in 331 the emperor Constantine issued an edict addressed ‘to all provincials’, which seems to have taken stock of existing rules governing legal procedure and courtroom processes, as well as introducing some modifications to existing guidelines for arbitration. A number of these topics within the 331 edict were discussed with reference to concrete property disputes or suits concerning guardianship. Theodosius II’s compilers appear to have chopped up this 331 edict and included the pieces under at least four different books of the *Codex Theodosianus*: they included extracts in book 2 under the title *de finium regundorum* (‘Concerning the regulation of boundaries’); book 3 under the title *de administratione et periculo*

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<sup>7</sup> *CTh* 1.1.6pr: Omnes edictales generalesque constitutiones uel in certis prouinciis seu locis ualere aut proponi iussae (iussas, T), quas diuus Constantinus posterioresque principes ac nos tulimus, indicibus rerum titulis distinguantur...Ac si qua earum in plura sit diuisa capita, unumquodque eorum, diiun[c]tum a ceteris apto subiciatur titulo et circumcisis ex qua[que] constitutione ad uim sanctionis non pertinentibus solum iu[s] relinquatur [All Latin texts from the *Codex Theodosianus* are quoted from the *Projet Volterra database*:

<http://www.ucl.ac.uk/history/volterra/perl/volterra.htm> ]

*tutorum et curatorum* ('Concerning the administration and liability of tutors and curators'); book 4 under the title *de litigiosis* ('Concerning things involved in litigation'); and book 11 under two titles, *de appellationibus et poenis earum et consultationibus* ('Concerning appeals and their penalties and references of cases to the emperor') and *de his qui per metum iudicis non appellaverunt* ('Concerning those persons who have not appealed through fear of the judge'). Two further extracts (not included in our extant version of the *Theodosian Code*) may appear in book 3 of Justinian's *Code*, under the titles *de iurisdictione omnium iudicum et de foro competenti* ('Concerning the jurisdiction of all judges and the competent court') and *ubi in rem actio exerceri debet* ('Where an *actio in rem* should be brought').<sup>8</sup> In the absence of any 'original' or 'complete' version of the 331 edict we can only arrive at a comprehensive sense of what the drafters of the constitution hoped to achieve by trying to piece together these fragmented extracts. Any attempt at a single reconstruction of 'the original text' is, of course, fraught with difficulties. First, the whole concept of an 'originary' text is misplaced: the 'original' copies of the edict sent out from the imperial chancellery in 331 (as letters addressed to provincial governors) were from the outset intended to be recopied, with the rhetoric possibly

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<sup>8</sup> The relevant texts are *CTh* 2.26.3, Aug.1 [331?] recorded as being addressed *ad universos provinciales*; *CTh* 3.30.4, Aug 1 331 *ad universos provinciales*; *CTh* 4.5.1, Aug.1 331, *ad provinciales*; *CTh* 11.30.16, given Aug. 1 331, posted at Constantinople on Sept. 1, *ad universos provinciales*; *CTh* 11.30.17, given Aug. 1, set up Sept.1 331 *ad universos provinciales*; *CTh* 11.34.1 given Aug. 1, set up 1 Sept 331, *ad universos provinciales*; *CI* 3.13.4 given 1 October (1 August ?) 331 *ad universos provinciales* and *CI* 3.19.2 given Aug.1 331, *ad universos provinciales*.

On the manifold dangers of trying to reconstruct imperial constitutions based on dating formulae transmitted by the Theodosian compilers see J.F. Matthews, *Laying Down the Law, A Study of the Theodosian Code* (New Haven and London, 2000). The *Volterra database* (n.7 above) is an indispensable tool in any attempt to reconstruct imperial constitutions, specifically as it enables a search for the 'join(s)' for any given entry (for example, a search for the 'join' for *CI* 8.10.7 will give the entries *CTh* 11.28.1, *CTh* 15.3.2 and *CTh* 8.5.15, which all may (plausibly) belong to the same 'original' constitution of the Emperor Julian).

adapted for a new audience by the governors' office staff responsible for the edict's provincial publication(s).<sup>9</sup> Second, in terms of the content of the 331 edict, it is impossible to assess how many discrete subject headings Constantine's constitution had, and indeed what they were. It is also unclear whether all of the different topics that the Theodosian (and Justinianic) compilers identified in the Constantinian edict might not have originally arisen in the context of a single concrete case or a series of related cases. If our friend Ammon the advocate had had occasion to consult this 331 edict, of course, none of these difficulties would have been apparent.

It is certainly possible that the Theodosian compilers 'cut and paste' policy altered the original scope and intention of certain imperial laws. Constantine's celebrated constitution ordering the destruction of the notes of Ulpian and Paul on Papinian is a case in point. This constitution was included in the *Codex Theodosianus* at 1.4.1 - it was addressed to Maximus Prefect of the City and records a date of issue of September 28, 321. This text in its entirety reads: 'Since we desire to eradicate the interminable controversies of the jurists (*prudentes*), We order the destruction of the notes of Ulpian and Paul upon Papinian, for while they were eagerly pursuing praise for his genius, they preferred not so much to correct him as to distort him.'<sup>10</sup> Modern historians have tended to read this constitution as evidence of a creeping fourth century imperial hostility to juristic authority and a consequent narrowing down of juristic science to boundaries established by the emperor's decision alone. However, a Constantinian constitution

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<sup>9</sup> Provincial publication could, of course, be epigraphic – and changes to the 'original' text could be either voluntary or accidental. See Feissel, D. 'Épigraphie et constitutions impériales: aspects de la publication du droit à Byzance' in *Epigrafia medievale greca e latina, ideologia e funzione, Atti del seminario di Erice 1991*, ed. G. Cavallo, C. Mango (Spoleto, 1995) 67-98.

<sup>10</sup> *CTh* 1.4.1: Perpetuas prudentium contentiones eruere cupientes Vlpiani ac Pauli in Papinianum (Momm.; papianum, A) notas, qui, dum ingenii laudem sectantur, non tam corrigere eum, quam deprauare maluerint, aboleri praecipimus (praecepimus A).

included at *CTh* 9.43.1 (under the title ‘Persons who have served a sentence and have been restored’) has the same addressee, and a close transmitted date of issue: September 14, 321. It opens with the sentence:

With reference to a query concerning a will, which the son of a deported person had made, if his father returns, it is our wish that the opinion of Papinian shall prevail, and the notes of Ulpian and Paul [on Papinian], shall be removed, thus the son shall be in the power of his father, when his father’s rank and property have been restored to him.<sup>11</sup>

The text then moves on to a detailed discussion of the legal implications of Papinian's opinion. *CTh* 1.4.1 and *CTh* 9.43.1 thus both state the same provision with respect to Papinian and the use of notes on his writings, although the latter does it as part of a restricted ruling concerning one highly specific area of Roman law (and presumably only orders the destruction of Ulpian and Paul's notes on the single corresponding Papinian *responsum*). Gothofredus and Otto Seeck, the latter braving the wrath of Theodor Mommsen, both amended the date of issue for *CTh* 1.4.1 to September 14, 321: thus identifying it as originally part of *CTh* 9.43.1. If they are correct, then Constantine's order to destroy the notes of Paul and Ulpian on Papinian may well have originally only applied to cases involving sons who made wills before their deported fathers returned. The general extension of the ruling to cover Paul and Ulpian's notes to Papinian's *responsa* in their entirety would have come in 438, when the text was excerpted at *CTh* 1.4.1 under the title ‘The opinions of the jurisconsults’. Even if we reject the amendment to the date, however, and view *CTh* 1.4.1 as a Constantinian 'free-standing' general prohibition, it is important to recognise that

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<sup>11</sup> *CTh* 9.43.1: In quaestione testamenti, quod deportati filius remeante patre fecisset, remotis Vlpiani atque Pauli notis Papiniani placet ualere sententiam, ut in patris sit filius potestate, cui dignitas ac bona restituta sunt.

Constantine's ruling on the use of Paul and Ulpian's notes arose out of a specific legal situation (in fact *CTh* 9.43.1 reads very much as if Constantine is responding to his Prefect of the City with reference to a pending concrete case). By way of comparison, the infamous so-called 'Law of Citations' - included at *CTh* 1.4.3 and infamous because of its 'counting heads' attitude to weighting juristic opinions - definitely is an extract taken from a much lengthier oration to the Senate delivered in AD 426, that also dealt with complex questions in testamentary law, as well as the law of donations.<sup>12</sup> I would suggest that, in 426 as in 321, the rules laid down governing the use of juristic opinions were arrived at in the process of working out in practice particularly complex and difficult subject areas of substantive Roman law.

#### The Modern Palingenesic Habit and Late Roman Imperial Preambles.

Modern palingenesiae of late Roman imperial legislation, such as the *Projet Volterra's* palingenesia for the years 193-455, Tony Honoré's for 193-305 and 379-455, and those produced by the *Accademia Romanistica Costantiniana* for 337-375, perform an essential task in reconstituting imperial constitutions otherwise separated or neglected by the Theodosian and Justinianic compilers.<sup>13</sup> These modern *palingenesia* also go beyond the official compilations, and

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<sup>12</sup> A bid to make sense of the numerous fragments of this *oratio* as a whole is made by Matthews, *Laying Down the Law*, (n. 8 above) 24-26.

<sup>13</sup> On the *Projet Volterra* database see n.7 above; Honoré's '*palingenesia* of Imperial rescripts (193-305)' was originally published with T. Honoré, *Emperors and Lawyers* 2<sup>nd</sup> ed. (Oxford, 1994) and is now accessible electronically via <http://www.iuscivile.com/materials/honore/rescripta/> (maintained by Ernst Metzger). Honoré's '*palingenesia* of the laws of the Theodosian dynasty' was originally published with T. Honoré, *Law in the Crisis of Empire 379-455AD* (Oxford, 1998) and is now accessible electronically via <http://iuscivile.com/materials/honore/leges/> (again maintained by Ernst Metzger); the *Accademia Romanistica*

on occasion they enable us to compare constitutions within the *Codes* to fuller versions extant in outside sources - for example other non-official legal compilations (such as the so-called *Sirmondian Constitutions*), epigraphic copies of imperial constitutions and literary sources<sup>14</sup>. The (all too rare) ‘complete’ texts underscore the fundamental fact that all the constitutions included in the Theodosian and Justinianic *Codes* are in fact excerpts.

Theodosius II (like Justinian a century later) laid down a series of specific editorial instructions to his legal compilers: each individual constitution was to be edited so that it might ‘...stand forth illuminated’, hence ‘...the law may be constrained by brevity and may be lucid with clarity’ (*CTh* 1.1.6, 1). The same stress on illumination through brevity was emphasised in the 438 validation of the *Codex Theodosianus* addressed to Florentius, the Praetorian Prefect of the Orient: ‘We have completed a true undertaking of our time; We have dispelled the darkness and given the light of brevity to the laws by means of a compendium.’ (Theodosius II, *Novel*

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*Costantiniana* (ARC) aims at reconstructing the corpus of late imperial *leges* "... as students are too often satisfied by the information furnished from the edition of Mommsen and the *Regesten* of Seeck". ARC *palingenesiae* currently include P. Silli, *Testi Costantiniani nelle fonti letterarie. Materiali per una palingenesi delle costituzioni tardo-imperiali* 1/3 (Milan, 1987), P.O. Cuneo, *La legislazione di Costantino II, Costanzo II e Costante (337-361), Materiali per una palingenesi delle costituzioni tardo-imperiali*, 2/2 (Milan, 1997), and F. Pergami, *La legislazione di Valentiniano e Valente (364-375), Materiali per una palingenesi delle costituzioni tardo-imperiali* 2/4 (Milan, 1992).

<sup>14</sup> Epigraphic copies and codified texts compared: D. Feissel, ‘Une Constitution de L’Empereur Julien entre Texte Épigraphique et Codification (CIL III, 459 et CTh I,16,8)’ in *La Codification des Lois dans L’Antiquité*, ed. E. Lévy (Paris, 2000) 315-337. Literary sources for late Roman law: J. Gaudemet, *Le droit romain dans la littérature chrétienne occidentale du III au V siècle*, *Ius Romanum Medii Aevi*, I.3b (Milan 1978) and M. Sargenti and B. Siola, *Normativa imperiale e diritto romano negli scritti di S. Ambrogio* (Milan, 1992).

1.2).<sup>15</sup> The brevity of some of the constitutions included in the Code, however, raises serious questions about their original context. Short, or even single sentence, extracts are not uncommon (some signalled by the phrases *post alia* and/or *etc*, and some not). Even in the cases where we seem to have a much fuller text given for a particular constitution, the Theodosian compilers still, at the very least, cut the preambles and the original operative instructions for that text's copying and circulation in any given locality. The cutting of the preambles has an important significance, as it masks the fact that the issuing of imperial constitutions in response to concrete cases and situations (an activity well attested under the early empire up to the reign of Diocletian) continued throughout the Late Roman period.<sup>16</sup>

The preambles to a limited number of imperial constitutions do survive as an integral part of the text, in particular in the post-Theodosian *Novellae*. Frequently these preambles give a crucial context for the constitution itself, which in turn affects our understanding of the case specific circumstances that prompted its issuing. A *Novel* of Valentinian III, given at Rome on December 26 446, received at Rome by the Praetorian Prefect Albinus on the following day and posted as a Praetorian edict in the Forum of Trajan two days after that, highlights the relationship between petitions made to the emperors by private individuals, their case-specific imperial responses and the issuing of so-called 'general laws' (*leges generales*). The preamble to Valentinian's *Novel* 21.2 opens with the statement: 'Since We are aware that the divine Emperors and Our Clemency have frequently found in petitions the incitement for establishing laws, it is

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<sup>15</sup> Discussion of the compilers' various editorial policies: N. Van der Val, 'Die Textfassung der spätrömischen Kaisergesetze in den Codices' *Bullettino dell'Istituto di Diritto Romano* 83 (1980) 1-27 and Matthews, *Laying down the Law* (n.8 above) 57-71.

<sup>16</sup> M. Bianchini, *Caso concreto e lex generalis. Per lo studio della tecnica e della politica normativa da Costantino a Teodosio II.* (Milan, 1979) explores the phenomenon of case specific circumstances mentioned within the imperial constitutions included in the *Codex Theodosianus*.

Our pleasure, starting from an event which has recently occurred, to legislate matters which will be for the benefit of all.’<sup>17</sup> Here the drafter of the constitution specifies that requests for legal clarification from private petitioners frequently prompted the emperors into action, not only through their responses to the specific case in question but also as a stimulus to the issuing of a constitution ‘which will be to the benefit of all.’<sup>18</sup> The preamble then goes on to describe the ‘event which has recently occurred’ in some detail: the Illustrious lady Micce wished to name the Illustrious lady Pelagia as her heir in her will, but could not secure the necessary number of witnesses, so made her wish known in a holographic document and entrusted it to her nephew. On Micce’s death the nephew duly published said document, but Pelagia did not feel secure in the succession and ‘...annexed to her petition to Us (ie. to Valentinian) the decision of the last will, and she did not consider herself as an heir until We should approve the justice of her case.’ Pelagia, like Ammon’s brother Harpokration a century before her, went straight to the top for a ruling on the law that should govern their particular situation. The preliminary section of Valentinian’s *Novel* ends with the emperor’s judgement that Pelagia shall obtain possession, in accordance with Micce’s wishes. Section 1 then begins:

Nevertheless, in order that We may not deny the salutary assistance of this judgement to the human race, by a law which shall remain continuously valid We decree that if any person should

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<sup>17</sup> Valentinian III, *Novel* 21.2.pr: Cum sciamus et divos principes et clementiam nostram condendarum legum fomitem frequenter invenisse de precibus, iuvat ex facto, quod nuper evenit (invenit C1), cunctis profutura sancire. [All Latin texts of the post-Theodosian *Novellae* are quoted from Honoré’s ‘*palingenesia* of the laws of the Theodosian dynasty’ (n.14 above).]

<sup>18</sup> M. B. Fossati Vanzetti, *Le Novelle di Valentiniano III, I Fonti* (Padua, 1988) 37, identifies four *Novellae* of Valentinian III which specify private *preces* as prompting their drafting (= Valentinian III *Novellae* 8,1; 8,2; 21.1 and 21.2).

prefer to order his last will through a holographic document, he shall have the unrestricted right to do so. For in many cases it often happens that the opportunity to secure the statutory number of witnesses is denied dying persons.<sup>19</sup>

There then follows a careful and detailed working out of this general ruling, in the context of '...the laws of the ancient emperors' and the civil law, as well as the requirements of the Praetorian law codified in the Hadrianic perpetual edict. Valentinian's 'new' general law is thus carefully contextualised by relating it to the various 'systems' of law already in force. With Valentinian's *Novel 21.2* we can see quite clearly how the issuing of a case-specific rescript in response to a private petition could prompt a general imperial law, despite the fact that the private rescript itself has not survived: we only learn about it through the imperial drafter's detailed report to the Praetorian Prefect in the texts preamble.

If we now turn back to the detailed editorial instructions given by Theodosius II to his code-compiling commissioners, the 429 team were instructed that: '...the very words themselves of the constitutions, in so far as they pertain to the essential matter, shall be preserved, but those words which were added not from the very necessity of sanctioning the law shall be omitted' (*CTh 1.1.5*). This editorial policy was restated for the benefit of Theodosius' second code-compiling commission in 435: '...the words which are superfluous to the force of the sanction shall be removed from each constitution, and the law alone shall be left' (*CTh 1.1.6*). If we were to apply this editorial policy to Valentinian III's *Novel 21.2* we can easily see how 'cutting the superfluous' (*demendi supervacanea*) would necessitate leaving out all the details concerning

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<sup>19</sup> Valentinian III, *Novel 21.2.1*: Ne tamen huius statuti salubritatem generi negemus humano, mansura iugiter (igitur d) lege decernimus, ut quisquis per holografam scripturam supremum maluerit ordinare iudicium habeat liberam facultatem. Multis enim casibus saepe contingit (contigit gad.CS), ut morientibus testium numerus et copia denegetur.

Pelagia's petition and its case-specific response: the operative part of the *Novel* would be identified from the opening of section 1. Thus our hypothetical 'excerpted' Novel 21.2 would begin: '...We decree that if any person should prefer to order his last will through a holographic document, he shall have the unrestricted right to do so [etc.]'.<sup>20</sup> Having been thus excerpted, Valentinian's *Novel* 21.2 would look like a spontaneous decree, issued by imperial fiat and originating from the emperor's desire to legislate on a particular topic. And this is precisely how most of the constitutions addressed to imperial bureaucrats and included within the *Codex Theodosianus* do in fact begin: 'We decree that...'; 'We do not permit any person...'; 'It is our pleasure that...'; 'Since we desire to...' (to take some examples from the opening pages of book 1 alone). All of these opening gambits create the impression that, as Jill Harries puts it '...the statement of a rule, without discussion, was the one preferred by emperors.'<sup>21</sup> Which in turn creates the appearance of a strong imperial centre laying down the law, rather than a responsive imperial centre which produced legislation of a 'general' applicability in response to questions and queries thrown up by legal practice itself.

As Fergus Millar argued in his classic 1977 monograph *The Emperor in the Roman World (31BC-AD337)*, it is the idea of a 'responsive' emperor which predominates for the first three centuries AD largely as a result of the well-documented survival of case-specific private rescripts (these rescripts having been collected in the late third century Gregorian and Hermogenian codes, as well as Justinian's sixth century codification).<sup>22</sup> However, responsive rescripts that answer substantive points of Roman law disappear from our view in the fourth and

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<sup>20</sup> Loc. cit.

<sup>21</sup> J. Harries, *Law and Empire in Late Antiquity* (Cambridge, 1999) 2.

<sup>22</sup> On the collection of rescripts into codes see S. Corcoran, 'The publication of law in the era of the Tetrarchs – Diocletian, Galerius, Gregorius and Hermogenian' in *Diokletian und die Tetrarchie. Aspekte einer Zeitenwende*, Millennium Studies vol. 1, edd. A. Demandt, A. Goltz, H. Schlange-Schöningen (Berlin / New York, 2004) 56-73

fifth centuries - notwithstanding a handful which can be culled for the reigns of Constantine, Julian, Valentinian I and Gratian from sources such as the *Fragmenta Vaticana*, the *Consultatio Veteris Cuiusdam Iurisconsulti*, the *Mosaicarum et Romanarum Legum Collatio*, the *Collectio Avellana* and a few epigraphic and 'literary' sources.<sup>23</sup> As the post-Theodosian Novels suggest, if we still had the preambles to the constitutions included within the *Codex Theodosianus* we could prove that case specific responses to both private petitioners and imperial officials were issued continuously throughout the late roman period, and moreover that they frequently provoked the 'general' imperial constitutions which do survive.<sup>24</sup> Simon Corcoran has recently demonstrated how the Theodosian compilers did a good job in hiding the legislation of the emperor Licinius from our view<sup>25</sup>; my suggestion is that their editorial policies achieved the same effect with respect to the issuing of rescripts in the fourth and early fifth centuries. With Licinius the concealment was deliberate, whereas the concealment of the private 'rescript system' was incidental: fourth and fifth century petitioners would have simply known that it was still in full

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<sup>23</sup> The 'minor' late Roman legal sources are included in *Fontes Iuris Romanae Anteiustiniani* 3 vols. edd. S. Riccobono and G. Baviera (2<sup>nd</sup> ed. Florence, 1940-3); vol. 1 *Leges* including inscriptions and papyri; vol. 2 *Auctores*; and vol. 3 *Negotia*. For discussion see D. Liebs, *Die Jurisprudenz im spätantiken Italien (260-640 n. Chr.)*, (Berlin, 1987). The *Collectio Avellana* = *Epistulae imperatorum, pontificum, aliorum inde ab a. CCCLXVII usque ad a. DLIII datae, Avellana quae dicitur collectio*, *Corpus Scriptorum Ecclesiasticorum Latinorum* 35, ed. O. Gunther (Prague, Vienna, Leipzig, 1895).

<sup>24</sup> For discussion of the different forms in which imperial legal decisions were issued and their relative efficacy and application see P. Voci, 'Note sull'efficacia delle costituzioni imperiali I. Dal principato alla fine del IV secolo', *Studi di diritto romano*, II (Padova, 1985) and P. Voci, 'Note sull'efficacia delle costituzioni imperiali II. Il V secolo', *Studi di diritto romano*, II (Padova, 1985); also P. Kussmaul, *Pragmaticum und Lex. Formen spätrömischer Gesetzgebung*, *Hypomnemata* 67 (Göttingen, 1981).

<sup>25</sup> S. Corcoran 'Hidden from history: the legislation of Licinius', in *The Theodosian Code. Studies in the Imperial Law of Late Antiquity*, edd. J. Harries and I. Wood (London 1993) 97-119

operation, and legal practitioners (at least) would have been aware that it fed into the making of imperial law.

### Behind the late Roman lawcodes.

If we return to Ammon, his brother and their Mother we can illustrate a number of uses of different kinds of rescripts in the mid-fourth century. First, there is Ammon boldly challenging the high-priest with his *grammata* issued by the emperor Diocletian. Second, there is Harpokration setting out to gain a personal *beneficium* from the reigning emperor (probably Constantine, but just possibly Constantius II), with the Diocletianic text tucked firmly under his toga. We shall take each in turn.

As Diocletian's *grammata* is otherwise unattested and Ammon's archive does not furnish us with any information beyond its author and broad subject matter, we can envisage at least two different possibilities for its form and content. On the one hand, the term *grammata* could refer to an imperial response to a private petition – a petition perhaps made by someone within Ammon's own family at least a generation before him, with the response preserved in the family's archives<sup>26</sup>; or the private petition could perhaps have been made by someone unrelated to Ammon or his relatives, with the response later copied by Ammon from a private collection or from a provincial archive, or indeed copied from an official's daybook (with the rescript having

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<sup>26</sup> Geens, 'Archive of Aurelius Ammon' (n.1 above) lists four fragments of a draft petition from the Ammon archive dating to the Diocletianic era and concerning a disputed priesthood: *P.Duke inv.* 190-193 and 195. The case apparently involved an individual who had '...written petitions full of lies to the emperors Diocletian and Maximian' and was allegedly pretending to be a priest and thus enjoying freedom from compulsory obligations. The Diocletianic *grammata* mentioned by Ammon may well have some connection to this earlier dispute (and may even have been granted in person during Diocletian's visit to Egypt in the Winter of AD 301/302 ?)

already been pleaded as part of the case it was issued in direct response to, or perhaps even in some later analogous lawsuit). If the *grammata* in question had been a direct response to a private petition, however, we could expect Ammon to have used the Greek *antigraphê* for the technical Latin term *subscriptio*. Ammon was a practised advocate; moreover he uses the word *antigraphê* in a later (unconnected) lawsuit also conserved in his archives, with reference to a rescript issued by the emperor Constantius II in response to a private petition.<sup>27</sup> *Grammata* thus possibly denotes a rescript in the 'loose' sense of the term, namely a letter sent as a response by Diocletian to a case-specific query from an imperial official.<sup>28</sup> Again, Ammon may well have come across such a text in his daily legal business.

Whatever its original form, Ammon's confidence in the authority of Diocletian's *grammata* in his dispute with the high priest, turned out to be misplaced. The papyrus which follows Ammon's letter home in his archive, records that the high priest had read his petition and sent it back to him '...neither had he endorsed it nor did he think fit to appoint [Horion junior] to the office'.<sup>29</sup> Apparently the high-priest had in mind some counter-rule concerning orphans, but the fragmentary nature of the papyrus does not allow us to state exactly what the objection was. The only reason that we know of the high-priest's decision, however, is that Ammon was not content to let the matter rest and drafted a petition on his nephew's behalf to the Prefect of Alexandria. This petition once again urges the force of Diocletian's *grammata*, this time for the benefit of the Prefect himself in the form of a complaint against the high-priest's negligence: 'It was the emperor who decided long ago and we offered to him the imperial *grammata*, which

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<sup>27</sup> *P. Ammon* I, 8 l.2 and 9 l.20.

<sup>28</sup> Willis, 'Letter of Ammon of Panopolis to his Mother' (n.1 above) 103 notes that Diocletian's 'letter' could have been handed down within Ammon's family for future use or could refer '...to an otherwise unattested constitution or rescript generally regulating the *propheteia*'.

<sup>29</sup> *P. Ammon* I, 4 col. ii l 29.

decides all things for all men...I now take refuge here in this most august court...' <sup>30</sup> Ammon expected the Prefect, at least, to honour Diocletian's text. We do not know the outcome of the case, and it could well be that Ammon was attempting to pull a fast one by pleading a Diocletianic rescript that did not in fact directly support his nephew's position at all.

The abuse of case-specific imperial responses, issued either directly to private petitioners or to official magistrates is a well-documented phenomenon in the *Theodosian* and *Justinianic Codes* for both the pre and post Constantinian eras. A personal rescript (or in the later terminology an *adnotatio* <sup>31</sup>) was invalid, and thus not to be asked for if *contra ius*; it could not rescind an otherwise properly completed donation, sale or will; it could not be issued to a private petitioner when a case was pending nor when the case had been decided and an appeal omitted; nor could a rescript invalidate a case decided by the emperor, for obvious reasons. <sup>32</sup> The restatement of these principles throughout the fourth and fifth centuries was necessary precisely because these abuses were taking place in practice. *Pauli Sententiae* 5.25.10 mentions the case of an advocate who '... rescriptis sciens dolo malo usus fuerit...' and Symmachus' *Relationes* 30, 31 and 40 testify to one magistrate's genuine confusion as to what to do about the practice. Advocates, then as now, were paid to win the case for their client - it was up to the judge to decide if any given rescript was being pleaded outside the acceptable bounds of the law. By

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<sup>30</sup> Op. Cit., col.ii ll 32 and 56.

<sup>31</sup> See R. W. Mathisen, 'Adnotatio and petitio: the emperor's favor and special exceptions in the early Byzantine empire' in *La Pétition à Byzance*, edd. D. Feissel and J. Gasco (Paris, 2004) 23-32; Fossati Vanzetti, *Le Novelle di Valentiniano III* (n.18 above) 183-205 also discusses the late Roman uses of the terms *rescriptum* and *adnotatio*.

<sup>32</sup> Theodosius II, *Novel 6* (438): non sacra annotatio non divina pragmatica habeat locum contra generalem nostri numinis sanctionem; *CI* 1.22.6 (491 ?) monemus, ut nullam rescriptum, nullam pragmaticam sanctionem, nullam sacram adnotationem, quae generali iuri vel utilitati publicae adversa esse videatur, in disceptatione cuiuslibet litigii patiantur proferri.

forbidding the extension of rescripts *contra ius* the Emperors left the way open for the ‘creative’ extension of case-specific private rescripts that conformed to *ius*. These remained a useful source for the construction of legal arguments in court and late Roman advocates accordingly made a habit of citing these rescripts in cases which they were not originally issued for.

The imperial rescript system could also act as a useful means of confirming particular devices whereby individuals attempted to give legal effect to their wishes (for example manumissions of slaves, deeds of gifts, and testamentary documents). *Novel* 21.1 of Valentinian III (issued in 446) records the case of a certain Leonius, who wished to ensure that his wife could inherit his property if he died before her. Section 1 states that ‘...the respectable Leonius, even though he was protected by the ancient constitutions, preferred as a suppliant to await our decision.’ The emperor then states that he has embraced ‘...this opportunity to renew the law of Honorius...’ to the effect that Leonius is on safe ground. Section 2 is at pains to place Valentinian's ruling in the context of various legal courses of action already open to someone in Leonius' situation:

For although all persons are permitted to compose their wills in accordance with the civil and praetorian law, although they are permitted through nuncupation, although they are permitted by means of the municipal public records, without doubt that will shall remain even more valid which shall be established by the testimony of the Emperor and his subscription, provided, however, that no later will of the deceased should be extant.<sup>33</sup>

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<sup>33</sup> Valentinian III, *Novel* 21.1,2: Nam cum liceat cunctis iure civili atque praetorio, liceat per nuncupationem, liceat (omit liceat E) municipalibus gestis iudicia suprema componere, procul dubio manebit firmior haec voluntas, quae testimonio principis et subscriptione condetur (condetur g.OSL conditur d.ph Pith. conditoris firmatur Sichard.), si tamen nullum defuncti posterius (posterior E) exstabit (stabit g) arbitrium.

This section of Valentinian's Novel is a useful reminder of the diverse means that were available to a testator in seeking to ensure the validity of their action under late Roman law. For Leonius, the imperial *subscriptio* was his insurance policy.

Turning now to Harpokration's *preces* to the emperor, it too was (in all probability) rhetorically framed along the lines of Leonius' petition discussed above: as an imperial confirmation of a prior entitlement. In reality, however, what Harpokration was seeking was the grant of a case-specific *beneficium*. There is no record in Ammon's papers of Harpokration's request being either granted or refused. Rescripts were, however, frequently issued *ad personam* granting legal immunities and privileges to specific individuals or corporate groups, or bestowing property or offices.<sup>34</sup> A quick perusal of some of the relevant Constantinian laws demonstrates the diversity of these petitions for specific *beneficia*. Senators could petition to be restored to their birthrights and they *might* get them back (*CTh* 15.14.4), but if they were formally accused of a crime or acquired any patrimony obligated to shipbuilders (*CTh* 13.5.3) they could forget making that *supplicatio* to the emperor (*CTh* 9.1.1). Defenders of the cities who petitioned to be exempt from the responsibility for fugitive slaves likewise weren't to bother asking (*CJ* 6.1.5), neither were plebians who used venal *suffragium* to petition for an imperial *dignitas*, nor apparently anyone petitioning for ownership of the estate of a decurion who had died childless and intestate. A regulation of 325 testifies to an ingenious forensic practice of petitioning the emperor so that you could divide your case up and take it piecemeal before

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<sup>34</sup> D. Feissel, 'Pétitions aux empereurs et formes du recrit dans les sources documentaires du IVe au VIe siècle' in *La Pétition à Byzance*, edd. D. Feissel and J. Gascou (Paris, 2004) 33-52 gives a checklist of known petitions made to emperors between the fourth and sixth centuries at 45-49 and a checklist of known sixth century rescripts referring to petitions at 50-52. J-L. Fournet and J. Gascou, 'Liste des pétitions sur papyrus des Ve-VIIe Siècles' in *La Pétition à Byzance*, edd. D. Feissel and J. Gascou (Paris, 2004) 141-196 lists one hundred and eighteen private petitions known from papyri, with brief descriptions given for each entry.

different judges - this is *contra ius* and has to stop (CTh 2.18.3); as does the practice of petitioning the emperor for the relief of curial obligations in two different municipalities. Finally, you could petition for exemption from certain compulsory public services if you had five living children, but you couldn't pass off other people's children as your own before the emperor - cunning, or perhaps rather foolhardy, individuals had apparently tried to do this (CTh 12.17.1). As is clear from these examples, the regulations regarding petitions for *beneficia* evolved in an ad hoc manner, as and when specific supplications forced new imperial clarifications.

Whilst the granting of private rescripts (and particularly those bestowing *beneficia*) was constantly seen as a potential threat to public law and the welfare of all, we also find emperors determined to maintain the munificent ideology of imperial rule. In August 436 Theodosius II issued a constitution specifying that previous rescripts, however they were impetrated, should remain in their own undisturbed force, '...since it is impious for the generosity of the Emperor to be revoked' (CTh 11.1.36). In turn, litigants were not deterred from deliberately pleading case-specific *beneficia* in court as a means to extending the original scope of their application, despite the fact that the penalties could be severe. A 426 constitution states that *beneficia* which have been granted to corporate bodies, to provincial envoys, a city or a curia apply only to the circumstances on account of which they were issued, and do not count as general laws "...and he who desires to interpret them with excessive subtlety...shall be branded with infamy, and shall obtain no advantage through his deceitful conduct.' (CI 1.13.2) The reference to 'excessive subtlety' in interpretation is an important reminder that imperial laws, whatever their form or content, were constantly interpreted and reinterpreted by interested parties.

### Conclusion.

The pages of the Theodosian and Justinianic *Codes* are replete with examples of litigants, advocates, iurisconsulti and indeed judges attempting to tweak, evade and negotiate imperial laws to their own particular advantage. As a *Novel* of the emperor Theodosius II rather despondently states, less than five years after the promulgation of his Code: ‘Almost nothing is devised for the welfare of the human race which is not converted by the clever plans of men into fraud and malice.’ (*N.Th* 9.1 pr). Just as in classical law, some 'postclassical' rackets, dodges and loopholes worked, and some were caught out by the pace of the emperor's own responsive legislating. Thus if we wish to understand the evolution of Roman law the study of how late imperial legislation was applied in practice is at least as important as the study of that legislation itself. We need constantly to go beyond the imperial texts for they were (more often than not) prompted by specific cases, which are lost in the process of compilation. We need to be aware that late Roman imperial constitutions had such origins, and equally that they had a future; in that they were taken up, used, (mis)interpreted, even manipulated on the ground and in the courtrooms - by individuals such as Ammon *scholasticus*. Through this focus on the practice of law we can thus avoid the fate of Hadrian of Tyre, as recounted by Philostratus: receiving an imperial text, prostrating ourselves before it and then breathing our last over it.<sup>35</sup>

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<sup>35</sup> Philostratus, *Lives of the Sophists*, trans. W.C. Wright (Harvard, 1921) 590.