The imperial policy against heretics of restricting succession in the fourth century AD, with an appendix on the Theodosian Code

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Summary

A distinctive common feature of the measures against heretics and apostates in the 4th century AD is that their rights regarding successions are being curtailed or even removed. How was that done and is here a general policy visible? And what was the purpose behind these measures? Was it merely the wish of relatives to keep assets in the family as Riedlberger suggests, or was it to prevent that these sects became affluent, or perhaps was there a theological dimension to it? Since the essential texts derive from the Theodosian Code, this collection of imperial constitutions is discussed as well.

Keywords
heretics – apostates – succession – Codex Theodosianus

1 The sanctions in succession against heretics and apostates

The Romans always combated beliefs which they considered detrimental to the security of the Roman state. For that reason the Bacchanalia were forbidden in 186 BC. In 59 BC the Roman senate ordered the destruction of the altar of Isis which stood on the Capitol. Later, in 28 BC Augustus forbade to erect chapels for Isis in Rome, and Agrippa extended this in 21 BC to a mile around Rome. The Christians were persecuted since they refused to sacrifice to the emperor. From that perspective it does not come as a surprise that in the
4th century heterodox Christians and apostates were persecuted as well once Christianity was favoured by Constantine. The title in the Theodosian Code on heretics begins with CTh 16,5,1 of 326 which says that privileges in consideration of religion may favour only those who adhere to the catholic faith (catholica lex), not heretics. Others laws against heretics and schismatics followed. Mostly the sanctions were directed against their churches; the death penalty was not applied. Thus orthodox (catholic) Christianity was favoured, be it not yet elevated to the official religion of the state. Theodosius I did this in his edict of 27 February 380 (CTh 16,1,2), known as Cunctos populos. In it he ordered all the inhabitants of the empire to live accordingly to the teachings of the apostle Peter and accept the Holy Trinity. These are the catholic Christians, those Christians who do not adhere to this are heretics, their places where they convene are not churches, and the emperor shall smitten them with retribution. That did indeed not take much time. On 8 May 381 he issued a constitution against the Manichaeans (CTh 16,5,7). But unlike previous constitutions he did not act against their churches. What he did was to take away their capacity to bequeath or receive by bequest property (the so called testamenti factio activa et passiva). It is a remarkable sanction. In the beginning it concerned three specific heretical groups (Manichaeans, Donatists, Eunomians) and Apostates but other heretical groups followed, until CTh 16,5,65 of 428 applied this sanction to all heretics and apostates. Later, under Justinian, heretics cannot inherit in any way (testamentarily and ab intestato, CJ 1,5,18,6ff.).

In itself it is a strange sanction. Of course it is more than a nuisance if you cannot make a testament or benefit from an inheritance or legacy, but as long as the intestate succession applies, most people will not bother. It poses the question: why did the emperors chose this sanction? The prevailing answer in literature is that it symbolises the deprivation of Roman citizenship. Still, that answer cannot satisfy because it is not clear how this could stop heresies and apostasies, and one might ask: why not deprive them straight of citizenship? Another question is, why the Roman emperors combated what they characterised as heresies. Was it a specific feature of Christianity that all should adhere to central dogmata like the Nicene creed? Other religions in Antiquity did not bother about divergent views, even among the Jews the particular opinions of the Pharisees, Sadducees and Essenes were tolerated. According to Humfress

1 An interesting question which asks for a reply. But was it possible? And what would be the effect? Heretics would become peregrini and probably out of reach as regards religion. But the edict Cunctos populos speaks of all peoples: did it include peregrines residing in the empire? If not, it might explain the tolerance towards the Arian Goths.
it was a continuation of the earlier practise to safeguard the social fabric, the social order, and the community’s relationship with the gods. It was now about the right relation between men and a single Christian God. And that required that the right doctrinal belief was defined and maintained.

Although it is certainly desirable to deal with such a question in general before entering a research into the question, why heretics and apostates should be punished with such a restriction in succession law, it might lead to a too extended investigation of the first question: why removing from heretics the faculty to make a testament and to receive from a testament? Why not as before resort to merely imposing *infamia*? Between the introduction of this sanction and its completion in 428, subjecting all sects and apostates to the same restrictions, lies merely a time span of 47 years, so it was apparently considered a good expedient against them. There is some literature on this but a recent work by Riedlberger (hereafter R.) is of such a width and depth that, even if it does not set aside all previous works, it will still be inevitable. It covers the period in which, as said, the sanction emerges for specific sects and becomes a universal sanction. R.’s approach is methodological. First he sets out the rules on (testamentary) succession, then he deals with the three main sects affected: the Manichaeans, the Donatists and the Eunomians; after which he discusses the rather amorph group of apostates. It is best to follow this order, because these groups had different opinions about the right belief, and the reactions of the Church and emperor varied accordingly. But the contact with the constitutions of the Late Empire as included in the Theodosian Code incited R. to enter a research into this compilation. That is, actually, a different subject which better be discussed later on under II.

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3 This article is at the same time a review of P. Riedlberger, *Prolegomena zu den antiken Konstitutionen, Nebst einer Analyse der erbrechtlichen und verwandten Sanktionen gegen Heterodoxe*, Stuttgart – Bad Cannstatt 2020, 898 p. The book is divided in seven parts, but actually comprise as indicated two divisions. Part I is ‘Prinzipien späantiker Gesetzgebung und der Codex-Theodosianus-Kompilation’. This is the first division, because the following parts deal with the specific anti-heretic legislation and form a second division. Part II, ‘Hintergrund’, is about succession in general in Late Antiquity and sanctions in this area, not directed against heretics, Part III on ‘Manichäer’, Part IV on ‘Donatisten’, Part V on ‘Eunomianer’, Part VI on ‘Apostaten’, Part VII ‘Erbrechtliche Sanktionen nach 428’, while conclusions (‘Ergebnisse’), bibliography and indices close the work. It covers the bulk of his book: 560 pages. I shall first deal with the second division because that was the original purpose of R.’s research and then I shall discuss his views on the Theodosian Code.
1.1 Inheriting
The basics of the Roman law of succession are simple. If someone died in Late Antiquity without a testament, his children would inherit his assets, in equal shares, regardless of sex. If there were no children, further removed kin would inherit. This ab intestate succession could be changed by way of a testament. One could disinherit a child, but there should be a good reason for this or else it could claim its legitimate part. As to the context of succession, it suffices to say that inheriting was the major way assets were transferred in times of peace and that the possibility to dispose of these by testament was a great advantage over transmission ab intestato, be it that there always remained the possibility of the querela inofficiosi testamenti against a testament. The importance of a testament, if it was drawn up (probably only by the happy few), may in most cases have been to make a division between the heirs and to provide for substitute heirs. But heretics may have, as the orthodox, wanted to grant their own sect benefits. And one wonders: how many were affected by this? If it was only the clergy, was it meant to neutralise the leadership in the hope that by that the aberrations would peter out? If so, was it because the elected of the Manichaean renounced their fortune that their sect survived so long?

What other sanctions were there against heretics (p. 318-352)? They consisted of a variety of sanctions against a variety of heretics. R. discusses only two significant sanctions: banishment and expropriation. Except for the Manichaean these only affected the clergy. There was a difference between deportatio (definitive banishment, loss of citizenship, confiscation), relegatio (temporary banishment) and exilium (an open term). Their exact meaning often depends on the context. E.g. p. 330: temporale exilium, insulandi gratia to some islands and provinces: here apparently it meant relegatio. R. concludes

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4 The introductory section on bequeathing and inheriting in general (p. 264-290) is correct and fine, but way too long. Is it indispensable to know that it is estimated that around half of all Roman civil law suits were about inheriting? R. himself is sceptical about this estimate (p. 265 n. 21) and rightly so. It concerns only that which through the filter of the legal writings came to us. Are the passages on the Junian Latins useful? They could not make nor profit from a testament, but with them there was no succession ab intestato too: they died as if they were slaves again and in a logical second their assets turned into peculium. That was not the case with heretics. About the drawing up and opening of a testament? As to the querela, R. mentions this on p. 269, refers here to p. 754 for presumably more information, and then on that page refers to p. 733. It is a small example of the way how the entire book is one jumble of confusing referencing.

5 It is of course sensible to check similar sanctions against non-heterodox (p. 290-318). Here it would have sufficed to give the reader summaries and not to deal in extenso with the few constitutions and then give the conclusion on p. 317-318. R. does not say whether this has relevance for the legislation against the heretics.
that with *exilium* usually the more technical *relegatio* is meant. Perhaps the length of both was shortened by the Easter amnesties. Parallel existed the banishment from Rome, an old way to remove the instigators from a potentially large and politically sensitive audience. R. mentions also that Donatists forced Catholics to a kind of stationary banishment by refusing to sell them bread and to have contact with them (p. 338). That is exceptional, but it is the reverse of traditional exile and banishment, viz. that it removed the punished person from his family and relatives and his social network, which was in those days very important. The other important punishment was expropriation, *proscriptio* (p. 339). It was an independent punishment and not, e.g., confiscation as a result of, e.g., *deportatio*. An interesting closing of this section is the topic of circumvention of the laws. Some laws prevented that, e.g. by including *fideicommissa* in the sanction. R. thinks that in practice it will have been difficult to circumvent these laws. He does not mention the combated and condemned practice of *nomina et tituli transferre* (e.g., in CTh 13,7,2). An *additamentum* is his treatment of the expression that somebody is excluded from society (p. 345-352).

After this follows the treatment of *infamia*, infamy (p. 353-393). R. is absolutely right when he states that this aspect was far more important for the ancients than we think. It is therefore very important that he expounds on this, because heretics were often punished with infamy. On p. 353 n. 141 R. deals with the existing literature, inveighing against Pommeray6 (‘leider praktisch wertlos’), and Bond7, who indeed say rather strange things on the subject and the law. But R.’s justified criticism will not be read: it is enclosed in a thick book, in German, with a title which may not give a clue to this point. Likewise

7 S. Bond, *Altering infamy: Status, violence, and civic exclusion in Late Antiquity*, Classical Antiquity, 33,1 (2014), p. 1-39. R. wonders how it got through the peer review. But if these are not legal historians? Perhaps it is good that R. did not have to read Bond’s *The corrupting sea: law, violence and compulsory professions in Late Antiquity*, in: R. Kroese, A. Vitoria, G. Geltner (eds.), Anti-corruption in history, From Antiquity to the modern era, Oxford 2017, p. 49-62 which also abounds in speculative elucubrations. An example (p. 56): ‘his [Diocletian’s] formation of state associations of tradesman (e.g., *collegia, corpora*) can also be seen as an imperial attempt to secure goods and services essential to the functioning of the state. By circumventing the contracting of private suppliers for certain goods and increasing the bureaucracy of oversight through highly regulated state trade associations, price gouging could be addressed and mitigated in regard to certain goods. As such, we should perhaps begin to look at the creation of these *corpora*, which were often similar to involuntary trade guilds, as a tactic of anticorruption in Late Antiquity’. It makes this reviewer wonder whether we are seeing a revival of Waltzing’s anti-socialist, late-nineteenth century bourgeois views on the Later Empire, based on superficial reading.
he digresses on p. 376-378, he takes the measure of authors on p. 386-391 extensively. With good reason but again: if he wanted to be effective, would it not be better to have it published elsewhere? And although – as other parts in the book – this section reads pleasantly and is informative: did infamy need 40 pages? Was there no other good survey or could it not have been published separately?

Anyway, R. establishes, first, that in Late Antiquity infamy was directed at the upper class and implied a demotion to the lower class of viliores (no middle class socially existing), effectively making somebody into an outcast, and, second, that there is no connection between infamy and the incapacity to testate nor loss of citizenship, in spite of those authors who without reason assume this. In addition R. checks Sozomenos (p. 393-405), lawyer and author of an ecclesiastical history. It appears that, although he had a Codex Theodosianus at his disposal, his rendering may be rather free. In a conclusion R. explains that he wanted to deal with the general theories on the anti-heretic legislation, particularly where it sees in it mere symbolic legislation.

1.2 Measures against the Manichaens
A formidable competitor with Christianity was Manicheism and it is no surprise that the first extensive law was issued against them. R. opens with a long exposé on Manicheism (409-422) and on the relation between Manicheism and magic (423-428). It is usual to assume that the legislation on magic led to that on Manicheism, which is wrong. Manicheism acknowledged Jesus, saw its founder Mani as his successor and considered itself a form of Christianity, but its tenets belied that. The exposé is instructive but as R. himself says (p. 428), it is not necessary for the legal-historical interpretation. The first law against it was CTh 16,5,3 of 372 and was issued for Rome. It is a rather mild constitution, directed against their conclaves: the teachers will likely be firmly punished, the urban sites where they taught or dwelled confiscated, the audience banished from Rome. Was it because it fell under the law on collegia illicita (D. 47,22,3)? R. does not enter into this (p. 432). The reconstruction of a historical order of constitutions (p. 429-436), ‘anticipatorily’ to later exegesis of the constitutions, makes reading cumbersome.

The first anti-Manichaean constitution, CTh 16,5,7 of 381, removes from Manichaens the testamenti factio activa et passiva on penalty of nullity and confiscation and infamy8 and this with an exceptional retrospective effect (CTh 16,5,7,1). If somebody still received something (e.g., by intestate

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8 Does it also remove the faculty to donate as R. assumes? The text has sub specie donationis, which rather suggests a sham act to circumvent the said measure. Also the sequence,
succession), it will be *caduca* if he is Manichaean. The constitution sets the beginning of this with the issuing of a previous law (*ex die latae dudum legis*). The intestate succession was not affected (p. 438). What was that previous law? R. thinks of CTh 16,6,1 of 373 as the previous law (p. 439). He sees in this the aim to prevent that followers bequeath to the ‘elected’, the leaders, and in this way enrich them (p. 439). Apparently combining this with the phrase *vivendi iure Romani ... facultatem* he makes an equation with the Junian Latins and considers it a factual removing Roman citizenship. R. suggests that the emperor reacted in this way to many petitions of disappointed relatives of Manichaeans. That, however, remains speculation. Why should the emperor assist those relatives who had no express claim like descendants who could claim the legitimate portion? R. further suggests that followers in the hope to be reborn as elected wanted to exchange earthly goods for heavenly blessings (p. 441). Perhaps that was a motive, although lacking more information we cannot equate it to the contemporaneous Christian belief that good deeds compensated sins (see below, under ‘Ergebnisse’). It rather seems to me that the emperor wanted to prevent the setting up of houses and other centres of religious life by Manichaeans, like we see with the Christians (and which R. mentions on p. 415). In short, to prevent the establishment of religious centres which would compete with churches and monasteries. As explanation for the retrospective effect R. points to the crime of *laesio maiestatis* of which a deceased person could be condemned with effect from the day it was committed. But as he says, here the emperor merely made a comparison, and intestate succession (nor donations) were not affected (p. 444). Thus it remains an exceptional measure.

In the following year 382 CTh 16,5,9 was issued, extending these rules to Manichaeans who led an anachoretic life. They became at once *intestabilis*. Here, if there were no descendants the *proximi adgnati* could inherit (with that kind of life children were not likely). R. sees this also as a prohibition to donate (p. 450). He interprets the text as implying a direct expropriation in the sense that already in his lifetime the anachoretic Manichaeans could no longer dispose of his assets and, if I understand him well, had to transfer these at once to his descendants or *adgnati proximi*. It requires quite an extension of the meaning of *intestabilis*. Likely what was meant with the *vivus impendat* was the *donatio mortis causa*. R. bases his view on the use of *resstituere* and *dimittere* which words relate according to him to acts between living

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CTh 16,5,7,1-2 does not mention donation. On p. 444 R. states that the retrospective effect did not extend to donations, which he has difficulties to explain.
persons. But definitively against his interpretation speaks that the entire period is begun with *nihil moriens relinquat* and what follows undeniably refers to dispositions *post mortem*. R.’s interpretation, the anachoretic Manichaean cannot leave anything at death since he already did not possess anything during his life, indeed makes ‘den Jurist stutzig’ (p. 451), and rightly so. It is contrived. If R. were right, we would have a strange situation: the assets are not confiscated, but their owner does not possess them either. Could he not sell them? Mortgage them? Who owns in that case? R. does not deal with such legal questions. CTh 16,5,9,1 imposes the same retrospective patrimonial restrictions for three other heretic groups, together with punitive sanctions.

CTh 16,5,7 of 381 and CTh 16,5,9 of 382 introduce the succession sanctions against Manichaeans, and in CTh 16,7,3 of 383 Gratian confirms these, but he also mentions a law of Valentinian which sets a *poena* for Manichaeans, confirmed by *decreta* of Gratian and Theodosius. What may be meant by this *poena*? R. interprets *decreta* here as the two laws CTh 16,5,7 and 9. That creates some confusion: is the same sanction mentioned twice? R. explains this by assuming that whoever drafted the law of 383, did not possess the law of 372 and misunderstood the reference in CTh 16,5,7 to that law (p. 436). But the confusion is the result of R.’s own interpretations. The *decreta* are not laws but decisions in legal proceedings, thus verdicts by which Gratian executed his father’s *poena*. That *poena* may well have been set in the law mentioned *ex die latae dudum legis* in CTh 16,5,7 but does not have to have been, contrary to what R. assumes, the same restriction of succession for Manichaeans as in CTh 16,5,7 and 9, particularly because Theodosius says that exceptionally his law has retrospective force. And why should it have been CTh 16,6,1 and not CTh 15,6,3 of 372 which confiscates their congregation buildings? To add sanctions in succession fits such a measure.

Another law of 383 is CTh 16,5,11, which sanctions gatherings of, among other sects, Manichaeans (p. 461). The last constitution by Theodosius is of 389, CTh 16,5,18 (p. 463). It banishes them, particularly from Rome, their testaments are invalid and they cannot bequeath or receive anything on the occasion of death. CTh 16,5,35 of 399 repeats the existing sanctions (p. 466). R. embeds these constitutions in rich historical beddings. CTh 16,5,40 of 407, however, escalates the patrimonial sanctions (p. 474). It orders Manichaeans to transfer

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9 What he says (p. 450 n. 93) about *restituere* is generally right, but it has also the meaning of ‘leisten’, ‘gewähren’. As to *dimittere*, since the text is referring to the intestate succession, the Manichaean indeed has to let go (another meaning of *dimittere*) his assets to his *adgnati* if he has no children. Hence his interpretation is not watertight.
their assets to their *proximi* or else confiscates these\(^\text{10}\). CTh 16,5,40,2 refers to the ten persons of the praetorian edict, who are enumerated in Coll. 16,9,2 (p. 475). New is also the incapacity to contract over their assets (CTh 16,5,40,3-4, p. 476). This fits the threat of expropriation. Finally, the fiction that this heresy was a *laesio maiestatis* (CTh 16,5,40,5) made a posthumous accusation possible and so to act retrospectively. Further sanctions against those who allowed meetings on their estates were issued. A similar sanction was issued in 404/405 against the Donatists (p. 481). Repetitions followed in 423 (CTh 16,5,59), 428 (CTh 16,5,65), and Nov.Val. 18 (p. 484). Again the texts are embedded in a broad historical context. R. then relates some actually performed punishments of Manichaean, which consisted of banishment. The Vandal Hunderic acted more brutally (p. 487). But as regards the sanctions on succession etc. there is no actual trace. This part is interesting but less excursions and verbosity would have been fine, making it better to follow.

### 1.3 Measures against the Donatists

The Donatists formed a Christian movement in North-Africa, at loggerheads with the orthodox (hereafter in line with R. Catholics). The Donatists did not accept those clerics who had given in during the persecutions under the Tetrarchy and those, consecrated by them. The first constitution is CTh 16,5,21, directed in 392 to the prefect of Oriens but also valid in Africa. R. calls this the Ten Pounds of Gold-Statute (*Zehnpfundgoldgesetz*): it fined with a fine of ten pounds gold those heretics who had ordained clerics or became a cleric. The locality where this had happened was confiscated. According to R. this law aimed at important people because for ordinary people it would actually mean being expropriated (p. 503). But why might it not have been precisely meant so? The aim is to wipe out the backbone of any heretical sect: the clerics (unless these are R.’s important people). Since the Catholics had for a long time no specific anti-Donatist legislation at their disposal, this law might assist them in their feud, but the Donatists were not heretics. Their movement represented a schism (p. 510). As it was, in Africa only the loss of a church building was an effective weapon. But there were attempts to use the Ten Pounds of Gold-Statute against them (p. 511). It succeeded in the case against bishop Crispinus who was declared a heretic. His appeal was rejected and now all Donatists were considered heretical (p. 520-521). The Catholics, however, wished that the law was only applied where Donatists had exercised violence (p. 526). In the so called *Commonitorium* of 404 Augustine asks for

\(^{10}\) Not, as R. incorrectly thinks (p. 474), was such a confiscation already introduced by CTh 16,5,9 (p. 450).
imperial confirmation of this and for the extension of the testamentary restrictions to Donatists (p. 527). Which constitution had he in mind? That against the Manichaeans? R. rejects this possibility because that law made it impossible for a Manichaean to inherit *ab intestato* whereas Augustine in Aug.c.Parm. 1,12,19 merely speaks of acquiring by testament or donation, not *ab intestato*. There seem to have existed a general law in this sense in 404 (p. 532, 534). But in the *Commonitorium* Augustine does not mention the intestate succession. Notwithstanding R.’s exposé (p. 534-540) it remains an open question. He further discusses applications of the ten pound fine. Still, we have to remember that a fine of ten pounds of gold is very common in the Theodosian Code, see also for this and this constitution Maragno’s impressive work on fines in gold.11

In what R. calls the Edict of Unity, transmitted in CTh 16,5,38 and 16,6,3, of 12 February 405, Manichaeans and Donatists are mentioned both: who joins one of these sects will experience the fixed sanctions. On the same day the long CTh 16,6,4 was issued (p. 548-576). According to R. it was a constitution accompanying the Edict and containing for the most the text of a previously issued constitution of 404. He bases this on the textual rupture after *prospeximus*. However, such a rupture may also be due to the editorial work of the compilers. But R. only considers the constitutions as testimonies of the date of their issue, not as selected parts of a code. Anyway, Donatists were now declared heretics and could no longer claim to be schismatics. Perhaps this only applied to those who had rebaptised. CTh 16,6,5 of the same date says literally the same. Scholars have suggested that this text derives from another issue of the measure. R., on the other hand, suggests it is the original continuation of the beginning of CTh 16,6,4 after *prospeximus*. This raises a problem. If the original draftsmen inserted the text of an older constitution into CTh 16,4,4, why did they do this? And if it contained after this insertion the same text, why did the compilers of the Code separate this part and not delete it? Another solution is to assume, first that the compilers edited CTh 16,6,4 rather clumsily, second that CTh 16,6,5 was part of the Edict as rendered in CTh 16,6,3, while its *inscriptio* was erroneously copied from CTh 16,6,4. The constitution expounds on their heresy and establishes confiscation for rebaptised persons, with the moderation that children who reconvert may claim their father’s goods. It imposes also the confiscation of estates where heretics abide; it forbids any sham deals and donations. In CTh 16,5,4,3 the faculty to profit from donations is taken from them (including those agreeing with the practice of rebaptisation) in addition to the active and passive *facultas testandi*. Here R. prefers the reading of *propriam permixtionem*, which indeed makes sense. The

faculty to donate remains, as does the intestate succession. It is R.’s plausible suggestion that this was the law, issued in 404 in accordance with the wish of the African bishops, but CTh 16,6,4 did not as the bishops wished punish only the violent aggressors, but inveighed against the Donatists in general because of their anabaptism. This sanction was more than the bishops wished for, as was the leniency shown to those who reverted to orthodoxy. R. then expounds on the dating of these laws and on the later vicissitudes of the anti-Donatistic laws and now analyses CTh 16,5,54 (p. 576). It repeats the previous sanctions. R. thinks that the brevity of the repetition implies that these sanctions were of no significant importance anymore. But the difference is that confiscation applied now to all Donatist clerics, not just those who rebaptised. Further, Donatist laymen were now also punished, with a considerable fine. After five fines confiscation followed. Tenants of imperial and private estates who allowed assemblies were fined. Likewise coloni were fined with one-third of their peculium. R. tries to explain why in CTh 16,5,52 of 415 the masters have to correct their coloni, whereas in this case it is the authorities who fine. Correctly he concludes that it concerns here private property while the term peculium derives from the restricted position of the colonus versus his landlord. After this constitution we do not encounter the restrictions in succession anymore (p. 583). On p. 585-598 R. discusses their presence in non-legal texts, then the date of the second book of Contra litteras Petiliani and Aug.epist. Divj. 10, the chronology of Augustine’s writings, and a time table (p. 599-607). A clear conclusion about the purpose of the measures against the Donatists lacks.

1.4 Measures against the Eunomians

The Eunomians have been called in modern research ‘Jung-Arianer’, ‘Neo-Arians’ (p. 609) and in Antiquity also Anhomoeans in opposition to the Arians (and semi-Arians) who were called Homoeans. They formed a spin off of Arianism and existed only in the east. Both sects opined, against orthodoxy, that Christ was not of the same nature as God, yet on the precise relation between the two they heartily disagreed. R. gives first an extensive survey of Eunomianism, which is very instructive (p. 609-634) and which should help us to understand better the legislation (p. 629). R. mentions the difference between Arianism and Eunomianism and argues that the baptismal practice of the latter definitively set them as a separate sect apart (p. 631-632). But if Eunomianism was so damned (not only by the orthodox but also by the Arians), why was there no similar legislation against the equally heterodox Arians?

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12 How R. can maintain that Donatists could still inherit by testament from a non-Donatist (p. 564) is a riddle to me.
R. affirms that the emperors very well distinguished between the two but never issued restrictions in succession against the Arians specifically (p. 634). Why? The question is not dealt with\(^{13}\). Then R. deals with the constitutions in chronological order. The earliest restriction in succession is rather late, 389. Several general constitutions (CTh 16,5,8, 16,5,11, 16,5,12 and 16,5,13) precede the restrictions in successions. CTh 15,6,17 of 389 deprives Eunomian eunuchs of the testamenti factio activa et passiva (p. 636). Were really only eunuchs meant? R. discusses the various views and decides for a literal meaning. He distinguishes the case that somebody instituted an Eunomian eunuch as heir or legatee, or fideicommissary heir, and that an Eunomian eunuch made a testament. In the first case the eunuch's part would be caduca. R. mentions the intestate heirs as duped but that is not relevant here because the testament remains valid and thus other dispositions too. The other case is relatively simple. The testament was invalid. If they were freedmen, their manumissor would inherit all. If they were freeborn, their inheritance could only pass on ab intestato, i.e. to their agnates and further relatives. R. assumes their entire fortune became also caduca (p. 645) but the constitution does not say this and it requires that the person entitled to inherit is barred by law to accept.

But in CTh 15,6,23 of 394 Theodosius revoked a previous similar law which regarded Eunomians (p. 646). Did he have CTh 16,5,17 in mind? Some assume that law was extended to all Eunomians, others assume an intervening law. And then: did the revocation include Eunomian eunuchs? R. proposes that CTh 15,6,17 was later interpreted as applying to all Eunomians including laymen (p. 647), that Theodosius received many petitions for an exception, that the said law was unlike the laws against other heretics, where the lay people were spared such sanctions. Consequently Theodosius removed this anomaly.

Similarly CTh 16,5,25 of 13 March 395, which renewed previous sanctions (be it, that personal privileges were revoked), is revoked shortly after by CTh 16,5,27 of 25 December 395 which grants them the faculty to make a testament and further confirms what Theodosius previously granted them (p. 651, 656)\(^{14}\). R. explains this on the basis of the timings, viz. that the Praetorian Prefect Rufinus wanted to pursue a harsher policy against the heretics than the emperor; after his death, the emperor returned to the former situation: sanctions against the clerics, no sanctions against the lay people (p. 659).

\(^{13}\) It might deserve another study. Yet, might the different treatment have shed light on the reason behind the sanctions regarding succession?

\(^{14}\) Why R. links CTh 6,5,7, issued on 25 December, with Christmas, although he himself says that this was not a special day, remains obscure.
In CTh 16,5,36 of 399 the testamenti factio is restored to the Eunomians and they were no longer considered peregrines. They had now also the faculty to donate (p. 661). R. sees this as a confirmation of the previous situation. Remarkable is the explicit mention that they may donate, where already 20 years earlier the Manichaeans could not donate. Regarding the reference to peregrines, R. refers to p. 287 where he maintains that it did not imply the loss of Roman citizenship. Certainly, but the loss of the testamenti factio put the Manichaeans and Eunomians on the level of peregrines: they could not be instituted by Romans nor institute them\textsuperscript{15}. That will also be the meaning behind the repeated affirmation that they have nothing common with other people communi iure: the loss of the testamenti factio made them as if peregrines, cutting them from the body of Roman citizens. The emperors could not strip them of their citizenship unless by condemning them to slavery, but this came as close as possible.

The next constitutions are CTh 16,5,49 and 50 of 410, which are connected: 50 is an addition to 49 for a particular group of officials (p. 664-665). First the emperor refers to a law of his father (according to R. the prohibition to assemble). From now onwards the testamenti factio and donating and donations are denied to them. Now, however, the emperor orders that whatever becomes caduca in this way may not be petitioned. CTh 16,5,60 specifies this. R. argues against the idea that these rules were to favour the intestate heirs: invalid donations were confiscated. True, but inheritances still passed on to them. The constitutions further demonstrate that such caduca could be claimed. Perhaps this was to oppose denuntiations for one’s own benefit. R., as elsewhere, expounds on possible reconstructions which then are rejected. The reason to reintroduce the restrictions remain unsolved (p. 672).

CTh 16,5,58 of 415 orders the confiscation of houses in Constantinople, owned by Eunomian clerics in which they hold meetings or baptise. It orders also the banishment who allows himself to be rebaptised, and of clerics who hold meetings or consecrate, or be consecrated. After that the constitution repeals all beneficia specialia granted to Eunomians and repeats the restriction on succession and donation. The constitution has more sections, but as R. says, its structure is a bit chaotic. R. is convinced that this law is composed of parts of previous rules, as he is that it happened in other cases (p. 675, 680). Unfortunately he cites for this only section 4 with CTh 16,5,25,1 of 395 (p. 676). But the words R. considers as having been literally copied being: Eunomianorum, quae, sunt, illud, beneficio speciali, are neither words nor a combination of the distinguishing kind. It is an audacious hypothesis. Is that

\textsuperscript{15} M. Kaser, Das römische Privatrecht, Bd. 1, München 1971, p. 862, 684.
sufficient ground to reproach Honoré for not having recognised the copying of CTh 16,5,25,1? To attribute to him a ‘Bauchgefühl’ in his research (p. 680)? It is very little to base an allegation on and certainly not enough to demean a great scholar16.

What is R.’s conclusion? He sees three phases: May 389 till June 394, March till December 395, and from March 410 onwards. In the first and second phase the Eunomians merely lost the faculty to inherit and to bequeath (and regain it). In the third phase the restrictions were renewed and donations were also forbidden. They were not punished with infamy (why not?). The sanctions were twice revoked because they were introduced on the basis of single cases and later seen as inappropriate (p. 683). But the presumption that these laws were induced by petitions is unproven and speculative. Better is his suggestion that the emperor wanted to spare the lay people. But why would the emperor have introduced the mentioned sanctions at all? Even if it were only for the clerics or eunuchs? That question is left open.

1.5 Measures against Apostates

What is an apostate (p. 685-719)? In itself it merely means ‘who has stood aside/left’ and that can mean anything. The term is used very widely, so that R. uses title CTh 16,7, De apostatis and the kind of apostates referred to there to arrive at some definition. Roughly it is a Christian who voluntarily relinquishes this belief to practice pagan rites (again). As Christian are also those considered who have been accepted as catechumen, a baptism was not required. It had to be voluntarily, then those who abjured Christianity under duress were called lapsi: they had not acted intentionally but out of weakness (p. 698). It raises the question, whether apostasis was considered a kind of treason (perduellium). It might explain why these laws were issued only after Christianity became state religion and where CTh 16,7,3 has eam superno numini … perfidiam, this is not so strange an idea. R. has not dealt with this point. Further, the apostate should be practising pagan rites, i.e. organised forms of idolatry. The term included those who turned to Judaism or Manichaeism (CTh 16,7,3) so R., to distinguish the different groups, calls them ‘Heidenapostaten’. It is not clear whether the constitutions understand by Christianus orthodox or also heterodox Christians (likely both). Further R.’s definition does not include those who moved from orthodoxy to heterodoxy. The number of apostates among the elite will

16 Tony Honoré not just wrote on the language and draftsmen of the constitutions, he also reformed the South African law of trust (The South African Law of Trusts) and wrote together with H.L.A. Hart Causation in the law. There are not many who achieve such different accomplishments.
have dwindled after Julian since it no longer served an administrative career (p. 704). After a long exposition on renegates and the ecclesiastical sanctions for them, R. arrives at the first constitution against apostates, CTh 16,7,1 of 381 (p. 381; NB: a little more than two months after Cunctos populos [CTh 16,1,2] promulgated Christianity as state religion). This constitution deprived apostates of the faculty to draw up testaments. Testaments may be declared void, also of already dead people as CTh 16,7,3 shows. R. points out that almost at the same time a similar law against the Manicheans was issued (p. 722ff.). CTh 16,7,2 restricts the testamenti factio activa of catechumenen to heredes legitimi. The constitution then removes from apostates also the capacity to benefit from testaments. CTh 16,7,3 includes those who accepted Judaism. It sets a punishment for those who persuaded the apostates and a time limit of five years to accuse dead people of apostasis (and so to invalidate their testament).

Perhaps CTh 2,19,5 formed part of this constitution, suggests R., since there also is a five year limit. But a querela inofficiosi testamenti required that the de cuius had not observed a stringent moral duty (officium), such as bequeathing to loyal children. Here the testament might be invalid because the de cuius was an apostate, notwithstanding that he had complied with all officia. Merely having the same time limit is rather thin to make a connection.

Follow CTh 16,7,4 and 5 of 391. C. 4 removes the full factio testandi from apostates. They cannot regain this by paenitentia, the fact that they fide quem deo dicaverant polluerunt impedes this17. Further they are stained with infamy and loss of rank. As with other heretics, apostates should be removed from the company of all (already in CTh 16,7,2). A question is, what kind of paenitentia is meant? The ecclesiastical? If that were the case, it would mean that even after a completed ecclesiastical penitence the restrictions would continue. R. assumes that here it is, exceptionally for the penal law, a penitence towards the emperor (p. 746-747). CTh 16,7,6 establishes that apostates will only be succeeded by father, mother, brother, sister, son or daughter, grandchildren. CTh 16,8,28 and 16,7,7, of 426 and for the west, regulate first Jewish and Samaritan converts to Christianity. They may not be disinherited by their ascendants. Have they, however, committed a grave crime against them, then these may leave them only the Falcidian part. CTh 16,7,7 repeats the restrictions in succession, adding to these that sham sales are forbidden. Their assets should completely devolve upon their Christian intestate relatives, who may claim without limitation. Here R. discusses also the querela inofficiosi testamenti (p. 758). But how could

17 That suggests an oath like the one sworn by the militia, and it perhaps suggests perduellium.
it be inofficiosum, when the de cuius could not make a testament? What kind of claim may an intestate heir have used? Likely they claimed the bonorum possessio contra tabulas or simply the hereditas\textsuperscript{18}. In his conclusion (p. 763f.) R. makes clear that apostates stood better than the other groups: they were not banished nor denied contracting, or forced to transfer their property in their lifetime.

1.6 The fate of the sanctions in succession

The sanctions in the law of succession after 428 are discussed (p. 765-810). The first is CTh 16,5,65 of 428, a long text which comprises all heretical sects but indeed, as R. maintains against Humfress, does not systematise the various regulations. It sets sanctions thereby dividing the heretics in four groups, each with different sanctions. The ten pound fine for the clerics remained for all. Further all the previous sanctions were confirmed, including those restricting successions and donations. In the course of this the constitution presents several times a repetition. R. is of the opinion that the drafter combined texts and did not mind to put some order in it. But perhaps the sharp 21st century German mind asks too much of the 5th century educated court official (p. 765-782). A second point is whether this was the law Nestorius meant when writing et contra reliquas haereses innovavi (p. 766). This confirms R. convincingly (p. 782). Follows (p. 784) Nov.Val. 18 de Manichaeis of 445. This novel confirms all previous laws against them and gives a short summary. But it does not contain restrictions in succession. R. gives further exegeses of the two Anti-Eutychian laws CN 480 of 452 and CN 489 of 455, which do have successorial restrictions (p. 791-796), and of Hunerich’s edict of 484 against Catholics, turning the successorial restrictions against them. Finally we have a survey of Justinian’s measures against heretics in general (p. 800-809), and of the afterlife of this in the Middle Ages.

1.7 Ergebnisse

R. summarises the results of his research in Parts II-VII in the ‘Ergebnisse’. His research was on the sanctions in succession law against four groups of heterodox and apostate people. They all share the prohibition to dispose by testament over their own assets. The details varied. The intestate succession was in this period always left unimpaired. As to explanations, none of those put forward were satisfying. With the Donatists it were African bishops who petitioned for it with the emperor. In other cases there is no such a cause visible

\textsuperscript{18} See M. Kaser, \textit{Das römische Privatrecht}, Bd. 11, München 1975, p. 472-473 for the different developments in east and west. The b.p. was not yet set aside in the west in 426.
and R. assumes it were the intestate heirs who petitioned for it. It seems, so R., that individual cases led to this legislation. Remarkable is, that for 47 years only these groups were struck by this prohibition, but it is explainable: they were the most hated groups of heretics. Remarkable is also that not only the clerics but subsequently also all lay people were struck by the prohibition. R. rules out that it was a symbolic punishment. According to him none of the usual explanations directly suffice. It is likely, and certain with the Donatists, that petitions led the emperor to act. Where with the Donatists it were African bishops, in other cases he suggests it were intestate heirs. Why it remained restricted to four groups and not to other heretics he explains so: the emperors did not like to use this weapon because it was a very fundamental right and it hurt also the lay. The explanation, it was a symbolic gesture in order to cut the heretics out of civil society he rejects flatly. It might simply have been done to invalidate existing testaments (p. 812-813).

Still, why only these four groups? Is it a sign of the great restraint with which the emperors used this means if we consider the later inclusion of other groups? Rather not. Is there really nothing more to be said about it? For example, would a comparison with the orthodox Christians not have been illustrative?

These are his conclusions on a research over 560 pages which began with a reference to Noetlichs’ work on the legislation against the heterodox. It focused on the restrictions in succession imposed on heretics, viz. the denying of the testamenti factio activa et passiva. To this came additions such as the prohibition to donate. That has been set out very well. But what conclusions does R. himself draw?

R. suggests that disappointed intestate heirs complained and petitioned for invalidating existing testaments. Thus material motives lay at the basis of this legislation. But this suggestion is not very probable and is rather speculative. There is no indication of this and it is questionable whether the emperor would have bothered. Why should the African bishops have acted for them and if so, why would they not have mentioned that? And, e.g., with the Eunomians: why would the Praetorian Prefects have toiled for the cause of some little landowners from the provinces? And moreover: one-quarter was always for the intestate heirs (through the querela inofficiosi testamenti c.q. actio inofficiosi) and they could also complain about missed donations (querela inofficiosi

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If this was the case for the orthodox intestate heirs, why should the emperors assist heirs of heretic testators and put these in a better position? It is a point R. does not address. Further, in the case of the querela inofficiosi testamenti the authorities were reluctant to annul the entire testament. The difference in this case is that the testament here would be declared completely void ab initio, by that potentially harming bona fide persons. This explanation therefore cannot hold.

1.8 Other motives

The fact that it were African bishops who pressed for the sanctions (and, it would seem, other bishops in the other cases too) might be a hint for us to explore this track more. Then, what did the orthodox think of the faculty to bequeath apart from the intestate succession? Did the orthodox profit from the possibility? The answer is clear and unambiguous: the Church profited enormously from bequests and donations. Wood gives some estimates of the size of the ecclesiastical properties. It is clear what the Church did with it: supporting the poor, keeping hospitals and performing other charity (also suggested by R.). But the question behind this is: why did people bequeath and donate to the Church? Brown has written on this. It is, summarising briefly, the words of Jesus in Matthew 19:24 ‘And again I say unto you, It is easier for a camel to go through the eye of a needle, than for a rich man to enter into the kingdom of God’. As Brown makes clear particularly Augustine provided the solution: not by renouncing all riches remission of sins was possible but by sacralising these through giving on a regular basis. R. himself also mentions this point when discussing the importance of baptism and penitance (p. 693-695, where the period of postponement of baptism dwindled after Constantine, people preferring to be baptised now and apparently accepting the possibility of having to do penance afterwards). What better way to donate during one’s life but also to bequeath something at death, balancing those sins committed after the last gift or committed unconsciously? If this suggestion is correct, the prohibition implied that heretics – who considered themselves the true Christians – could not even out their sins through giving to the church, which in turn severely impeded their chances of entering the Kingdom of Heaven. It would

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20 Kaser, Das römische Privatrecht II (supra, note 18), p. 515-517; CTh 2,19,4, not in R.s index. For the donation: id., p. 521.
directly have affected their spiritual welfare. R. hints at this on p. 441 where he suggests this for Manichaeans. And the fact that this legislation affected also the lay people becomes understandable too. If they should have that chance to save their souls and their clerics not, it would make no sense issuing this legislation. Then, the heretics considered themselves Christians and were therefore likewise interested in their spiritual welfare23, while apostates might wish to return to Christianity and need salvation24. Perhaps I am wrong, but it would have been interesting to have read R.’s views on this.

But there is something else which might point also to another effect as well. Several times it is said when taking away the *testamenti factio* that this sets the heretics outside the civil society and the common law25. R. expounds on the various cases where heretics are said to be disconnected with civil society (p. 345-352) and concludes that it concerns rhetoric phrases. That is partly true. Yet in a discussion of the close connection between citizenship and the *testamenti factio* he states that the withdrawal of the latter might in the rhetoric bombast of the imperial constitutions be equalled with loss of citizenship. He mentions in this context as example the Junian Latins as the typical non-citizen of the later Roman empire (p. 286). This was, however, more symbolic (p. 260-261). Later on R. specifies this by mentioning Gai epist. 1,1,4, where Gaius says that of the Romans, Junian Latins and *dediticii* the first have the better status since they have *testamenti factio* (p. 286-287; NB: Gaius speaks here of three kinds of *freedmen*, not of freeborn people as R. seems to think). However, R. rejects the idea that it implies for heretics more than just the loss of the *testamenti factio*: it are all dramatising formulations (p. 287).

But was the Junian Latin the typical non-(Roman) citizen? They were modelled after the coloniary Latins and thus linked to Roman citizenship. If they married a Latin or Roman and had a child, they all could by way of the *anniculì probatio* become Roman citizens. Actually, they were the a-typical non-citizens. Contrary to what R. maintains it were the barbarians who were the typical non-citizens, they were peregrines, marriage with them was in the west forbidden (CTh 3,14,1), and they could not be instituted by Romans nor

23  It can be argued that this explanation does not hold for the Manichaeans, but here the spiritual welfare was evidently also at stake. Anyway, it would have been a good thing to examine.
24  Here probably a differentiation is required, since according to Theodosius I apostates were for ever excluded from the Church (p. 747). But practice may have differed. Or the denial of the *testamenti facultas* may have been here a simple copying.
institute them as heir\textsuperscript{26}. That will also be the idea behind the repeated affirmation that the heretics have nothing common with other people \textit{communi iure}: the loss of the \textit{testamenti factio} makes them as if peregrines, cutting them off from the body of Roman citizens. The emperors could not strip them of their citizenship unless by condemning them to slavery, but this came as close as possible to stripping them of citizenship, because of, as R. himself underlines, the equalisation of citizenship and \textit{testamenti factio}. It will have been partly rhetoric, but partly far from rhetoric: the withdrawal of the \textit{testamenti factio} was as real as it could be. The political and theological message will have been clear, more than the hollow rhetoric that they did not form part of orthodox society. It was given a real and effective confirmation (as proved by R.’s suggesting the initiatives of the intestate heirs). But in that case we must assume a deliberate policy of the emperors, perhaps instigated by orthodox bishops. And in that case the question arises: why not the Arians, where other sects were later included?

It remains unclear what motives exactly lay behind those measures. It is, however, possible that more than one led to them. Symbolic gestures were certainly part of the imperial set of instruments. Yet the restrictions on succession were certainly not just symbolic. Their symbolism was based on solid ground and its purpose could not be misunderstood: to put them and their views at a par with the barbarian peregrines. It is also possible to suggest, in relation to the orthodox Church, that it was to prevent a building up of capital and with that the faculty to expand, and to restrain their financial possibilities; or, theologically viewed, to take away the possibility to amend in the moment of death for sins.

Perhaps R. himself was not so happy with his results because he says that without question the conclusions regarding the late antique legislation are more important (‘Fraglos wichtiger als diese Ergebnisse hinsichtlich der erbrechtlichen Sanktionen sind die Folgerungen, die man mit Blick auf das spästantike Recht allgemein ableiten kann’, p. 813).

\section{A new examination of the Theodosian Code}

\subsection{The Theodosian Code, imperial archives}
Those ‘fraglos wichtiger’ conclusions were made in Part I on the late antique legislation, together with the Theodosian Code, a collection of imperial

\textsuperscript{26} Kaser, \textit{Das römische Privatrecht II} (supra, note 18), p. 682, 684.
constitutions of the period 312-437. R. felt the need to delve deep into the Theodosian Code. He says in his preface: it was necessary, in view of the different opinions, to form his own view, and only a view which is consistent with the analysis of the relevant texts is to be taken seriously. R. begins the section on rescripts (p. 27) with the question why a collection of constitutions would be necessary and gives as example Plin.ep. 10,72, where Pliny asks the emperor Trajan how to apply a senatusconsult. Trajan's answer is to send him the senatusconsult so that he can form an opinion himself (Plin.ep. 10,73). R.'s conclusion is: the imperial central administration in Rome had to ask the governor in a faraway province for a copy because it apparently could not find it in its own archives or beginning to do so was a dead-end. He apparently implies by this that a collection like the Code would solve this problem. It is a rather hasty approach and prejudices his views on these archives. Then, Pliny did not specify the senatusconsult nor gave a date: what was more normal for Trajan to ask for a copy so that the original could be found in the archives? Records were systematically archived and inventoried. A second example, meant to be more instructive (Plin.epp. 10,65 and 66), is instructive indeed, but differently as R. meant it to be. Pliny sends an edict of Augustus and four epistulae of Vespasian and Domitian, and asks whether these are authentic. The answer is, after consultation of the commentarii, that only one is authentic (NB: the reply is not: only one could be found). In other words, if the imperial chancery had the text, including date, it was very well able to find the copy in its file books (commentarii, semestriae) if it were not a falsification, which means that its archives – central archives – were in good order, or, if we do not want to form from these two cases already a general judgment, that in any case it was not, as R. suggests, a mess.

Yet he assumes, proceeding from this misinterpretation, that in the course of time the situation only worsened (so on p. 248: ‘schlampige[n] Archive’, p. 249: ‘man daher mit großen Lücken rechnen muss’ – all without evidence). The example he gives here (p. 21) is of Augustine who sends a letter with the text of the relevant constitution to Florentinus (Aug.ep. 114). R. concludes that merely referring to the constitution did not suffice, to be sure the text was sent as well, NB: to an official. R. acknowledges that one might also see here not

27 P. 14: ‘Nur ein Modell, das sich auch in der »Praxis« (wenn man die Arbeit van den Codex-Theodosianus-Fragmente so nennen will) bewährt, muss ernst genommen werden; und nur eine Analyse, die auf begründetem Fundament errichtet ist, verdient zutrauen’.

an ignorance of the law but an attempt to subdue the official. That, however, seems to be the better view, officials were not always selfless individuals and could even extort. A similar prejudicial interpretation follows with the famous letter of Augustine to Alypius, in which he sends the text of a constitution of Honorius, saying ‘hanc legem subiunxi huic commonitorio meo quamvis et Romae facilius possit forsitan inveniri’, ‘I attach this law to my letter, although it might easier be found in Rome’. R. interprets this so, that Augustine was not sure whether Alypius notwithstanding all his legal experience might find the text in Rome (!) [exclamation mark by R.]. It is an interpretation which is at the least contrived. Augustine wanted to save Alypius the trouble to search in Rome for the text although it would not be so difficult. Similarly with Libanios or. 48,15. The Antiochene town council let the number of its members dwindle, to the detriment of the city administration. Libanius refers to a law (CTh 12,1,51) and he asks rhetorically, why did they not publish and apply it? According to R. the law was unknown but how are we to deduce this from this example?29 The point is that the councillors knew the law but did not want to apply it, keep it from the public and therefore did not publish it.

This excursion is not meant to split hairs. An important part of the discussion on the Theodosian Code turns around the view one has of the state of the imperial and other archives because the compilers had to work their way through archives in order to collect the constitutions.

### 2.2 Constitutions

In the section ‘Konstitutionen’ (p. 40) R. makes the distinction between prescriptions of a general nature or application (constitutions) and prescriptions of a singular nature or application (rescripts in the broad sense). The importance is that the Theodosian Code (hereafter: the Code) should contain only the first category. The difference was not sharp and in the Principate rescripts, although given in individual cases, could have a general purport in that the emperor added a general interpretation of the law. But the validity of rescripts was in 426 in the west restricted to the case given for, while they were not included in the authoritative Code of 43830. Then R. deals with the

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29 P. 24: ‘Erstaunlicherweise gab es das Gesetz übrigens wirklich!’ R. apparently does not sense the rhetoric here.

30 The latter is not R.’s argument. In p. 35 n. 25 R. opposes my interpretation of CTh 1,2,11 with several rhetorical questions which do not help to prove something and are in contradiction to what he himself says on p. 38. That private rescripts were not collected in the Code is simple: they did not comply with the later prescriptions of the Lex Citandi (included in the Code) and of CTh 1,1,5 to collect only general rules issued since Constantine through constitutions. The rescripts of the Gregorian and Hermogenian Codes were welcome. R.
constitutions, where one must strictly distinguish between rescripts and edicts. Next to the edicts letters to high officials form the overwhelming part of the Code. A digression on edicts follows, where it would have helped to state that in general all functionaries with *imperium* could issue edicts, be it that they could not enact against imperial law. R. wonders how edicts could be recognised if they did not begin with *dicit* (p. 45). It would have been useful in this context and since we are dealing here with the Code, to refer to Van der Wal and his contributions on the three forms of Late Antique legislation (*lex generalis, lex edictalis, oratio in senatu habita*). Instead all kinds of edicts follow. R. takes position against the idea that the praetorian prefect would send the letter to the governors who then published it with their own edict. According to him (p. 54) it concerns the edict of the prefect himself. It seems that R. implies by this, that in every province (i.e., its capital? or every town?) a prefectural edict was hung out. Who did this? I would guess the governors. In the end it is not so important, as long as the inhabitants learned of the new law. More important is the question whether the imperial letter itself or a recapitulation of it by the prefect was published, as Seeck maintained. The evidence shows that both were published and that the second was not meant to explain the first (p. 57). R. raises another question: why do governors from the 2nd century onwards not issue an edict themselves, but write a letter to a subaltern official with an order to post it in all villages and towns (p. 60)? R. leaves this unanswered, which is a pity since it is a good question. Van der Wal’s articles would also have been useful for the *orationes in senatu habita*, which were normative (R. rejects correctly the idea that subsequently a senatusconsult was made, p. 63 n. 89).

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32 And not just Wal, as on p. 76.


35 But see the way the governor Fulvius Asticus reduces the Price Edict for his province: M.V. Bramante, *Statutum de rebus venalibus, Contributo allo studio dell’ Edictum de pretiis di Diocleziano*, Napoli 2019, p. 289-363.

36 Whether they were published remains not discussed, R. does not even consider whether they were filed away.

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2.3 Versions of constitutions

In section 3, ‘Ausfertigungen’ (p. 64), R. treats of the different versions of the same constitution, sent to different functionaries. As already Seeck assumed, texts were adapted to the circumstances of the recipient. Here R. comes across the presence of the different dates and criticises Seeck for too easily redating texts which turn similar texts into different versions. R. rather thinks of a reissuing of a text. His digression on the variation in style, even when it concerns the same theme, depending on the recipient, is very instructive, as are the pages on the subscriptions, particularly through the use of epigraphical material. His conclusion is that imperial norms were not simultaneously issued in both an edict and a letter; imperial edicts outside of Rome are very rare (p. 77).

2.4 Validity of constitutions

R. proceeds to the validity as such: were constitutions generally valid or restricted to the realm of the official to whom they were addressed? It is one of the major questions about the Code and late antique legislation (‘Geltung’, p. 77.) First he demonstrates that *promulgare* does not mean ‘to publish’ but ‘to issue’, viz. a law, then he joins the view of Bianchi Fossati Vanzetti and Kreuzsaler, that publication was never the condition for the validity of a law, rejecting Kaiser’s view in this matter, and sets out to adduce more examples of this. These few additional examples are good. But was validity restricted to the recipient or to the part of the empire in which the law was issued? The first possibility R. thinks very improbable. True, we have no law which was without doubt valid for the entire empire (although it seems to me that in CTh 11,28,10 *generaliter per omnes provincias et populos sparsimus* is a very general order). R. gives examples which in his opinion show that the validity of a constitution was not restricted to its recipient but could be applied elsewhere (p. 89-90). In the literature Gaudemet was the first to propose that the validity of constitutions was restricted to the east or the west, depending on the issuing emperor (of course only when there were two administrative parts). R. rejects

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37 Unfortunately he cites me as an adherent of the rejected view in a second edition of a book, of which he himself says, that it is uncertain whether it was revised. The first edition was of 1993, but I joined Bianchi’s view in A.J.B. Sirks, *The Theodosian Code*, Friedrichsdorf 2007, p. 29, 88-89. As to Kaiser, R.’s rebuttal is not clear. Justinian’s novel is not a confirmation of the existing state of law, but a confirmation of the outdated state of law and provides a terme de grâce for those testators who are still alive to revise their testament (those who died can no longer change their will, therefore the outdated state is confirmed). This precisely confirms Kreuzsaler’s thesis, that in the moment of issue the law gained force. See on this A.J.B. Sirks, *Could after the division of administration in 364 an emperor issue a law for the entire empire?*, ZSS -RomAbt., 138 (2021), p. 564-565.
his arguments, stating further that in the legal texts there is nowhere an indication of such a restricted validity. When the texts for the Code were collected, the compilers took constitutions from the east as well as from the west and mixed them without marking their origin (p. 94). Matthews’ argument that all constitutions became at once valid everywhere when the Code gained force, he rightly rejects.

But R.’s arguments about the Code disregard the circumstances of the Code: Theodosius wanted a compilation for the entire empire, in order to re-establish unity, constitutions had to be arranged according to subject-matter and chronologically. In view of his purpose, that was natural. Precisely this makes R.’s argument weak. Why would Theodosius want to re-establish unity, if there had already been unity in law? R. cites a rhetorical and essentially anachronistical question from Liebs: how would a judge know whether a law was made for east or west (p. 95)? He does no give an answer, implying that the constitutions were valid everywhere. But the answer is simple. A judge was no professional judge (as nowadays) but a career administrator. He had to preside lawsuits, but for the application he had to rely on his staff. These were the professionals who had studied law, there was a transmitted knowledge of the applicable law and there was an archive (the archive of the provincial capital) where they could check whether a text had been issued in their province or part of the empire. Further, the constitutions in the Code figure on one hand as texts, collected to be inserted in a Code. As such they represent a general law issued here or there. Could the compilers know where that here or there was? And on the other hand, once collected, they formed the material for application. The rhetorical question applies only to this latter situation. Do we see a melting together here? The two questions merit different answers. The first is connected with the working method of the compilers and the argument fails here. They would consult the central archives. As to the second, as long as the imperial administrative apparatus functioned (which was in the west soon restricted to Italy), there should not have been a problem. The provincial staffs would have known which law applied in their province and which not, before and after the Code. The suggestion of R. that if one would follow the view of separate realms of validity, it would mean that Justinian later on introduced many western rules in the east by his Code without taking account of this circumstance, which would be dramatic (‘einer der dramatischsten Aspekte des Codex Iustinianus’) (p. 95), is a dramatic exaggeration. Formally, Justinian was sole emperor and claimed also the west for himself. In that sense his Code comprised the

38 R. says that ‘zahllose westliche Bestimmungen’ which were before invalid in the east became valid. As elsewhere, one would like to see concrete examples from R.
entire empire, be it that parts had to reconquered where his Code would be introduced (in Italy: in 554). The Digest and Institutes were issued as laws for the entire empire. Regarding the Code, might it not be rather the other way around: that he introduced with his Code many eastern rules in the parts of the west (Africa, Italy)? Also, but that deserves more investigation, there was a tendency to compare the laws in the Code only regarding their contents in as far as they were not clearly restricted in application (see c. Haec and the Summarea Antiqua)39. Is it not possible and probable that Justinian’s compilers did the same and only considered whether a law was still useful, with the exception of some laws specifically applicable for Rome?

2.5 Other arguments for general validity
R. himself admits that there are few arguments for a geographically general validity in the divided empire. He attaches much importance to the case of Libanios, about which below. There are cases where the constitution of one part was cited in the other part to gain advantages: CTh 16,5,48 of 410 (p. 100) and 12,1,158 of 398 (p. 102). The first refers to a law, issued in the western part (CTh 16,5,40 of 407), the second to a law, issued in the eastern part (CTh 16,8,13 of 397). As third proof R. adduces the eastern CTh 4,6,8, which softens the harshness of the earlier western law CTh 4,6,7 (p. 102). For Gaudemet this meant the rejection of eastern laws and fidelity to western solutions. R., on the other hand, asks why it was anyway necessary to legislate against an eastern law if it was not valid in the west. That is a good question. However, the reverse is in that case also true: Would the countermeasures not also be valid in the other part and so annul the law? And there is another problem which R. does not address in this context. If a constitution was valid throughout the empire, notwithstanding that only one emperor had issued it, what about its publication? Because, as M.A. De Dominicis, cited by R. on p. 93, shows, there is no recipient in one pars imperii of a law of the emperor of the other pars imperii and this is to be expected: for an emperor the functionaries of the other half were not under his authority and v.v. Notwithstanding the rich references and acute remarks of R. the solution is not so easy. One might argue that in the two

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39 It would be good to make an analysis of the laws in the Justinian Code which were taken from the Theodosian Code and distinguish between eastern and western, before making such statements. It is undeniable that there were different regulations regarding the navicularii and the coloni adscripti in the partes imperii. In the Justinian Code the eastern regulations are included, yet we see some western constitutions as well. Were these now valid in the east? Or envisaged Justinian their application in the parts he was to reconquer? Or did they embody an unwritten legal tradition in the east, in which case their validation posed no problem?
first cases the emperors expressly restricted the force of their corrective laws to their own part, but what about other laws where the area of application is not restricted? Are we to assume that the order to publish implicitly restricted the applicability to the area of publication? As to other cases, R. admits that these are not unequivocal (p. 103-105).

The question is also addressed when considering CTh 1,1,5, Nov.Theod 1,5, Nov.Theod. 2pr. (p. 105ff.) and Nov.Val. 26. The prescriptions in these texts for future constitutions reads R. so as that those constitutions which an emperor considers as important and general enough for the other part, would be sent over with a separate personal letter, after which they were filed in the archive and published through edicts. It is not a confirmation requirement. It is the sending emperor who decides what will be valid in the other part. The receiving emperor may still modify or abolish such a transmitted law, but in principle it is valid (p. 106-107). One may wonder what the purpose of this supposed arrangement was. We might see in Nov.Val. 26 the confirmation of Nov.Theod. 2. However, the rubric carries De confirmatione legum divi Theodosii Augusti quae latae sunt post Theodosianum, and in Nov.Val. 26,1 Valentinian says ut sicuti uterque orbis individuisordinationibus regitur, isdem quoque legibus temperetur – 'so that as both worlds are ruled by indivisible regulations, they should also be guided by the same laws'. Apparently Theodosius’ words were not interpreted as R. thinks. Similarly the rubric of Nov.Theod. 2: De confirmatione legum novellarum divi Theodosii. In the eyes of the contemporary people confirmation was required. R. does not take the rubrics into account. The order to publish the laws implied an authorisation and this the more since according to R. the receiving emperor had the authority to amend or reject the law40.

R. considers the view of a validity, restricted to one part of the empire, as hanging in the air because it does not consider the actual Late Antique situation. Emperors did not issue laws with validity for only their part, they sent letters to some or more state functionaries. The division of the empire was not in question. That there were different legal developments in east and west is purely hypothetical (p. 108). Yet emperors sent letters only to the state officials of their own part. Their laws were published only in their own part. The question, whether the datio by an emperor implied validity outside his realm is not discussed by R. at this point. As to different legal developments, these are attested in the literature41. Although R. denies that there were different legal

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40 See more in detail Sirks, Could after the division (supra, note 37), p. 564-565.
41 See B. Sirks, Food for Rome, Amsterdam 1991, for the navicularii, which R. has not included in the bibliography and apparently not consulted. Perhaps I was wrong in this research,
developments in east and west, he nevertheless acknowledges its possibility: lawyers could adduce norms from the other part, which by way of a consultatio reached the emperor who could accept or reject them. This implies that there must have been communication between both parts about the law (p. 111). R. thinks it was necessary to prevent a drifting apart of the partes imperii but why he thinks this remains an open question. His argument that there was no top-down but at the best only a bottom-up version of the law is open to dispute. It is true that in litigation parties had to produce their own evidence and it would be interesting to investigate why there was no ius novit curia rule (even, perhaps, in the cognitio extraordinaria). But if the orders of emperors to divulge laws is not top-down, what else is then? R.’s considerations are certainly interesting and astute, but they are not convincing. I refer for the entire question to a separate contribution42.

2.6 Authorship of constitutions
In the section on the genesis of laws (p. 112ff.), R. discusses the subjects of authorship, reasons to issue, and confirmation of laws. Under the first he mentions the formal plurality of imperial authorship: laws always mention all emperors, even if in practice the actually issuing emperor is referred to as author. Why this fiction was maintained R. does not discuss, passing over to the question who actually designed the laws. Here of course Honoré’s work is discussed, which R. considers as failed. He points out that laws will often have included formulations from previous laws, and that we can only guess about who drafted the texts, where Honoré assumed individual styles (p. 117). However, even when phrases of previous laws are copied, which is of course well possible, they might still be framed in a different style: the (only) example R. gives on p. 676 leaves every opportunity for the individual style of the new draftsman. Honoré’s great achievement is that he turned the focus on the legislative process at the imperial court. For the next section ‘Veranlassung’ (p. 118) Millar’s and Schmidt-Hofner’s views of the reacting emperor are cited, with the latter’s addition that this allowed the emperor to change the law substantially. R. gives several examples of this process. To this the contribution of the praetorian prefects in instigating and formulating new law as for the later period demonstrated in Schiavo’s work could be added43. The third section

but then I would like to know. I shall demonstrate the same for the coloni censibus adscripti in my forthcoming book on the coloni in the Roman empire.

See Sirks, Could after the division (supra, note 37), p. 555-567, on the question of geographically limited validity.

42 See Schiavo, Ricerche (supra, note 31).
'Bestätigungen' (p. 124) is about the many confirmations of previous laws we encounter in the Code. R. begins with explaining this by assuming that a central register and a simple way to cite laws lacked, without giving any evidence for this, presumably in line with his wrong interpretation of the Pliny letters (see above)\textsuperscript{44}. Better are the causes he cites next for the seeming repetitions in legislation: meticulousness of an official who rather wanted to be certain he applied the law correctly, refreshing a prohibition, request for reformulation (and then to the advantage of the requesting person). Schmidt-Hofner's thesis, it served propaganda, R. rejects (p. 131-132). But is a repetition of a prohibition, in order to refresh the subjects' conscience, not at the same time propaganda, viz. that the emperor is omnipresent and watchful? The proposition that repetitions in the Code are illusory R. flatly rejects since according to him this thesis is easily refutable with many examples\textsuperscript{45}. The material underlying this thesis, however, he does not check, nor contradicts it. He refers to ‘zahllose Fälle’, citing only two from the anti-heretic legislation in Book 16 and one title outside of Book 16 (CTh 4,6, about which below). That is rather thin evidence for the books outside of Book 16 and the reader would have welcomed more concrete evidence. It is a pity that he has not in this case read the relevant literature.

2.7 The order to compile

The section about the commission for the compilers of the Theodosian Code (p. 132ff.), begins with the Gregorian and Hermogenian Codes, where, \textit{mirabile dictu}, R. assumes on p. 134 that Hermogenian used the filed original versions, which, since he assumes Hermogenian was \textit{magister libellorum}, were the central archives of which he wrote on p. 125 that they did not exist. Both codices are only of interest because their structure contributed to the structure of the Code, although R. does not explain this here. His exposition on the choice of texts – imperial constitutions from Constantine onwards – is interesting: he rejects with good reason existing explanations, but his own suggestion, viz. that including constitutions anterior to Constantine would have made the project too ambitious, does not convince. As such it was already too ambitious. That in contrast to the two Diocletianic codes the Code was an official enterprise is well known and does not need much words. The \textit{similitudo} with the

\textsuperscript{44} See for the way archives were organised Haensch, \textit{Das Statthalterarchiv} (\textit{supra}, note 28).

\textsuperscript{45} On p. 132, taking position against my contribution in \textit{The sources of the Code}, originally published in 1993, but using the unrevised edition of 2010, without checking my later publications (or worse, thinking that because it dates from 2010, it is more valid than my previous publications) and not checking my research as put down in \textit{Food for Rome}, although I made that caveat.
two codes lay in the structure. Follows an exposition on the first and second stage of the compilation procedure and the promulgation of the Code. The Code came into force on 1 January 439, after that texts not included in it were considered false, with the exception of those in the military commands and in various fiscal files.

2.8 Generalitas: the definition
The next section deals with the criterium of generalitas (p. 154). In three ways he explores this: first, by analysing the wording of CTh 1,1,5 and 6; second by looking for a definition of generalitas in the Code; third, by comparing those constitutions of which we have the complete version with the extract in the Code. It is refreshing to see a new examination of the texts, but it would have been good also to include what Van der Wal already said. That goes as well, by the way, for the sources of the texts46.

For the second way the western oratio of 426, which contained the so called Lex Citandi, is the obvious text. R. rejects any connection between this oratio and the eastern constitution CTh 1,1,5 of 429. That is hard to accept in view of the political events of the years 423–426, Galla Placida’s stay in Constantinople and the great role of the eastern administration in restoring the order in the west. The Lex Citandi is about textual reliability of legal texts, cited in court. Archi assumed that this idea originated in the west, after which the east followed. It is indeed possible that in 426 the western chancery was so much worried on authenticity, reliability and generality of laws. The west had been visited by the Goths, who had sacked Rome in 410, and by other disasters. But the relief came from the east and so there is a good case for suggesting, as Volterra did, contrary to Archi, that the idea for the Lex Citandi arose in Constantinople and was realised in the wake of the military intervention in 425, viz. that the east decided to restore order in the administration and judicature too. Thus to reject any connection between Rome and Constantinople as R. does (p. 160, 164) seems rash. Then R. confuses CTh 1,4,3 with its interpretatio (p. 161, 165). The latter indeed is the infamous simplification, but CTh 1,4,3 itself gives a balanced approach to the problem of text reliability. His rejection on p. 164–165 of a connection between the oratio and Constantinopolitan jurisprudence bases on a supposed link between the mechanicity of the second half of CJ 1,14,2 and CTh 1,4,3, for which he takes the interpretatio of the Alarician compilers, a much later text; which makes his ‘easy falsification’ dubious. That

46 Van der Wal, Die Textfassung (supra, note 33), p. 2, 5 for the sources: the imperial acta, and the role of the commentarii.
does not take away the possibility that there may have been differences in the concept of *generalitas* in Rome and Constantinople and R. enumerates several.

In the section ‘Das Schicksal des Texts’ (p. 168) R. treats of the way the Justinian compilers took over and dealt with the texts of the Theodosian Code and whether these can be used for reconstructing the Code47. Also the *Breviarium* of Alaric may serve as source, but his view that the Alarician compilers luckily usually did not change the texts (p. 173) is incomplete. They did indeed not have the authority to do this but the *interpretationes* demonstrate the actual application48. Follows a digression on the manuscripts of the Code used (R and V) and how to reconstruct the Code on basis of these and other, fragmentary manuscripts, the amount of text lost (about 20 or 25%). Then he expounds (too long and unnecessarily) on the history of the Mommsen-edition (p. 181-184).

The question whether the collection was complete, which is a bit strangely called the reality of the collection (p. 185ff.), rests on his assumption that the Code was according to CTh 1,1,5 complete for the period 312-437. It is evident that it actually does not include all laws issued and R. enumerates several possibilities for this incompleteness. Of these only one is important for R.: there were constitutions which did not fulfill the *generalitas* criterium. On this R. expounds what such a criterium might define (p. 199-211). It is a useful digression because there are constitutions such as on Easter amnesties which are, in our view, not general, although selecting general laws was precisely what the committee had to do. But what did the jurists of the 4th and 5th century mean by *generalis*?

In a previous section (p. 153ff.) R. has developed a personal *generalitas* criterium, determined by some ‘*generalitas*-markers', like the words *generali lege* \[*sancimus*], or an order to divulge the norm everywhere through edicts, or the contents. These criteria he checks now in a section on constitutions not included for lack of generality (p. 199ff.). That is indeed an interesting

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47 Why it is speculative to insert those constitutions, only transmitted through Justinian’s Code, R. does not explain. Luckily he can cite my proof (B. Sirks, *Mommsen und der Codex Theodosianus*, in: Theodor Mommsen und die Bedeutung des Römischen Rechts, I. Fargnoli, S. Rebenich edd., Berlin 2013, p. 121-140, here p. 126-131) as ‘Einschätzung’. Also his remark, ‘Es wäre sehr merkwürdig, wenn die C.I.-Kompilatoren trotzdem Forschergeist entwickelt und Textzeugen für uralte, längst außer Kraft getretene Konstitutionen gesucht hätten’ (p. 171 n. 260) is completely beyond the mark. The compilers were ordered to use only the existing Codes and not to look for outdated constitutions prior to 438 and leave out outdated constitutions issued after 438 (c. Summa 1).

approach. Of the 16 Sirmondian constitutions ten are inserted in the Code, in nine such a marker (a publication order) is present. In the six not inserted constitutions none has a order to divulge. In c. 1 and c. 3 there are references to generality, but if they were excerpted and inserted they may have been lost. Of nine other more or less intact transmitted constitutions there are fragments in the Code too, three of which have orders to publish. R. concludes that the compilers used automatically the formal criterium of the publication order as marker of generality. The reverse test, checking those general constitutions which did not leave a trace in the Code, is cumbersome since we do not dispose of a good edition. Taking here the collection of Maier⁴⁹, some 100 laws, he finds only four which have a marker but were not inserted. For these he suggests explanations and so he sees his working hypothesis confirmed by these figures. Unfortunately it is not possible to check for the accuracy of his theory those constitutions which are not transmitted but indirectly attested. But he arrives at the obvious: the compilers will have left these aside because they did not comply with their formal generalitas criterium, and his own criterium is also purely formal (p. 205). The compilers may have left out a law which did not present R.’s marker, yet was general. That sets a problem with the orationes in senatu habita. These were always general, yet they were not published. And indeed, there are no orationes found outside of the Code which are excerpted. Still, if they were not published, their survival chance was low. Regarding texts, included in the Code yet lacking generalitas, he finds just one. However, the laws of Julian against the Christians and those against the Pelagians are completely left out. Why? R. suggests a secret additional order of the emperor (p. 198-199). I find this in any case regarding the Pelagians hard to believe, as also the suggestion of a secret order. But if R. accepts this, he may also accept a similar order to weed out all outdated laws in the Code of 437. This section is methodologically very interesting even if it does not yield hard results, but would have done well as separate publication.

To add to R.’s digressions: if one compares the Novels of Theodosius as sent to the west with the constitutions of him as included in Justinian’s Code and which were considered general too, we find a disparity: Theodosius sent over 35 novels issued by him in the period 438-447, of which only 24 we find in Justinian’s Code (fragmented etc.; Nov.Theod. 1 and 2 excluded). Thus nine were not included, although they were general. In Justinian’s Code we find on top of that 26 constitutions for the same period and not included in the batch. But they were general enough to be included. How are we to appraise the work

or criteria of the officials who collected the batch of Novels, or of Justinian’s compilers? Are we perhaps too harsh on them?

2.9 Obsolete texts included?

R. mentions another possibility why general laws were excluded: because they were outdated. But this he contests (p. 192-199). There are many constitutions which do not feature in the Code. There are explanations for this, but they do not suffice to explain all. R. refers here to authors who assume that the compilers left out outdated constitutions, with which he deals on p. 191. He does not agree with this, first because Theodosius ordered in 429 to collect all constitutions, including the outdated, and second, because the incongruencies in the Code we have show that obsolete laws were included.

Here we are at a difficult point. One of the great questions about the Code is whether it contained obsolete rules or not? The problem is that R. relies for his view on CTh 1.1.5 and 6, his analysis of Book 16, and on one examples outside of Book 16. He does not take other evidence into account. Yet the way we interpret the relation between CTh 1.1.5 (all constitutions including obsolete ones) and 6 (only valid ones?) depends wholly on that other evidence; the two constitutions in themselves give no clue or else the question would not have turned up. I have dealt elsewhere with this question and R.’s views and I refer the reader to this. But R.’s example of CTh 4.6 may show the defects of R.’s argumentation.

As proof of his claim that the Code contained obsolete laws R. takes the case of Libanios’ natural son. It is just ‘ein Beispiel für Zahllose’ outside of Book 16 (p. 192; unfortunately the countless other examples remain unmentioned; less rhetoric would not have harmed the argument). In or. 1.145 the Antiochene rhetor relates how a western constitution brought him the faculty to institute his natural son as heir. This constitution would have been CTh 4.6,4 in the title CTh 4.6 (on natural children and their mothers). The relation between the constitutions he describes as follows: a Constantinian law by which children of concubines could no longer inherit (perhaps the missing c. 1; c. 2; certainly c. 3), a liberal regulation of Valentinian I (c. 4), a return by Theodosius to the severity of Constantine (not transmitted between c. 4 and c. 5 but proved by Libanios or. 1.195), a confirmation by Honorius of Constantine’s and Theodosius’ regulations (c. 5); Arcadius repeats Valentinian’s regulation, restricting the portion for natural children to one-twelfth resp. one-quarter if there are no legitimate

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50 An assumption which cannot hold, see A.J.B. Sirks, Did the published Theodosian Code include obsolete constitutions?, Tijdschrift voor Rechtsgeschiedenis, 89 (2021), p. 70-92, here p. 77-78, 79.
descendants (c. 6); Valentinian III restricts this portion to generally one-eighth (c. 7); Theodosius II annuls this and returns to the previous regulation (c. 8) (p. 187, 192ff.). This, so R., suffices as proof.

And indeed, if one reduces the contents of these constitutions in this way (and R. thinks, one should not bother with small differences, p. 195), contradictions and obsolete constitutions soon turn up. Yet the situation is more complicated and requires a more thorough exegesis. R. assumes that CTh 4,6,4 was valid in the entire empire (p. 98) but does not see that it could not set aside CTh 4,6,3, the lex specialis which prohibited Libanios from instituting his son as heir (p. 98, 293), nor could CTh 4,6,4 otherwise in any way apply to Libanios. That already takes the edge of R.’s argument. CTh 4,6,5 (west) cannot be read as abolishing CTh 4,6,4, CTh 4,6,6 introduces the liberalisation for the east; to give some objections. The problem is that R. assumes that all constitutions were valid everywhere and that axioma colours everything. Besides, CTh 4,6 is a fragmentarily and incompletely transmitted title, subject to several conflicting interpretations and hypotheses. To base a proposition for all the Books 1-15 as R. does on merely such a title is insufficient in itself but here it is also an unsteady basis for further theories, certainly when they are meant to have such a purport as R. intends.

True, the language of the constitutions is often winded, but equally often the compilers did not retain much text and so we may assume that they left only the legally essential. What was essential to them, should also be essential for us and requires close juristic reading. Further, one may not focus on these constitutions as sole example of juristic thinking. Next to the constitutions rescripts were still issued, likely in the terse and pertinent legal style we know from the Gregorian and Hermogenian Codes and the Apokrimata. In law schools the writings of Ulpian, Paul, Papinian and other great jurists were still taught and used to acquire legal proficiency. Exegesis was applied to these texts (see the way Byzantine law professors taught) to this purpose. To understand the scholarship behind these texts it is useful if not necessary to have a sound knowledge of Roman law and a good training in the exegesis of legal texts, preferable of those in the Digest texts, in order to analyse the constitutions because behind these lies a still respectable legal expertise. We

51 On insufficient grounds, see my Libanios’ son and CTh 4,6, forthcoming.
52 As confirmed in CJ 5.27.
53 CTh 4,6,4 was issued for fathers who had next to legitimate offspring natural children. Only if of the first group no one survived, he could leave one-quarter to the latter. But as far as we know Libanios was never married or had any legitimate children.
54 See my Libanios’ son and CTh 4,6, forthcoming.
should take that into consideration when studying them. More research is necessary, but it does not help to extrapolate Book 16 to the rest of the Code. The problem is that Book 16 is precisely the problematical book in the Code. It deals with religion, a contentious subject in 435, and it is possible that choices were avoided or, also possible, that the constitutions were collected in haste and were not yet selected.

2.10 Another test of validity of laws in the Code

But let us approach the question from a different, practical angle. The hypothesis, the Code comprised all issued general constitutions, both valid and obsolete, leads to an unworkable situation (how many general laws were issued in 312-437? as long as we do not have an idea of all the general laws issued in the period 312-437, any statement on this is speculative). How can one be certain that a constitution is not obsolete? Every law in a constitution has to be confirmed by an external source, just as that is done with statements in the Historia Augusta. That make the Historia in fact an unworkable source. The same with the Code. Although we may be certain that it contains also valid rules, we cannot be sure which is certain and which not. But we have an excellent external source in the form of Justinian's Code. Any law in it was valid in Justinian's time and therefore it is a sound assumption that, if the law was taken from the Theodosian Code, it was valid in 438 too. Of course one has to take account of textual changes by the Byzantine compilers but essentially this holds. What was valid in 534, will have been valid in 438 and before. There are circa 900 of

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57 On p. 195 R. mentions my research into the navicularii, which he has not read. But to say that I made very global statements on basis of this while I made the reservation that in the end it would depend on actual research, is a misrepresentation. On the meaning of vis sanctionis in CTh 1,1,6 see now Sirks, Did the published Theodosian Code (supra, note 50), p. 74-75.

58 See also more in detail on this question Sirks, Did the published Theodosian Code (supra, note 50), p. 87-93.

59 Justinian’s compilers included western laws. If they were obsolete – but that would go against Justinian’s order to collect only the valid ones – the promulgation of the Code would have given them validity in Justinian’s empire.
such texts\textsuperscript{60}. Notwithstanding the biases, we may assumed that all the rules as retained in the Justinianic selections present rules, valid in 438\textsuperscript{61}. Add the constitutions only transmitted through Justinian’s Code, 261, and the constitutions, transmitted in the Breviary of Alaric, since they too were considered still valid in 506:151, after deducting those already counted for being in Justinian’s Code. Add to these those constitutions which in our research were found as valid, 89 \textsuperscript{62}. The resulting total, 1392 texts, form 50% of the total of 2783. Such reliable (i.e., still valid) constitutions then can be connected with constitutions which they confirm, and one may build up in this way an extended body of reliable constitutions. It does not imply, of course, that all the constitutions not included in Justinian’s Code were obsolete in 438: they may have become obsolete after 438 or they did not relate to the practice in the eastern part of the empire and were therefore not included in 529 or 534\textsuperscript{63}.

Another way is to take the maxim \textit{lex posterior derogat legi priori}, assuming that this maxim was to guide reading in the Code. Then one should take the latest constitution in a title or take a constitution confirmed by Justinian’s Code, see whether it makes an earlier law obsolete, and go on to the one but latest, etc, etc. This method recommends itself if the last constitution is a reliable one. It will be interesting to see whether this leads to obsolete constitutions in many titles. But what about constitutions which are not covered in one of

\textsuperscript{60} This is of course an approximation. First, if a Theodosian text was split by the Byzantines, we counted only one Justinianic reference. Second, the cuts were sometimes considerable and made part of the Theodosian text obsolete in 534: theoretically that part might already have been obsolete in 438, although we think that very unlikely. Third, Justinian’s compilers were allowed to make textual changes: these may reflect a change in rule (the same goes for the Theodosian compilers: they too may have changed slightly or more the original rule). Fourth, if a few constitutions were skipped, in consideration of the total it will not change the outcome. More important is the second problem mentioned.

\textsuperscript{61} And regarding the moment of issue: valid at that moment too, if the Theodosian compilers did not edit them in a way, distorting the original meaning.

\textsuperscript{62} In CTh 13,5-9, 14,3-4 (not also included in Justinian’s Code), further 14,18-23, 14,25-26 and further those in our \textit{The colonate in the Roman empire} (forthcoming); but this suffices for our argument.

\textsuperscript{63} After all, Justinian’s Code was in the first place meant for his empire which was in 534 still the eastern part of the empire of 438. An example of constitutions turned obsolete on account of abolition is CTh 4,12, due to Justinian’s abolition of the \textit{senatusconsultum Claudianum}; an example of a different practice is CTh 6,4, \textit{De praetoribus et quaestori - bus}, of which only CTh 6,4,16 survives, but in a different context than CTh 6,4; because the Senate of Constantinople was an official’s senate and not one of rich landowners as Rome’s, the constitutions of CTh 6,4 were not applied in the east. But see M. Moser, \textit{Landownership and power in the Senate of Rome}, Journal of Late Antiquity, 9 (2016), p. 436-461, who argues that the senate was attractive for great landowners because of the fiscal advantages and possibility of influencing the authorities.
these three ways? Do they remain in limbo? What if the latest constitution might be obsolete itself? And if one assumes the compilers did not collect all laws, is it possible that some missing laws confirmed such included ‘unconfirmed’ laws? This approach is theoretically correct, but in view of a bulk of half of the constitutions proven valid in 438, working with the hypothesis that all constitutions were valid unless otherwise proven is a reliable and easier way to achieve the same result.

2.11 Other aspects of the Code
The following sections (p. 211ff.) are rather a kind of sag wagon, R. tying up loose ends. When discussing the editorial dividing of constitutions (p. 213) the fact that R. has not set up an hypothesis of how the compilers works hampers a solid analysis. It allows for suggestions like that the first committee did not have a working structure of books and titles but merely divided constitutions without thinking about titles, whereas the second had one and could attribute texts (p. 214). That is hard to believe. The structure was in general already prescribed in 429 (CTh 1,1,5). Similarly he has no explanation for the post alia and etcetera marks, neither does he discuss the literature on this. More space he dedicates to the leges geminatae, but his conclusions remain thin: that later drafters took over earlier formulas is not a surprise, jurists like to stick to the transmitted wording to avoid new litigation, but as we shall, it is difficult to prove this in the Code due to the literary conventions. The last part here is dedicated to excerpting errors of the compilers (p. 216ff.). His conclusions is that the compilers worked on the whole carefully.

2.12 The constitutions as texts and as reality
The section on textual changes (p. 219-225) is instructive. R. concludes on basis of the few cases where we can compare that the compilers reduced the texts to their legal essence. Two texts are difficult, Sirm. 6 and the Edictum de accusationibus, because, so R. here the editing seems strange. However, to say that the compilers showed a different engagement in editing texts (p. 224) cannot not bring much as long as there is no falsifiable hypothesis on how they may have worked.

In how far may we use the normative texts as sources for the historic reality?64 With that R. means: were they realised, viz. were they more than verbal aspirations? That is not quite the same as one might think, viz. whether their issuing was based on and meant for real circumstances. R. does not say

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64 ‘In wiew fern lassen sich normative Texte als Quellen für die historische Realität heranziehen?’, p. 225.
whether he means the Code and the year 438, or the individual texts, each at the moment of their issuing, but it seems he is only interested in the latter. The value of the Code as such is not dealt with, understandably, then in the end R. is interested in the individual constitutions of Book 16. In my opinion the texts of the Theodosian Code should in the first place be considered as parts in the legal whole of the Code. In that view they are all containing still valid law and first the legal situation must be analysed. If one assumes, as R., that obsolete laws were included too, the legal analysis becomes more difficult, yet it still has to be done. As such it presents the situation for 438. Whether the texts present a correct picture for their moment and place of issue depends on further research.65

Then R. deals with the language in the imperial constitutions (p. 227). It is different from the legal commentaries of the second century, they are much more florid. Why their drafters showed ‘juristische Inkompetenz und Sorglosigkeit’ is a rather audacious statement considering the few examples adduced. It is easy to criticise ancient legislation but modern legislation is linguistically often very complicated too. As said before, it requires legal expertise to interpret these texts. Still, R. shows here his unquestionable philological competence. He concludes that the style was the result of a conscious effort, not of carelessness. But is it justified to say of CTh 16,5,17 that it does not formulate precise legal consequences and is the result of real disinterest in legal delicacies (p. 234)? The text, though florid, makes clear what the law is. The part on the vocabulary used (p. 236ff.) is very instructive too. The language used can sometimes even with specialised dictionaries not easily be understood. R. could have mentioned for the interested reader that the Oxford Latin Dictionary, though excellent, stops after the 3rd century and is of little help, but that Georges’ Handwörterbuch, which includes the letters of Cassiodorus, is very helpful and easily accessible.66 It is followed by a section on textual criticism (p. 240). That Mommsen attached too much importance on the earliest manuscripts (here R and V, p. 243), was already known from his editio maior of the Digest. In the next section on the inscriptiones and subscriptiones R. observes that the abbreviation dat in the subscription does not refer to the issuing by the emperor. It is generally assumed that a constitution must have a date of issue and that dat indicates this. This he rejects: it refers to the moment the letter was sent, since dare and accipere are complimentary concepts in

65 The same goes for Justinian’s codification. I present the application of this method in my The Colonate in the Roman Empire (forthcoming).

Latin (p. 247 n. 373). That may be so in literary Latin, but as long as we do not know where R. thinks *dat* was jotted down in this context it does not help to explain it. What was the date a constitution entered force according to R.? He accepted Bianchi Fossatti Vanzetti’s position that it was the moment of *datio*, when the emperor confirmed the text (by signing or whatever). If *dat* does not refer to this moment, when, then, entered a constitution force? Who jotted this down and where? Tjäder has written on this. R. has not given any thought about the archives and where the texts for the Code may have come from, nor about the way archiving worked (although he himself mentions here that the date should facilitate checking in the archives), but the batch of Theodosius’ Novels show that these were taken from yearbooks, indicated by the consulates. That will have been also the case for the constitutions prior to 429/437.

A summary closes the first part of the book (p. 248-252). R. simply states that particularly early constitutions could only be found in private collections, that the compilers had to reckon with gaps. All constitutions including the obsolete ones, were excerpted; with the exception of the sensible legislation on religion (this is a new observation, it has not been dealt with before – were here no obsolete constitutions included?). He assumes that we will possess most of the texts of greater relevance (i.e., general in nature). The selection was not perfect but not bad either. These remarks are rather gratuitous, then his hard research is basically restricted to a part of Book 16. That the compilers worked carefully is plausible be it based on little evidence. R.’s remark that we may not expect a systematic law book nor a developed dogmatic neglects sorely that underlying the constitutions there was the systematic of the civil law as developed in the Principate and continuously taught. To assume that an unpublished law had validity although this principle was nowhere formulated fails to take the constitutional position of the emperors into account. The emphasis on the bottom-up approach, in litigation, is only partly right: administrative rules, of which there are many in the Code, were definitively top-down, usually

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69 ‘Auch muss man sich von der Vorstellung einer entwickelten Dogmatik verabschieden, wie sie so grundlegend für die heutige Rechtswissenschaft ist’ (p. 250). It is amazing to read this statement in a book that hardly deals with private law and disregards the history of Roman law.
after reports from the administrative bottom. Indeed, the Code made *tabula rasa* in that it provided now a survey of rules applicable in court, in an orderly arrangement, but it remained difficult, so R., to extract from the wording the exact rules. That may be the case for us, but contemporary practice will have known better.

In his ‘Ergebnisse’ he summarises five results which, however, are not so unshakable as he presents them. The first allegation that the validity of a constitution was not restricted to the part of the issuing emperor, was rebutted. The second, that late antique laws can be approached by a stemmatic model, i.e., that older texts were re-used, he could not prove (see above) but only surmise, while the fact that legislation in the Roman empire was usually reactive and modifying previous laws is rather common knowledge. Third, he concludes that the antique lawgiver operated in a chaotic model, i.e. that because he could not know what authorities down the line knew, he did not consolidate with external texts. The example given here does not hold. Contrary to what R. maintains, viz. that Valentinian III merely summarises in a superficial way the existing regulations instead of referring to the Theodosian Code 16,5, is not what the novel does. After inveighing against the Manichaeans, Valentinian orders the Prefect to apply everywhere *poenas quas in sacrilegos iura sanxerunt*, in other words, to apply the existing laws, of which then a short description is given. He left it to the Prefect to look up these constitutions in the Code which certainly was present at court. Fourth, R. reproaches the drafters of the constitutions that they delivered accomplished art prose but produced at the same time obscure phrasings, easily misunderstood, even after the Code was produced. It is not evident what we are to do with this observation. That it is elegant prose is commonly known; whether it was misunderstood by the contemporaries is a question. The addressees were equally versed in this prose and will have understood the innuendos. As to the fifth conclusion, that the drafters of later anti-heretical laws apparently used the Code to draft better laws, is not to be excluded, but it remains a mere suggestion.

3 Conclusions

The Book has actually two subjects: the law on succession for heretics and apostates (560 pages), and the Theodosian Code (233 pages). It suffices for two books and that would have been preferable too. Now the title of this book twists its contents. Reading the book, both the part on the heretics and apostates and that on the Code, may take a heavy toll on some readers. There is certainly a line in the book but it tends to meander. R.’s focus on details obscures
here and there the view on the great lines. There are excursions which are too
long or unnecessary. It abounds with cross-references, indicated by an arrow,
which not only point to the left but, unfortunately, often also to the right (and
often there again to the left, etc.). It makes checking statements very cumber-
some and is not helpful for the argumentation. Likewise less rhetoric would not
have harmed the argument. The book also abounds with digressions and extra
remarks. They are always interesting, one cannot but admire the passion for
detail, but they distract from the line of thought and argumentation. One can-
not help wondering sometimes, could they not have been made into appendi-
ceses? Or put in a footnote (although, the book has already many long footnotes)?

Some, like the digression on the relation between Krüger and Mommsen
(p. 181-184), or on Mommsen on the *interdictio aquae et ignis* (p. 322-325), would
better have been published elsewhere if they really added something to what
we already know70. Moreover, R. engages in a lively discussion with the litera-
ture in which he does not spare some authors a frank and in-depth evaluation
of their work in the text or in long footnotes. That is a refreshing approach.

After all, critique is fundamental for the progress of scholarship. Perusing
the book, one gets the impression that the author began with the research
on the groups of heretics and apostates, then, having been confronted with
the Theodosian Code and its problems, decided to reverse the course of the
research and put in front what may have been intended (or would have been
better framed) as an appendix and call this his primary research. Whether this
has happened is of course speculation, but, as said, it is the impression one gets
from the many references back- and forward. It gives the impression of a work
in progress. The fact that the above commentary on Part I is so extensive is
mainly due to this character. It would have been good if these structural weak-
nesses had been ironed out so that the strength of the book had shown better.

So much for the formal aspects. R.’s inquiry into the Code is a welcome be
it unfinished review of theories on and research into the Theodosian Code. In
his ‘Ergebnisse’ he considered his observations on the Code as ‘fraglos wich-
tiger’ than what he said about the heretics and apostates. However, what he
writes about the Code holds less and is hindered by a lack of reflection. R.’s
observations and analyses, his original approaches, would have benefited from
leaving this Part I aside for a while, let the problems rest and then return to

70 On the first now: P. Riedlberger and I. Niemöller, *Paul Krüger, Theodor Mommsen, and the
Theodosian Code*, The Roman Legal Tradition, 17 (2021), p. 1-117. On p. 8 n. 11 he is so kind
However, the better and more interesting result is in Sirks, *Mommsen* (supra, note 47) that
about half of the Theodosian constitutions, included in Justinian's Code, were in one way
or another edited.
it, reconsider text and arguments, also taking more literature into consideration, and publish it separately. Such a reconsideration might have made him also conscious of some problems not noticed by him which I have mentioned above. Also the lack of legal expertise which now plays tricks on him could be remedied then.

As to the part on the heretics and apostates, each sect is introduced by a long theological and historical exposition yet for the central question, why precisely against these groups the restrictions in succession were introduced – a question not really answered – they do not contribute much. But apart from this: the constitutions are deeply analysed from a historical and religious point of view and particularly R.’s philological observations are much recommended to legal historians. It is the same for his many digressions. They make always good reading, R. knows a lot and they are very instructive. There are many sharp and acute observations found, often in small print or footnotes. The book is undoubtedly a welcome addition to our knowledge on legislation against heretics and apostates and a must for anybody interested in their history and how the laws treated of are embedded in it.