

A Handbook For Alaric's Codification *

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Had the byzantine compilers hardly ended the huge task of compounding the Digest, when Emperor Justinian was already promulgating the *Imperatoriam maiestatem* (1) constitution, in which it was made known that Tribonian, Theophilus and Dorotheus had received the request to write the third - and, up to

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1) As it is known, the constitution by which the Digest was promulgated (*Tanta, Δέδωκεν*) is dated on 16th December of 533 A.D., while the *Imperatoriam maiestatem* is slightly previous, from 21st November of the same year.

that moment, last - work of the Compilation: a book of *Institutiones*.

Cumque hoc deo propitio peractum est, Triboniano uiro magnifico magistro et exquaestore sacri palatii nostri nec non Theophilo et Dorotheo uiris illustribus antecessoribus, quorum omnium sollertiam et legum scientiam et circa nostras iussiones fidem iam ex multis rerum argumentis accepimus, conuocatis specialiter mandauimus, ut nostra auctoritate nostrisque suasionibus componant institutiones... (Imp. Mai. § 3)

Reading this constitution, we get the impression that Justinian was establishing a principle: *every codification needs a handbook*. According to his point of view, the aim of renewing and reorganising a whole legal system requires a new generation of jurists, who must know it and be able to put it on, and that is why they need a quick guide to orientate their first steps:

...ut liceat uobis prima legum cunabula non ab antiquis fabulis discere, sed ab imperiali splendore appetere et tam aures quam animae uestrae nihil inutile nihilque perperam positum, sed quod in ipsis rerum optinet argumentis accipiant: et quod in priore tempore uix post quadriennium prioribus contingebat, ut tunc constitutiones imperatorias legerent, hoc uos a primordio ingrediamini digni tanto honore tantaque reperti felicitate, ut et initium uobis et finis legum eruditionis a uoce principali procedat (Imp. Mai. § 3)

Therefore, if exercising jurists seem to be the immediate receivers of a codification, jurists in training are the guarantee of its future permanence, and thus they are its main addressees: “*uos (...) digni tanto honore tantaque reperti felicitate, ut et initium uobis et finis legum eruditionis a uoce principali procedat*”. A book of *Institutiones* is not barely a handbook; indeed, it is an instrument by which the codification begins to cave its roots in the fresh and prejudice-free ground of the next generation, which is meant for ruling the Empire:

Summa itaque ope et alacri studio has leges nostras accipite et uosmet ipsos sic eruditos ostendite, ut spes uos pulcherrima foueat toto legitimo opere perfecto posse etiam nostram rem publicam in partibus eius uobis credendis gubernare (Imp. Mai. § 7).

And so, after 300 years, good and old Gaius left his place to a new book, Justinian's *Institutiones*; a book that, even though it was its heir (2), was also a product of the new times.

The great work of Justinian, once finished, became the pattern of what a “perfect codification” should be like: *leges, iura, institutiones*. And since then, this pattern has been the mirror in which the researchers have compared and evaluated the *foregoing* attempts of codification: from the - never carried out - projects of Pompeius or Caesar (3), to the *incomplete* codification of

2) “*Quas ex omnibus antiquorum institutionibus et praecipue ex commentariis Gaii nostri (...) compositas...*” (Imp. Mai. §6).

3) See Suetonius, *Diuus Iulius*, 44; Isidor, *Etymologiae*, 5,1,5. About these texts, see lately PARICIO, J., *Los juristas y el poder político en la*

Theodosius II, who was only able to compile the *leges* (4), including also the private collections of *iura* and *leges* of the postclassical age, and the *codices Gregorianus* and *Hermogenianus*.

But, above all the previous, it is impossible not to compare the work of the byzantine emperor with the other great codification, the one that the visigothic king Alaric II promulgated in 506 A.D., and which meant the survival of Roman Law in the West until the rediscovery of the *Corpus Iuris* in the medieval Italy: the *Lex Romana Wisigothorum*.

The two great compilations belonged to different environments and moments, but both of them had a common aim: the two of them aspired to gather the *leges* and *iura* in which the applicable law consisted. But, on the other hand, there is also an essential difference: the lack of the third element in the *Lex Romana Wisigothorum*, the indispensable book of Institutions which would allow to teach the codification to the new generations of jurists, and by means of it, to take root in their spirits (5).

antigua Roma, Granada 1999, p. 49, n. 41, with commentaries on the related literature.

4) Cfr. CTh. 1,1,5 and 1,1,6.

5) About the comparison of the common features of both codifications, and the idea of the necessity of a book of *Institutiones* as essential element of a compilation, see NELSON, H. L. W., *Überlieferung, Aufbau und Stil von Gai Institutionen*, Leiden 1981, p. 183 ff.

The absence of a teaching book in the alarician codification is so evident that a great number of scientific works have been dedicated to its search and identification, as it is of course known. Obviously, this communication is not the appropriate place to deal with these discussions, but it is in any case necessary to remind that the central object of these researches has always been the *Epitome Gai*, that little work which was incorporated to the *Lex* under the title "*Liber Gai*".

Indeed, the fact that Alaric's compilers decided to incorporate a reelaboration of Gaius' work to the *Lex* itself, has made the researchers think that the visigothic king intended to take the same steps Justinian wanted to do afterwards: first, to reelaborate the traditional handbook, that of Gaius, adapting it to the new state of Law after the codification (6); second, to give the handbook legal enforcement: the same that Justinian would do later, by means of the *Imperatoriam maiestatem*, exactly this Alaric had already done by incorporating his own manual to the text of the law (7).

6) Whether the adaptation was visigothic, or it may come from a previous epitome, it does not have any influence on the question we are dealing with, which is its inclusion in the *Lex*; about this famous discussion, I submit the reader to its main exponents: ARCHI, who suppose the existence of the Epitome before the *Breuiarium Alarici* (see ARCHI, G.G., *L' "Epitome Gai"*. *Studio sul tardo diritto romano in occidente*, Milan 1937; repr. Naples 1991, with a lecture note of C.A. CANNATA, chapter I) and CONRAT, supporter of the visigothic origin of the *Epitome* (*uid.* CONRAT, M., *Die Entstehung des westgothischen Gaius*, 1905, repr. Wiesbaden 1967, sp. pp. 84 ff.).

7) See, for all, ARCHI, «L' *Epitome*...», *cit.*, pp. 34 ff., where the author exposes the - to that moment - "*communis opinio*".

But nowadays, it can be considered as proved that the *Epitome Gai* is not a handbook, but an *interpretatio* of Gaius' work that may have been used in legal practice: in order to quote just some arguments, it must be reminded that the work has the lack of the *commentarius quartus*, which in the *Institutiones* was dedicated to the formular procedure, already extinct at that moment; it is also simplified and reduced to make it more suitable for daily practice; moreover, it appears in the *Lex* without *interpretatio*, which proves that the work itself already contained the depuration required by legal practice (8). The *Epitome*, thus, might have been incorporated as "*ius*", not as "*institutiones*", just like Justinian would afterwards incorporate to his Digest selected fragments of Gaius' work, giving them not the value of a handbook, but that of a classical source of the law - the same value that the Law of Citations had already given to it in 426 A.D. (9)

8) ARCHI ("L' «*Epitome* »... ", *cit.*, p. 63) adds more clues: the fact that the sources are quoted without their name, or the style of writing, so different from the typical scholastic works. See, equally, GAUDEMET, J., "Le Bréviaire d'Alaric et les *Epitome*", IRMAE I, 2 b aa β, p. 35. In this sense also CANNATA, C. A., *Histoire de la jurisprudence européenne*, Turin 1989, p. 118, n. 91 (quotation according to the edition to my disposal, the spanish translation by Gutiérrez-Masson, L., Madrid 1996). In this question, it is very illustrative to make a comparison between the *Epitome* and the typically scholastic *Fragmenta Augustodunensia*: see RODRÍGUEZ MARTÍN, J.-D., *Fragmenta Augustodunensia*, Granada 1998, pp. 417 ff.

There are, however, opposite opinions: see for all LEVY, E., "Westen und Osten in der nachklassischen Entwicklung des römischen Rechts", ZSS 49 (1929), p. 236, where the author considers the *Epitome* of Gaius as a work destined to teaching (sp. n. 3, with literature).

9) See HONORÉ, A. M., *Gaius*, Oxford 1962, p. 129; CANNATA ("I rinviati al *ius* nella *interpretatio* al Codice Teodosiano", SDHI 28 [1962], p. 301), on

If things were really this way, we have lost the path in our research: the *Epitome Gai* was the only clue, since it was the sole work which could resemble something like the “*Breuiarium*’s Institutions”. Where shall we continue the search, then?

But, at this point, maybe we should consider whether there really is anything to look for, or if it is the omnipresent codifying pattern of Justinian, with its impressive tripartite structure, that is forcing us to always look for *leges, iura...* and *institutiones*.

In my opinion, we already have enough data so as to doubt about the real existence of such a third element: first of all, the simple fact that we have no news about such Alaric’s intention on providing the *Breuiarium* with a book of Institutions. The *commonitorium* of the *Lex* does not bring any information about this question.

Secondly, the circumstances in which the codification of Alaric and that of Justinian were elaborated are so different that it is possible to doubt whether the principles that rule the later can be found in the first: Justinian wrote his work once the Empire was extended and pacified, conscious of his role as creator (or restorator) of a new order: *Imperatoriam maiestatem non solum armis decoratam, sed etiam legibus oportet esse armatam*, it was said at the beginning of his famous constitution. Alaric, on the contrary, made his compilation under the pressure due to his still

his side, reminds that every single text of the *Lex Romana Wisigothorum* was considered law in force and effect; in such a conception there is no place for the original work of Gaius as a whole, but only for its *interpretatio*.

unstable situation ⁽¹⁰⁾, and his *Lex* is no other than the king's aim to guarantee the clergy and the roman society their traditional law ⁽¹¹⁾. His purpose seems to be, therefore, more conservative than innovating ⁽¹²⁾, and if that is true, it is possible to think that no new handbook was needed to complete his codification.

So it would be enough with the traditional handbook, the Institutes of Gaius. But today it is discussed whether this handbook was still in use or not in Alaric's time: Archi - in order to quote again the great authority in this question - used to talk about the "dramma dell'epoca postclassica", that is to say, the urgent necessity to adapt and epitomize the classical sources, in order to save a judicial administration which was plunged into chaos ⁽¹³⁾. On the other hand, the vulgarization of the postclassical legal science made consider "useless" the legal

10) Clovis, with his sudden conversion into catholicism, was menacing the visigothic kingdom, being supported by revolts of populations submitted to the arian king, and counting on a certain support from the episcopacy (who, as CANNATA underlines, had suffered under the arian domination; see "I rinvi..." , *cit.*, p. 298, n. 34, about Sid. Ap., *Epist.*, VII,6,6-9). In fact, Alaric himself died the year following the promulgation of the *Lex Romana Wisigothorum*, in the battle of Vouillé.

11) See, in this sense, KUNKEL, W., *Römische Rechtsgeschichte*⁶, Cologne-Vienna 1972, p. 144. In fact, the *commonitorium* refers to the presence of *sacerdotes* and *nobiles uiri*. See also ARANGIO-RUIZ, V., *Storia del Diritto Romano*⁷, Naples 1972, p. 375. About the controverted problem of the personal or territorial effect of Alaric's codification, see lately ALVARADO PLANAS, J., *El problema del germanismo en el Derecho español (s. V-XI)*, Madrid 1997, p. 31 ff., where the discussion is abridged, with the updated literature.

12) In fact, while Justinian retouches the texts of his Digest, Alaric maintains them and adds the *interpretatio* to the side.

13) See ARCHI, "L' «Epitome»..." , *cit.*, p. 58.

discussions of the classicals. Thus, the *Epitome Gai*, enclosed by Alaric in his codification, was no other than the final result of this process, the remains of the original Gaius' work, which would have been increasingly reduced and, in the end, substituted, as a result of the exigences of legal practice.

However, my own researches with the *Fragmenta Augustodunensia* - a palimpsest which I had the fortune to work with during the elaboration of my doctoral thesis - have led me onward to the certainty that in the postclassical West Gaius studies were developed and preserved even until the time of the visigothic king. In fact, the Autun Fragments show a kind of legal teaching revealing an absolute reverence for the *Institutiones*: Gaius' texts are quoted, literally transcribed and commented, and no distinction is made between institutions in use and those already left aside; moreover, the lemmatic nature of the Fragments makes us suppose that the work exiged the reader to have in his hands, in addition, a copy of the original Gaius' work (14).

14) Among all the data that this work provides, the most revealing in this sense is the presence of *lemmata*, that is to say, literally quoted sentences from Gaius' work: the copyist of the Fragments used to transcribe with capital (uncial) letters the Gaius' sentence that belonged to the commented paragraph, so that the reader could easily find it through the copy of the *Institutiones* that he had on his hands. The fact that these *lemmata* consisted just in one sentence (and not the whole paragraph), and sometimes even incomplete, proves this hypothesis: it was necessary to have in the hands, besides a copy of the *Fragmenta*, another one of Gaius, since the *lemma* did not contain the whole text to be commented, but only the part of it that made possible its identification (see RODRÍGUEZ MARTÍN, "*Fragmenta...*", *cit.*, sp. p. 383, about the *lemma* in FA 4,96, and p. 388, about the one in FA 4,97). SCHULZ and MARROU believe that the Fragments are the evidence of the study of the original version of Gaius in this late time (see SCHULZ, F.,

VOLTERRA's studies, on the other hand, have proved that law schools lasted in postclassical West long till the end, and in them we can frame the teaching of the *Fragmenta*'s author; the Italian researcher describes a European West which is much more cultured and classicist than it can sometimes be read in present handbooks - maybe just by mere inertia (15). Indeed, it is difficult to imagine that Alaric could have been able to carry out his compilation, in case he had not found a scientific environment versed enough in the classical texts so as to undertake the task of selecting the material of his future *Breuiarium*.

History of Roman Legal Science, Oxford 1946, repr. 1953, p. 279 ff; MARROU, H.-I., *Histoire de l'éducation dans l'Antiquité*; quotation according to the edition to my disposal, the Spanish translation of the sixth edition, by Barja de Quiroga, Y., *Historia de la educación en la Antigüedad*, Madrid 1971, p. 395 ff.). NELSON, *Überlieferung...*, *cit.*, p. 101, also considers the *Fragmenta* as an example of the permanence of the scholastic tradition.

15) The data that this author provides *partim* in his works (see, especially, "Appunti sulle scuole postclassiche occidentali", and "Western postclassical schools", both in his *Scritti*, vol. IV, Milan 1993, p. 511 ff., and 437 ff., respectively) are, in my opinion, absolutely convincing, and on the other hand they agree with the impression I got from my own research on the *Fragmenta*: for the Italian author, the western production of legal literature - that draws up a continuous chain from Constantine to Justinian - has no comparison in the East (indeed, he defends the existence of an influence from West to East, and not only in the opposite direction); on the other hand, the compilers of the *Lex Romana Visigothorum* gather texts from works like the *Pauli Sententiae*, which are not the same as those selected by Justinian's compilers. All this leads to think of a maintenance and originality not only of the studies about the classical tradition, but also of the creative work of the schools. Specially interesting are pp. 516-517 of his "Appunti", where information about the western schools is given, obtained from *Fr. Vat.* 204 and 150; CTh. 13,3,10 and 14,9,1, apart from several literary sources.

Finally, the preservation of Gaius' work can be also proved by another factual argument, already mentioned by Schulz and Ferrini ⁽¹⁶⁾, and that is the Verone palimpsest itself, which still conserves in the 5th century a presumably untouched copy of the Institutions. To this example we could join, without any doubt, the antionite manuscript. Besides, the Law of Citations - which precedes the *Breuiarium* in only eighty years - acknowledges and consecrates the study of Gaius, by exalting him up to the level of the other great jurists of the late classical time. And if we think that the Law of Citations was included in the Theodosian Code (in force since 439 A.D.), the distance between this testimony of the using of Gaius, and the *Lex*, is reduced to sixty-seven years ⁽¹⁷⁾. Is it logical to think that, in such a short period of time, the study of Gaius in its original version was substituted by commentaries and epitomes, to the extent of absolutely banishing it from the schools?

It should be better to suppose that the paraphrases and epitomes of postclassical times don't really mean the substitution of the Institutions, but its conservation and study. It is possible to think, however, that in addition to the scholastic activity - which preserved, studied and transmitted the text of Gaius - existed another parallel activity orientated to practice, which was devoted

16) See SCHULZ, "History...", *cit.*, p. 164; FERRINI, C., "Sui frammenti giuridici del palinsesto di Autun", *Opere di Contardo Ferrini. II. Studi sulle fonti del diritto romano*, Milan 1929, p. 431.

17) About all these questions, see FERNÁNDEZ CANO, A. C., *La "llamada" Ley de Citas en su contexto histórico*", with an original view of the nature and meaning of the law (in edition).

to the distillation of basic and effective principles, taken from the classical jurisprudential works; to this second activity would have belonged the *Epitome Gai*, a work that could play a better role in the *Lex Romana Wisigothorum* (made, of course, for practical purposes) than the classical book of Gaius (18). So it must not be thought that the existence of the *Epitome* presuppose, necessarily, a previous forsaking of the *Institutiones* (19). One last argument in this sense is the fact that the *Lex Romana*

18) Following what CONRAT had already stated (*Die Entstehung...*, *cit.*, p. 131), that of Gaius was, with great difference, the most old-fashioned (in terms of historical contents) among all those works that were to be included in the *Breuiarium*, a fact that justifies its direct substitution by its *interpretatio*; the value of the *Institutiones* is exactly the opposite, its wealth as instrument for a legal-historical training, which was needed by the beginners (as it happens today) to be able to understand the actual state of their law, and the origin of the fundamental concepts. Thus, HONORÉ (*Gaius*, *cit.*, p. 128) underlines two lessons taken from the Institutions that were essential for the education of every jurist: firstly, the respect for the *ueteres* (which can be found even in the Digest, with whole titles dedicated to legal history); secondly, the legal studies as contrast of opposite jurisprudential opinions.

Maybe the hypothesis of two parallel directions, the scholastic and the practical, could explain why there is such a deep difference between the compilation itself (which presupposes the existence of a commission with enough classical knowledge to be able to select the texts to be included) and its *interpretationes*, these ones a product of the vulgarization caused, among other factors, by the exigences of daily practice.

19) NELSON (*Überlieferung...*, *cit.*, p. 127 ff.), in fact, sees in EG 1 pr and 2(9) pr a calling to Gaius' Institutions, which makes him think that the reader of the *Breuiarium* should also have a copy of Gaius in his hands. About this question, cfr. the mentioned sources with FA 1,12; 4,91, where there are similar "callings", though in this case they refer to the same work.

Burgundionum presents a clear and direct influence of Gaius *Institutiones*, and not of its Epitome (20).

In conclusion, it is possible that not every codification followed the dazzling structure of “*leges, iura* and *institutiones*”; above all, since there was a work, that of Gaius, which had served as immutable basement to the training of generations of jurists, surviving throughout all the changes brought by the ending of the Principate, throughout the postclassical turbulences or in spite of the coming of a codification.

20) See WENGER, L., *Die Quellen des römischen Rechts*, Vienna 1953, p. 510, n. 223.