

Intercodices. Navigating between the Theodosian and the Justinian Codes

by Iole Fagnoli

1. Introduction

The twentieth century is commonly recognized as the best season of historiography¹ of the late antiquity. It is in fact in the second post-war period that a decisive change of perspective occurs: Starting from the 18th century², late Antiquity was considered a period of serious decline compared to the previous era – certainly of lower logic than the classical paradigm³ – and began to be studied again as an autonomous epoch, with its own characteristics⁴. It was considered decisive for the evolution of Western society⁵.

The paradigm shift is identified, in the late 1940s, by Henry-Irénée Marrou's 'Retractatio'⁶, which, reviewing some passages of his work on Augustine, denies the negative qualification he himself previously assigned to the treated epoch.

His contribution had been preceded by a few years by the choice of Santi Mazzarino, who was anything but a promising for a historian of antiquity in the first half of the 20th century, to make his debut on Late Antiquity⁷ and followed, between the 1960s and 1970s, by the studies of Arnaldo Momigliano⁸, Arnold Hugh Martin Jones⁹ and Peter Brown¹⁰. The wind of change has also received great enthusiasm in the legal field, especially since the 1970s¹¹. In Italy two institutions have set their eyes on the study of the Late Antiquity, especially in its legal dimension: since 1973 the 'Accademia Romanistica Costantiniana', supported by the 'Associazione Storico-Giuridica Costantiniana' since 1991 and since 1977 the 'Associazione di Studi Tardoantichi'.

2. The centrality of the Theodosian Code and its interpretative difficulties

To understand Late Antiquity, traditionally identified in the period from the reign of Diocletian to the death of Justinian, the Theodosian Code is without a doubt the main source that has survived to this day, although it contains only legislation and no other

¹ S. Rebenich, *Late Antiquity in modern eyes*, in P. Rousseau (edited by), *A companion to Late Antiquity*, Chichester 2009, 92; s. also G. Traina, *Introduzione. Fratture e persistenze dell'ecumene romana*, in A. Barbero (edited by), *Storia d'Europa e del Mediterraneo*, G. Traina (edited by), *L'ecumene romana*, Roma 2010, pp. 13 ff. On these aspects see my essay in Italian: *Il Codice Teodosiano ex machina*, in *Koinonia*, 44, 2020, on-coming.

² Among the most important works, mention is made here only of E. Gibbon, *History of the decline and fall of the Roman Empire*, I-VI, London 1776-1788.

³ The acceptance of late Roman Empire, coined in 1756, by C. Le Beau, *Histoire du Bas-Empire*, Paris 1756, was originally devoid of a negative connotation, however acquired shortly thereafter with the continuation of his studies.

⁴ S. Rebenich, *Late Antiquity*, p. 79.

⁵ A. Marcone, *Il mondo tardoantico. Antologia di fonti*, Roma 2000, p. 9.

⁶ H.-I. Marrou, *Saint Augustin et la fin de la culture antique. Retractatio*, Paris 1949.

⁷ S. Mazzarino, *Stilicone. La crisi imperiale dopo Teodosio*, Roma 1942.

⁸ A. Momigliano (edited by), *Conflict between Paganism and Christianity in the fourth century*, Oxford 1963.

⁹ A.H.M. Jones, *The later Roman empire, 284-602: a social, economic and administrative survey*, I-II, Oxford 1964.

¹⁰ Above all, his effective synthesis was significant also for purposes: P. Brown, *The world of late antiquity*, London 1971.

¹¹ Refer to A. Giardina, *Esplosione di tardoantico*, in *Studi storici* 40, 1999, pp. 157 ff. and G. Fowden, *Elefantiasi di tardoantico?*, in *Journal of Roman Archeology* 15, 2002, pp. 681 ff.

possible levels of legal dimension. It was in 429 that Theodosius II entrusted a commission with the task of making order in the works of classical jurisprudence as well as gathering all imperial constitutions starting from Constantine¹², while also making use of previous unofficial compilations: The Gregorian Code and the Hermogenian Code. The amount of difficulties faced with the effort of collecting and arranging organically, which had no precedent in the history of law¹³, is evident from the content of the constitution of the 20th of December 435¹⁴. In fact, the ambitious project appears downsized, more modest and stripped of the purpose of also collecting the works of classical jurisprudence. Furthermore, the legislative act doubled the number of members of the commission, from eight to sixteen. After nine years, the work of collecting the constitutions from 311 to 437 was finally completed: the Theodosian Code was published that year in the eastern part of the empire, while the western part received it in 438¹⁵. Yet in the West, the Code lived longer than in the East. In fact, it survived the fall of the empire in 476¹⁶, forming the basis of the Roman-Germanic laws, in particular that of the Visigothic kingdom which ended up replacing the *lex Burgundiorum* as well. The *Lex Romana Visigotorum*, also known as Breviary of Alaric, as published in 506 by the Visigoth king Alaric II, contained, in fact, in addition to parts of works of classical jurists, Novels of Theodosius II and other successive emperors, chapters taken from the Gregorian and the Hermogenian Codes, also different sections of the sixteen books of Theodosian. Thanks to the Visigoth and Burgundian normative texts, the Theodosian Code was indirectly able to have an impact on the legislation of the Franks and of the Church¹⁷.

The conscious completion of the design of Theodosius II is moreover geographically located in the East and is notoriously called the Justinian Code. Perhaps also inspired by the codification processes in place in the West, the Emperor Justinian set out to resolve the situation of the sources of law and the connected problems of abundance of texts, difficulty of finding information, contradictions and repetitions. He created the greatest legislative collection of antiquity, presented in the *Haec quae necessario. De novo codice componendo* constitution of 13 February 528 and published with the *Summa, De Iustiniano codice confirmando* constitution of 7 April 529. A second edition of the Code was made necessary by the interim publication of the compilation of the jurisprudential texts that Theodosius II could not realise. After the Digest, published with the *Tanta and Dedoken, De confirmatione Digestorum* constitution on the 16th of December 533, with the constitution *Cordi nobis est* of the 16th of November 534, the only Justinian Code that has come down to us was promulgated: the *Codex repetitae praelectionis*.

Moreover, the critical-reconstructive problems of the Theodosian Code are well known. In fact, the codification of Theodosius II has been handed down to us in several manuscripts, all incomplete, and this has led to enormous difficulties in its edition¹⁸. The fear of Theodor Mommsen, already in his old age, of not being able to complete the work, led him to sometimes hasty choices. His pupil, Paul Krüger, demonstrated this, especially

¹² C.Th. 1.1.5.

¹³ L. De Giovanni, *Storia*, p. 145.

¹⁴ C.Th. 1.1.6.

¹⁵ About the redaction of the Theodosian Code in detail, see J.M. Coma Fort, *Codex Theodosianus: historia de un texto*, Madrid 2014.

¹⁶ T. Wallinga, *Le codificazioni giuridiche*, in A. Barbero (edited by), *Storia d'Europa*, p. 609.

¹⁷ T. Wallinga, *Le codificazioni*, p. 611.

¹⁸ B. Sirks, *Mommsen und der Theodosianus*, in I. Fargnoli-S. Rebenich (edited by), *Theodor Mommsen und die Bedeutung des Römischen Rechts*, Berlin 2013, pp. 107 ff.

with reference to the Parisinus 9643 manuscript¹⁹. Mommsen was able *in extremis* to finish the work and his edition was published posthumously in 1904²⁰. Krüger himself later tried to produce his own edition, but he stopped at the eighth book²¹, not completing the work, leaving Mommsen's edition to be the only complete and commonly used one to this day.

3. Artificial intelligence in support of Roman law research

In the last years, the use of artificial intelligence for the benefit of Roman law research has seen an important advancement. Among a growing number of online resources that make it possible to consult and print sources²², stands a freely accessible database, Amanuensis, produced by Peter Riedlberger, a pupil of Thomas Finkenauer, with the collaboration, for IT profiles, of Günther Rosenbaum²³. Published in 2014 and accessible at www.riedlberger.de/amanuensis, it allows, after installation of an application, the search by lemmas in Roman sources, including those from the Late Antiquity. This repertoire has partly surpassed one of the most significant projects in the sector, the *Bibliotheca Iuris Antiqui* (BIA) CD-ROM²⁴, produced in 2000 under the direction of Nicola Palazzolo. Therefore, now that BIA is not compatible with the latest version of Windows 10, a valid alternative has arisen, not with regard to the bibliographic research, now largely substituted by the search engines on the World Wide Web, but in the search by lemmas. Amanuensis allows in fact to consult and print the Latin legal sources, but above all to search by lemma throughout the *Corpus Iuris Civilis*, including the Greek novels, as well as the Theodosian Code, the *Lex Burgundiorum*, the *Breviarium Alaricianum* and the *Edictum Theodorici*²⁵.

Amanuensis has incorporated the digitised sources from several previous projects. When it comes to the *Corpus Iuris Civilis*, the 'Romtext' database, developed by the University of Linz, has been included, on Joseph Menner's authorization. The collection also contains the novels in Latin, whose digitisation was edited by G. Maier, as well as the constitutions in Greek of a previous research, called 'Volterra database', aimed at the research of the later phase of antiquity. This is the 'Law and Empire AD 193-455' archive,

¹⁹ P. Krüger, *Codicis Theodosiani fragmenta Taurinensia*, II, Berlin 1879; Idem, «Über Mommsens Ausgabe des Codex Theodosianus», in ZSS 26, 1905, pp. 316 ff.

²⁰ *Theodosiani libri XVI cum constitutionibus Sirmondianis*, edidit adsumpto apparatu critico P. Kruegeri Th. Mommsen, Vol. I pars prior, Prolegomena, Berolini 1904, LX. *Theodosiani libri XVI cum constitutionibus Sirmondianis*, edidit adsumpto apparatu critico P. Kruegeri Th. Mommsen, Vol. I pars posterior, textus cum apparatu, Berolini 1904.

²¹ P. Krüger, *Codex Theodosianus*, 1, Liber 1-6, Berlin 1923, 2, Liber 7-8, Berlin 1926.

²² About an overview with the respective characteristics of each project, see the contributions: E. Germino, *Guida sitografica*, in A. Schiavone (edited by), *Storia del diritto romano e linee di diritto privato*, II ed. Torino 2011, 411 ff., already published in a first version as *Webitineri, per una sitografia sull'antico*, in F. Amarelli, *Itinera ad principatum. Vicende di potere degli imperatori romani. Lezioni*, Napoli 2010, 199 ff.; U. Agnati, *Per la ricerca giusromanistica sul web*, in *Rivista di diritto romano* 12, 2012: online on <https://www.ledonline.it/rivistadirittoromano/allegati/dirittoromano12agnati.pdf>

²³ P. Riedlberger, *Amanuensis v1.5.2*, 2015, project in collaboration with G. Rosenbaum.

²⁴ Among the many contributions on the use of information technology in relation to Roman sources, see: N. Palazzolo, *Ricerca bibliografica sui diritti dell'antichità: un archivio integrato su disco ottico*, in *Index* 20, 1992, p. 311 ff., and Idem, «Diritto romano e informatica umanistica: strumenti per il trattamento digitale delle fonti del diritto romano», in F. Arcaria and P. Sciuto (edited by), *Ius e tékne. Dal diritto romano all'informatica giuridica. Scritti di Nicola Palazzolo. Tomo II: Scienze dell'informazione*, Torino 2008, pp. 441 ff.

²⁵ Cf. P. Riedlberger, *Amanuensis. Eine kostenlose und effiziente Alternative für den Zugriff auf die lateinischen juristischen Quellen*, in ZSS 132, 2015, pp. 791 ff.

developed in 1995 in honour of Edoardo Volterra by Michael Crawford and Benet Salway which includes, in addition to the constitutions in Latin, those in Greek of this period of time, digitised under the direction of Jop Spruit. A second part of the 'Volterra Database', started in 2005, entitled 'Law and the End of Empire' aims to start from 446 until the Carolingian period and contains the first eight books of the Theodosian Code without Visigothic interpretations. The original website of the project results (<http://www.ucl.ac.uk/history2/volterra/>) no longer works and the new one appears to work only on certain browsers. In any case, the digital texts of the Volterra project are now accessible on Amanuensis.

4. ACTI CD-Rom and ACTI 2:0

2009 I published a digital archive *Auxilium in Codices Theodosianum Iustinianumque investigandos* (ACTI), distributed on CD-ROM²⁶. As an instrument of orientation within the copious legislative material collected by Theodosius II, both the interpretations of the Breviary of Alaric, as well as the content of the Justinian Code are combined with the Theodosian codification. The program allows the consultation of the passages contained in one and the other code²⁷.

The technical difficulties of the 2009 ACTI, in the form of incompatibility issues with some new versions of operating systems, had been surpassed in a new application, which was enhanced and faster and allows the user a more immediate and intuitive search. Although the availability of Amanuensis is a fixed point for *ex machina* research in Roman legal sources, I published a new software at the beginning of 2020: ACTI 2:0²⁸ that has some debts and connections with the ACTI CD-ROM. But the use of ACTI 2:0 met some problems during the challenges of the COVID-19 period.

5. *Intercodices*: a navigable archive in the Theodosian and the Justinian Codes

Intercodices is now a new digital archive. The computerized repertoire in fact focuses on the Theodosian Code and on the Justinian Code, trying, with the potential possibilities of artificial intelligence, to provide a tool for studying the legal profiles of the Late Antiquity in both Codes. The research system offers an organization of knowledge innovative in selection and management of materials.

On the one hand, the archive makes it possible to compare the constitutions of the Theodosian Code with the corresponding ones of the Justinian Code. The repertoire contains, in fact, the two codifications in their entirety, including all the constitutions in Greek, and allows the immediate comparison of the text of the imperial constitutions of the Theodosian Code with their Justinian tradition.

To the legislative material of the Theodosian Code, corresponding exactly to the 1904 edition of Theodor Mommsen, are premised, as in Mommsen's edition, firstly the *Gesta*

²⁶ I. Fagnoli (edited by), *ACTI Auxilium in Codices Theodosianum Iustinianumque investigandos-CD ROM*, Milano 2009, LED Edizioni Universitarie di Lettere Economia e Diritto s.r.l.

²⁷ See I. Fagnoli, *Il prodotto informatico della ricerca PRIN Palingenesi delle costituzioni tardo-imperiali*, in *Studia et Documenta Historiae Iuris* (SDHI) 76, 2010, pp. 885 ff.

²⁸ S. I. Fagnoli (edited by), *ACTI 2.0. Auxilium in Codices Theodosianum Iustinianumque investigandos*, Bern, 2020.

*senatus Romani de Theodosiano publicando*²⁹, consisting of the minutes of the Rome session of 438, when the Code of Theodosius II was presented in the West, and secondly the connected constitution by Valentinian III³⁰. Then the Sirmondian constitutions are, as in Mommsen's edition, added to the Theodosian codification, which is a small private collection of sixteen constitutions in religious matters, promulgated between 333 and 425, discovered by the French Jesuit Jacques Sirmond in 1631.

At the end of the constitutions of the Theodosian Code, the Visigothic interpretations, made in the Alarician Breviary to simplify the content of many constitutions, are also digitised, even if sometimes they have distorted their meaning. Moreover, Mommsen's edition includes such interpretations in correspondence of the constitutions to which they refer, although they were never part of the Theodosian Code³¹.

For a better research on late imperial legislation, it was decided to include, although they have never been gathered in an official collection, the post-Theodosian novels and therefore the imperial constitutions promulgated after Theodosius II, edited by P.M. Meyer in 1905 in the ACTI archive³².

The text of the Justinian Code included is that of the *Codex repetitae praelectionis* in the *editio minor* of Paul Krüger, the *editio stereotypa* of 1877³³. The three introductory *constitutiones*, the constitutions *Haec*, *Summa* and *Cordi*, have then been placed before the whole collection of the constitutions of the Justinian Code, as happened in the publication of 534.

The two codifications are in continuous dialogue. Next to each constitution of the Theodosian Code there is the possible correspondence in Mommsen's edition and, vice versa, next to each Justinian's Code constitution, any correspondence according to the Krüger edition of the Theodosian Code. Thanks to the possibility of reaching from the constitutions of the Justinian Code, which were already contained in the Theodosian one, the research of the scholar of the late imperial legislative activity acquires a potential that has not been allowed by the modern critical editions of the two Codes so far. It is in fact known that only the Theodosian Code of Mommsen's edition contains in a parallel box the constitutions in the Justinian tradition, but the Justinian Code does not reproduce in parallel the constitutions of the Theodosian one.

Furthermore, it is known that more than two hundred constitutions have been handed down to us only by the Justinian Code and not by the Theodosian. Mommsen chose to insert them in his edition only to the extent that they were contained in the manuscripts or in the Breviary, because only in such cases it is certain that there has not been a reworking by the Justinian compilers³⁴. Instead Krüger believed that much more could have been done also to reconstruct books and titles of the Theodosian Code³⁵. A more

²⁹ The image in background of ACTI 2:0 is a copy of the first page of the *Gesta senatus Romani de Theodosiano publicando* from the Codex Ambrosianus C. 29 inf.

³⁰ In this regard, please refer to the detailed reconstructive work of L. Atzeri, *Gesta senatus Romani de Theodosiano publicando. Il Codice Teodosiano e la sua diffusione in Occidente*, Berlino, 2008, in particular p. 24.

³¹ L. De Giovanni, *Diritto e storia. La tarda antichità*, Napoli 2015, 144.

³² *Theodosiani libri XVI cum constitutionibus Sirmondianis et leges Novellae ad Theodosianum pertinentes*, consilio et auctoritate Academiae litterarum regiae Borussiae ediderunt Th. Mommsen et Paulus M. Meyer, Vol. II, Berlin, 1905.

³³ P. Krüger, *Codex Iustinianus*, Berolini 1877.

³⁴ T. Mommsen, *Prolegomena. Vol. I. Pars prior. Theodosiani libri XVI cum constitutionibus Sirmondianis*, edidit adsumpto apparatu critico P. Kruegeri, Berolini 1905, p. LX.

³⁵ B. Sirks, *Mommsen*, p. 114.

immediate identification of these texts, not present in Theodosian Code, can open new avenues of investigation to the researcher of late imperial legislation.

On the other hand, *Intercodices* aims to promote research by lemmas in the different parts of the constitutions of the Codes. In fact, the archive allows you to navigate within the two Codes with the search by lemmas also through the apocope technique and the addition of the asterisk, obtaining in this way not only the places where the searched word is contained, but also those in which its variants are contained. The peculiarity of this database is the plurality of search masks that make it possible to differentiate the investigation. Searching by lemmas or dates is possible – within the Theodosian Code and the Justinian Code, switching between one and the other – in the text and in the respective *inscriptiones* with reference to the recipient or to the co-ruling emperors, as well as in the *subscriptiones* with reference to the place and whether the constitution was *proposita*, *data* or *accepta*. The search for lemmas is also possible in the *interpretationes* of the Alarician Breviary, relating to the constitutions for which they were written. Finally, the repertoire also provides an independent search mask for the dating of the constitutions. This makes it possible to instantly verify not only which other measures have the same dates, but also which have dates contiguous to the constitution object of the research and thus quickly to identify those that have a double tradition or the possible *iungendae*, as well as to resolve issues related to dubious dating

6. *Intercodices*: an open access software for both Windows and Apple users

Intercodices is a new tool also for another reason: it is freely available. The open access of intellectual works in general is undoubtedly encountering more and more supporters³⁶, taking root, despite the delicate balance between dissemination and proper appreciation of intellectual works, in scientific research in which the electronic publication of new scientific productions is even encouraged, alongside or in replace of the printed one. The obvious advantage of this form of digital representation is that of facilitating the access to and the dissemination of scientific information, overcoming – through the global digital environment – technical, legal and economic obstacles³⁷.

Intercodices is also a repertoire for all users, for those who use Windows and for those who use Apple system. Two different versions are available, one for Microsoft supporters and the other one for Apple supporters. These make possible that the whole scientific community, and not only Microsoft users, can use the potential of the software.

The opportunity to publish a software in open access for Windows and Apple users was made possible by funding ‘Strategical reserves 2019-2020’ from the Faculty of Law of the University of Bern as well, in the executive phase, by the Roman law expertise and the computer skills of Renato Perani³⁸. Access to multimedia content will be possible without downloading an application and therefore without the need for computer licenses pertaining to the University, as are required to install Amanuensis, e.g. The system is in fact proposed in a ‘portable’ version, able to start immediately without any software or app installations on each computer as well as directly from a USB stick.

³⁶ Since 2002, the year of the ‘Budapest open access initiative’, there have been several movements aimed at supporting open access at international level.

³⁷ See the incisive remarks on this subject by U. Agnati, «Per la ricerca», pp. 1 f.

³⁸ PhD in Roman and ancient law, Università degli Studi di Milano/Universität Bern.

The software *Intercodices* allows finally, with immediacy and rapidity not possible on paper, the comparison of the constitutions of the Theodosian Code with those, possibly corresponding, of the Justinian Code. It also makes it possible to navigate on every constitutive part of the constitution in the Latin and Greek languages in both Codes. Text, *inscriptio*, *subscriptio* and therefore also recipient, reigning emperors, place, where the emperor and his chancellery were, and the corresponding date are easily reachable with autonomous search masks, in order to facilitate the investigation of imperial legislation. The intersection and the combination of the investigation keys also make possible for everyone to explore new approaches and to frame, in an innovative perspective, also legal texts of which the significance is deemed to have been acquired, making the repertoire in any case a useful tool for interpretation and in-depth analysis of the complex legislative activity of this late phase of antiquity.