

ROMAN LAW
IMPERIAL CONSTITUTIONS AS A SOURCE OF LAW
CODIFICATION
WHAT DOES IT ALL ADD UP TO?

- I. SOURCES OF LAW (IMPERIAL CONSTITUTIONS)
 1. Gaius tells us that “An imperial constitution is what the emperor by decree, edict, or letter ordains.” ‘Constitution’ (*constitutio*) is the generic term; the word means simply something established or decided. ‘Decree’ (*decretum*, plural *decreta*), ‘edict’ (*edictum*, plural *edicta*), and ‘letter’ (*epistula*, plural *epistulae*) are more specific. The terminology reflects, to some extent, the development of the bureaucracy of the imperial chancery, but also the different contexts in which the emperor might write.
 - a. *Edicta*. The emperor was a Republican magistrate with *imperium*. As such, he had the power to issue edicts. Hadrian issued some. The *Constitutio Antoniniana* of Caracalla is one. Perhaps the most famous is one that probably never was issued: Luke 2:1.
 - b. *Decreta* are technically judicial decisions of the emperor either at first instance or on appeal. As we have noted previously, appeal was something new. It became possible with the *extraordinaria cognitio* when the judge himself became a public official.
 - c. *Epistulae* are letters to a magistrate, very occasionally to a private citizen. If the letter answered a question it was called a *rescriptum* (‘rescript’, literally a ‘writing back’).
 - d. *Subscriptiones* were written under a letter coming from a private citizen or on a *libellus*, a petition from a private citizen. They remained in the imperial archives but the author received a copy. These were also called ‘rescripts’.
 - e. *Mandata* are instructions from the emperor on imperial administrative matters.
 2. These various types of constitutions, can be mapped, though not perfectly onto the offices in the imperial chancery. These were the departments:
 - a. *ab epistulis* – with a branch that wrote in Latin and another that wrote in Greek.
 - b. *a libellis* (probably another name for this department was *a cognitionibus*)
 - c. *a studiis* (also known as *a consiliis*) – may be the office where the emperor’s judicial function was located
 - d. *a rationibus* — was the fiscal department; it became a public office quite quickly
 - e. *a memoria* — the department that wrote imperial speeches; later it became the office where imperial patents were prepared

As can be seen from the list, letters to officials and letters to private parties were in two different departments. The surviving examples in both the Theodosian Code and Justinian’s Code shows that both could be sources of constitutions that later were deemed precedential. That Papinian was secretary *a libellis* may indicate that that department dealt with matters that were thought to be more often strictly legal. The location of *decreta* is harder to find the bureaucratic scheme. That the results of what the emperor decided in actual cases were written down is indicated by the remarkable survival of a collection of decisions by emperor Septimius Severus in a short period when he was visiting in Egypt in 199–200 AD. Few, if any, of the extracts in the two codes seem to have been reports of imperial *decreta*, although some of the statements of law that are found in rescripts to officials or private parties may have originated in imperial *decreta*.

3. The system of imperial constitutions had some rather obvious problems:

- a. How did the Romans know of them? – There was no system of publication.
- b. Who had access to them? – Only officials. That, among other reasons, may account for the fact that many of the later jurists joined the bureaucracy.
- c. How could a jurist know whether the text was of a general or particular nature? This requires a knowledge of bureaucratic practice deeper than could be obtained just being allowed to see what was in the archive.
- d. All of this might make us focus on the special position of a jurist like Gaius. References to imperial constitutions in Gaius are numerous, much more than in other contemporary juristic writing. This may be one reason why Gaius was appreciated later on despite the fact that none of his contemporaries cite him.

II. ‘CODIFICATION’

1. Imperial constitutions became more and more important as time went on. In the Dominate, they were the only source of new law. An obvious solution to the problem of access was for someone or some group to collect them and publish them. Constitutions of Marcus Aurelius and Veres were privately collected. There was, however, no comprehensive collection of them until end of 3d century A.D. That period saw the publication of two private collections – the *Codex Gregorianus* and *Codex Hermogenianus*. Only fragments of them survive, but they seem to have been quite comprehensive. They served as a model for later codices.
2. One of the things that made the *Hermogenianus* and *Gregorianus* possible was the invention of the *codex*, a book made of parchment and bound like a modern printed book. Previously writing had been on papyrus rolls or wax tablets. Parchment is tougher than papyrus; you can make a physical book of it, as we understand books. It can be used to make large collections of texts that are intended for reference rather than reading from front to back.
3. One of the results of the invention of the codex was that the word *liber* (plu. *libri*), ‘book’, became ambiguous. It had for centuries referred to what could conveniently be fit onto a single papyrus roll, a maximum of roughly 100 modern printed pages. Hence, many longer classical works, such as Tacitus or Livy, contained many *libri* in a single work. Occasionally, the word *liber* was now used to refer to a codex. By and large, however, the ancients continued to think of a *liber* as referring to something of about 100 modern printed pages, and codices were divided internally into *libri*.
4. The *Gregorianus* and *Hermogenianus* were private, unofficial collections. During the classical period the only comprehensive official published source of law was the *edictum perpetuum*. In 429, Theodosius II appointed a commission to collect imperial constitutions with a general significance. They began with Constantine. The original intention was to collect all *ius et leges* as well, but only the collection of constitutions was completed. The *Codex Theodosianus* was finished in 438 and made effective on 1 Jan. 439. The commission collected constitutions without taking into account their later repealer. Hence the constitutions were given in chronological order, and you have to read an entire title, sometimes an entire book, in order to find out what was the law in effect as of 439. Probably about a half of the Theodosian Code has survived. A few constitutions later than 439 were added to it as *novellae*, ‘novels’. The Theodosian Code was valid in the Germanic kingdoms in the West, as the Code of Justinian was not. In the Middle Ages, the southern third of France was referred to as the *pays de droit écrit*, the ‘land of written law’, because the Theodosian Code, now broken up and quite garbled, was thought to still be in effect there.

5. Justinian I became the eastern emperor in August 527. He intended to restore the empire. Even before he began his successful reconquests in Italy, North Africa and Spain, he determined to collect definitively the sources and texts of Roman law.
 - a. Early in 528, he appointed a commission of ten men to produce a Code. They began with the Theodosian Code, the *Codex Gregorianus*, and the *Codex Hermogenianus*, and produced a Code in twelve books to replace them all. This Codex was published in April 529. It has not survived.
 - b. In December of 530, Justinian appointed a commission of seventeen jurists, headed by his quaestor Tribonian, to undertake a much more ambitious project: to compile a collection in fifty books of extracts from the classical jurists. The commission proceeded remarkably quickly, and Justinian's Digest or Pandects was published in December of 533.
 - c. At the same time Justinian published a volume of Institutes, based on Gaius' Institutes, an elementary textbook, like Gaius', in four books.
 - d. Between 529 and 534, Justinian rendered a number of decisions, sometimes called 'the fifty decisions', to resolve the controversies among the jurists and abolish the out-of-date institutions. These decisions have not survived as such, but they were incorporated in a revised version of the Code that was published in November of 534, which has survived.
6. All three works were authoritative. Without regard to the authoritative nature of their contents, Justinian promulgated each of them as an imperial constitution.
7. The Digest and the Code were also exclusive. No one was to cite juristic works or imperial constitutions that were not in the Digest or Code. Justinian also prohibited commentaries on his own work. That proved to be ineffective, as the 60 books of Greek Basilica of the 9th and 10th centuries shows.
8. The Digest and the Code were authoritative and exclusive, but they were not systematic. The Institutes were authoritative and systematic, but they were not exclusive. There is some system in the Digest and the Code. Each work is divided into books, 12 for the Code, 50 for the Digest. There is some system in the arrangement of the books, particularly in the Code. Book 1 deals ecclesiastical material, courts and administration; books 2–8 with private law; book 9 with criminal law; books 10–12 with administrative law. Each of the books is divided into titles, related to the topics of the books but with little system in their order within the book. The extracts within each title are arranged chronologically by the date of the emperor who promulgated the constitution. This is a system, but not one that we would call 'scientific'. The earliest constitutions mentioned are from Hadrian, the founder of the Roman administrative bureaucracy and the first emperor formally to issue constitutions with the intention that they be treated like *leges*. The organization of the Digest is more complicated. We will take up that topic in the next class.
9. In the case of both the Code and the Digest, the commissioners had the power to change, correct, and omit parts of the text in order to correct contradictions, mistakes, obscurities, bring the texts up-to-date in the light of current law, and simply to make them shorter. The key language in the commission for the Digest, which follows, was essentially the same as that for the Code:

“4. We command you to read and work upon the books dealing with Roman law, written by those learned men of old to whom the most revered Emperors gave authority to compose and interpret the laws, so that the whole substance may be extracted from them, all repetition and discrepancy being as far as possible removed, and out of them one single work may be compiled, which will suffice in place of them all

“7. . . . If you find anything in the old books that is not well expressed, or anything superfluous or wanting in finish, you should get rid of unnecessary prolixity, make up what is deficient, and present the whole in proportion and in the most elegant form possible. What is more, if you find anything not correctly expressed in the old laws or constitutions which the ancient writers quoted in their books, you should also take care to rectify it and put it into proper form, so that what is chosen by you and set down there may be deemed genuine and the best version and be treated as if it were what was originally written. . . .

“10. Again, if any laws included in the old books have now fallen into disuse, we by no means allow you to set them down. . . .”

10. That changes, ‘interpolations’, exist in the texts in the Digest and Code has been known since the humanists of the sixteenth century. Where interpolations can be spotted, they are valuable for legal history both for what they tell us about Byzantine law and for what they tell us about classical law. Over time scholarly consensus has varied as to how much interpolation there is, particularly in the Digest. Interpolation-criticism reached its height in the first half of the last century, when some scholars thought that many, perhaps a majority, of texts in the Digest had been mangled after they were written. These scholars sought to recover the core of what they thought of as ‘the true classical law’. The scholarly tide has turned. Many scholars today would point to the fact that a relatively small group of men, who had other things to do, could not possibly have rewritten the very large number of texts in the Digest in the short space of time that they had. That does not, of course, exclude the possibility that the some of the texts that the commissioners were looking at had already been changed in the post-classical period, but the modern presumption is that the text is genuine unless there is a good reason to believe that it is not.
11. The most powerful evidence of interpolation is when we have a version of the text that antedates Justinian and says something different. There are not many such texts, but there are a few. In addition to an almost-complete version of Gaius’ *Institutes*, there are several post-classical works that antedate Justinian and contain texts or epitomes or references to texts that are either also in Justinian or that imply a rule different from what we find in Justinian. These texts include:
 - a. the *Opinions* of Paul (*Pauli Sententiae*)
 - b. the Epitome of Ulpian (the so-called *Regulae Ulpiani*)
 - c. the Vatican Fragments, and
 - d. a very curious work known as the *Lex Dei* (the ‘law of God’) or the Comparison of Mosaic and Roman Laws (*Collatio legum Mosaicarum et Romanarum*).

All of these works are fragmentary, and none is very long. Here is an example of what can be done where a comparison can be made:

“[Julian] says that if a usufruct has been left by legacy to a slave who is owned in common and separately left to Titius, if the usufruct is lost by one of the common owners it does not go to Titius but ought to go to the other common owner, as he alone was conjoined in the grant: *neither Marcellus nor Mauricianus approves this opinion; Papinian in Book 17 of his Problems also departs from it. Neratius’ view is given in book 1 of his Opinions. But I think [Julian’s] opinion is correct, for as long as one of the common owners uses it, it can be said that the usufruct subsists.*” (Ulpian in D.7.2.1.2 and *Fragmenta Vaticana* 75.3)

The text as given in Digest 7.2.1.2 is in Roman type. The same text is found in the *Fragmenta Vaticana* with the additions in italic type. What was done here is probably typical of what the commissioners did elsewhere. A large variety of opinions on the topic was shortened, so that what remained was Julian’s opinion and Ulpian’s confirmation of it.

12. What the commissioners did with the texts in Code is somewhat different. They divided the constitutions into parts and put each part under its proper title. In many cases that had already been done in the prior codes. Comparison with the Theodosian Code shows that the commissioners simply left out, for the most part, constitutions that had later been repealed or amended. They also, as had prior codifiers, left out the prefaces, a declaration of intention that appeared at the beginning of the constitution. Probably not all of them had such prefaces, but Justinian's novels all do, and the price edict of Diocletian, which survives independently of the codes, also has one
13. The commissioners finished their work in 529. Justinian reigned until 565. In the intervening years he issued many new constitutions (*novellae*). No collection of them was made in his own time. Somewhat, but not much, later, unofficial collections were made, the largest of which contains 168 constitutions. Some of these make important changes in the law. In the 16th century, Justinian's own codifications, the Institutes, Digest, and Code, and his Novels acquired the generic name Corpus Iuris Civilis, which has been used ever since.

III. SOME GENERALIZATIONS ABOUT WHERE WE HAVE BEEN SO FAR

1. Codification is a phenomenon that is found in many legal systems. It tends to come at the beginning and at the end of long periods of development:
 - a. Aethelberht, king of Kent c. 600, and the Uniform Commercial Code (1951)
 - b. The Salic law, Clovis, king of the Franks, c.500) and the French Civil Code, Napoléon (1803)
 - c. the XII Tables, 451–450 BC, and Justinian, 529 (AD)

In each case we have at the beginning:

- a. literacy, or at least the beginnings of the use of writing for law
- b. the beginnings of professionalization, and
- c. a realization of the connection between what we would call the state and the law

At the end we have:

- a. a long period of professional development
- b. sources becoming unmanageable
- c. a man with a powerful personality, perhaps of genius

Whether it is possible to generalize about the early codes is a topic for the third part of the course, but the differences among the later ones are striking

- a. Justinian is a collection of texts; the UCC and the French Civil Code are systematic.
- b. The politics seem to be similar between Justinian and Napoléon but not Karl Llewellyn, the draftsman of the UCC
- c. Justinian is legally conservative, Napoléon and Llewellyn much less so

Conclusion: it is dangerous to see something too deep in the fact of codification itself.

2. A developmental theory of law is most firmly associated with Sir Henry Maine, the first edition of whose *Ancient Law* was published in 1861 (d. 1888). It is also firmly associated with liberalism and with Darwinian ideas (though Maine wrote before Darwin). Let us review G.4.10–32, because what we are going to say about legal development generally depends on it. The focus here is on Gaius' attitude towards the movement from *legis actio* to formulary procedure.
 - a. The *legis actio* was framed on the very words of the statutes (G.4.11). Don't take G. too literally here. Pomponius (D.1.2.2.6) is probably closer to right:

“Then from these statutes [XII Tables], at about the same time, actions were devised by which men might litigate, and lest these actions be indiscriminately brought by the people, they were required to be in certain and solemn form; and this part of the law is called *legis actiones*, that is, statutory actions. Accordingly, these three branches of law appeared at about the same time: the law of the Twelve Tables, from these came the *ius civile*, and from the same the *legis actiones* were devised. Moreover of all of these, both the science of interpretation and the (conduct of) actions were vested in the college of pontiffs, from among whom one was appointed each year to preside over private causes. And for nearly a hundred years the people conformed to this custom.” (*Materials*, p. 14)

- b. The notion of *sacramentum*. For Gaius, it is a bet, similar to that made in the action for debt in his own day; the word, however, has decidedly religious connotations.
 - c. “I affirm that this man is mine by Quiritary right according to his proper title. As I have declared, so, look you, I have laid my staff on him.” (4.16) That is certainly a verbal formula, and it would seem that it had to be spoken exactly.
 - d. The *legis actiones*, Gaius tells us (4.11, 4.30), gradually became unpopular because of their excessive technicality.
3. Keeping Gaius in mind, let us test some general developmental notions against the material in the first four lectures:

- a. Changes in procedure and changes in sources of law are correlated with changes in the constitution. So far as sources of law are concerned that statement borders on tautology: king, pontiffs and magistrates; *comitia* and *concilium*; the senate; the emperor cannot be sources of law unless the constitution calls them into being. So far as procedure is concerned the relationship is more subtle but clearly there:

legis actio – magistrate, pontiff, private agreement

formularium – magistrate, judge, and jurist, proceedings *in iure* and *apud iudicem*

extraordinaria cognitio – increasing state power, the magistrate now summons, the execution is in state hands

Which is the dependent and which the independent variable? It is hard to know in the case of sources. In the case of procedure, the chronology would suggest that politics are a precondition of change, but they may not be a sufficient condition for it.

- b. Changes and sources of law and changes in procedure are correlated with each other. This implies that law comes out of procedure. Some Continental writers have denied that this is necessarily so. The realist rebuttal has always struck me as convincing. The formal sources of law do not necessarily reflect the relationship of substance and procedure, but they do in the case of the Romans:

legis actio – framing the *actio*, the pontiffs, despite what Gaius says about the statute

formularium – the praetor’s edict and the commentary of the jurists

cognitio extraordinaria – appeal or referral to the emperor and the rise of the imperial constitution

- c. We move to the less certain: Changes in procedure and changes in sources of law are correlated with changes in society. Here too there is some tautology. A pontiff cannot be a source of law unless the society has pontiffs; the same true for jurists, but a more sophisticated statement of it would focus on distribution of power within the society. That is obvious with regard to the sources of law to the extent that they are correlated

with political developments, less obvious for procedure except to the extent that it is correlated with sources of law.

- d. Can what we just said about procedure and sources of law be taken as a reflection of the way that law must develop? Maine was more cautious here than his followers about positing necessary stages of development, and he was talking about things broader than just procedure and sources of law. For example, his famous dictum, which many would now deny, that the movement of what he called ‘progressive societies’ has been from status to contract is a statement about neither procedure nor sources of law, but about substantive law. Two of his pithy phrases, however, are worth some testing here along with one other of more recent vintage
 - i. fiction, equity, and statute, are the mechanisms for legal change, which always occur in this order
 - ii. religion develops into law :: the pontiff develops into the jurist
 - iii. professionalization leads to manipulation of formulae leads to bureaucratization leads to codification

The first two, Maine’s, have something to them but they don’t work as absolute rules e.g. the XII and the lex Aquilia are statutes, the first comes at the very beginning, the second quite early on. Secularization does seem to occur in Roman law; it does not in Jewish or Islamic. Further, the secularization of Roman law was never complete, and religion seems to return as a concern in the late empire. The third one may work, at least for Rome. Let’s take a look at it at 2 levels:

pontiff —> jurist private —> jurist bureaucratic
Papirius (a pontiff in Pomponius) —> Labeo —> Julian —> Tribonian
formulae religious —> *formulae* rationally developed —> *edictum perpetuum*
—> Code

It seems to work for Rome. There might be something to it more generally.

4. Another way of looking at this is to list parallels with the English development and not go for the broad generalizations. The number of such parallels is quite striking:
 - a. The multiplication of *formulae* in the later *legis actiones* and in the formulary procedure is like the multiplication of writs in English common law.
 - b. Strict pleading in the *legis actio* procedure is like the misstep in the Anglo-Saxon oath procedure or the misstep in the count in procedure by writ. In both cases the strictness is relaxed, by the introduction of the formula in Rome and by both the statute of jeofails and the rise of fictions in England.
 - c. Pleading to an issue in the formulary system is like pleading to an issue in English procedure, though there are, as we have noted, differences.
 - d. The necessity for pleading to an issue and stage-preclusion at this point existed in both systems. In the Roman case it happens when the parties leave the praetor with the formula, in the English when the writ issued to the sheriff to empanel the jury.
 - e. The development of forms of action happened in both systems. It was necessitated in the English case by the limited jurisdiction of the central royal courts, in the Roman case by, it would seem, a notion that the civil law was fixed.
 - f. The appeal to the divine was replaced by an inscrutable human decision-maker, the jury in the English case, the iudex in the Roman.
 - g. Money condemnation as a general matter was the rule at common law (though there were exceptions); it was also the rule in Roman law.

- h. The Roman praetor has a number of parallels with the English chancellor. The praetor's edict can be seen as parallel to the register of writs, the *ius honorarium* as parallel to equity; bona fides and fraud are typical equity developments. But the development in Rome was not in a separate court. That's the *extraordinaria cognitio*, and bona fides and fraud were already there when that happened.