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Dubium sapientiae initium
(R. Descartes, *Meditationes de prima philosophia*)

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IN ONORE DI JEAN-MICHEL CARRIÉ

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CONSTITUTIONAL ASPECTS OF THE DIVISION OF THE ROMAN EMPIRE BETWEEN EAST AND WEST

For the ancients the Mediterranean Sea was the binding link between East and West, North and South because by sailing it one avoids cumbersome and long travels over land. Phoenicians sailed from Sidon and Tyre to the West and settled in Carthage and Spain, the Greeks sailed to the north and south, grain was transported from Africa and Egypt to Rome and elsewhere. So why is it that we nevertheless speak for the fifth and sixth century of East and West, and, by the way, not of North and South? From the perspective of trade, commerce, and economics there was no reason for such a divide. Commercial routes followed the most expedient shipping ways, with no dominant wind directions. Politically the lands surrounding the Mediterranean Sea were divided up into various kingdoms and many cities of various ethnics. Even after the Punic Wars Rome became the dominant power and ruled after the western part also the eastern part, there was no division between East and West. The only difference we see at that time is that in the eastern part Greek was the lingua franca whereas Latin had not yet arrived at that position in the West. Similarly religion was no barrière. Everywhere local divinities were worshipped, syncretism made acceptance of foreign divinities easy, for pagans the unifying worship of the emperor as another divinity was no problem, and even Christianity, once it aspired to hegemony, pursued heretics and pagans everywhere. Although we see heresies to some extent restricted to certain areas, like Monophysitism in Egypt, or Nestorianism to Syria, and Donatism to Africa. It would, however, be too much to see here a division into East and West.

Even the reorganisations under the Tetrarchy were in this respect neutral. Although Diocletian's setup involved two emperors and two

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caesars, connected in a collegial structure, connected by marriages, and evidently aiming at a hereditary succession, there seems not to have been a fundamental division of the empire. For strategic and administrative reasons there was a geographical division of responsibilities and power, East and West each with an emperor and a caesar, but Rome was still the sole capital[1]. When Constantine became sole ruler, Diocletian's reform disappeared. To govern the empire better four prefectures were set up: Oriens, Illyricum, Italy and Africa, and the Gauls (with Spain and Britain). Their areas were first still flexible but in the course of time became fixated. The prefects formed a college and formally acted as such, that is, as a unity, but their competencies were separated. There were, however, since 332 two capitals: Rome and Constantinople, each with a senate and an urban prefecture. But Rome was more important and it was its senate that had, at least in the beginning of the fourth century, the decisive voice in acknowledging an emperor. The doubling did not lead to a separation between East and West.

1. *Demougeot's theory of a gradual division in 395-410*

So when may we speak of a division of the empire in East and West[2]? Why should we speak at all of a division in East and West? Is it not a retrospective thing, looking back when in 476 in Rome the last emperor was deposited while in Constantinople it was business as usual? Or is it because of the Theodosian Code which was promulgated first in the East and then in the West? In 398 the western emperor indeed spoke of *meae partes* as opposed to the *partes Orientis* (CTh. 12.1.58, see below). Yet that does not have to mean that there was a formal division.

According to Demougeot the extent of the empire necessitated from Diocletian onwards to have more than one emperor and assign to each one a part of the empire in order to defend this against foreign enemies and domestic usurpers. This was alternated by periods of one emperor ruling the entire empire. Under Valentinian I and Valens there

[1] See A. Bowman, *Diocletian and the first Tetrarchy*, in *CAH XII*, Cambridge 2005, 74 ss.

[2] I would not suggest the year 212 AD when basically all peregrine inhabitants received Roman citizenship, although the fact that the Greek speaking East, accepting also Roman law, now called itself *Romaioi* and from that perspective that year might be called the origin of the Byzantine empire.

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was in 364 again a division. Still, this was not a definitive division, the hereditary principle was not yet established. Then a change took slowly place, beginning with the defeat and death of Valens at Adrianople in 376 and ending with the sacking of Rome in 410. In between there was a short unity of the empire under Theodosius, who attributed in 393 the West to his son Honorius and the East to his other son Arcadius. It was to be expected in view of the youth of both that usurpers would appear, but by appointing efficient guardians the hereditary principle worked. The intrusion and devastation of the West by the barbarians, contrary to the welfare of the East, contributed to a division, now permanent, of the empire[3]. As historical analysis of the events and policies in both *partes* Demougeot's view is carefully set up and notwithstanding the newer literature still persuasive. Yet, persuasive only as to the developments and politics. Then, was the division also a constitutional one? Because, following Demougeot's narrative, during the troubles after Honorius' death in 423 and later again after Valentinian's death in 455, Constantinople was engaged in Rome, and when in 476 Augustulus Romulus was deposited, the unity became visible again in that the barbarians in the West paid homage to the remaining emperor. Politics are fluid and not a stable criterium. But in view of Demougeot's references to the hereditary principle of succession, she seems to have seen this as the constitutionally relevant factor.

2. *A constitutional division:* imperium *and legislation as elements*

If a division between East and West should be legally meaningful, we must look for legally meaningful differentiations. The first of that is: Is there a constitutional difference visible? The hereditary principle cannot function here because it works in both cases (unity and division). There was no developed Roman constitutional theory. What had been a constitutional foundation of the imperial power, the *lex de imperio*, of which we have the one granting Vespasian his authority, constitutional because the people by a *lex* granted the emperor his legislative and executive powers, was no longer applied by the end of the fourth

[3] É. Demougeot, *De l'unité à la division de l'Empire romain*, Paris 1951, 88-89; Part II, on the period 395-410, works this thesis out. In Part III she discusses the principal aspects of the division after 410.

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century. What we have are some texts in which is said or suggested that even the emperor should obey the laws. So what established the authority of an emperor? What established an emperor at all? Was hereditary succession a constitutional criterion? It would if descent alone sufficed as qualification for the emperorship, but even Theodosius I had to appoint his sons as Augusti and thus as co-emperors and hope that they would be accepted notwithstanding their youth. A candidate had to be accepted by the reigning emperors and here dynastic connection was certainly an advantage, as later on with Marcian. It seems that this was one criterion for being emperor. Yet one may wonder whether this connection made it easier to accept a new candidate, as so to speak as a member of the family, than that it guaranteed acceptance.

But leaving this question aside, what founded and defined the powers of an emperor? What competence did he have? I shall leave aside the command over the military since that is either the prerequisite to becoming emperor, for which subsequent acceptance is required, or it is the consequence of having been accepted as emperor. It is a diffuse question because the Republic had more the nature of a bundle of functions and the empire continued in name the Republic[4]. It could

[4] Th. Mommsen as known did not express himself on the later Roman empire. In his *Römisches Staatsrecht*, Band II, Leipzig 1887, 718 ss., 745, he considered the conferment of *imperium* and *tribunicia potestas* as foundation of Augustus' exceptional position (and of his successors). H. Siber, *Römisches Verfassungsrecht in geschichtlicher Entwicklung*, Schauenburg in Lahr, 355 ss., sees the achievement of Augustus in letting the new imperial faculties as it were come forth out of the Republic, now without time limit, particularly the military *imperium*. According to Siber Diocletian did not create a hereditary monarchy, successors were usually appointed by their predecessors. But its contents was now absolutistic: the emperor is legislator, the imperial functions form a bureaucracy. What, however, formed the constitutional basis of an emperor Siber does not formulate. J. Bleicken, *Verfassungs- und Sozialgeschichte des Römischen Kaiserreiches*, Band 1, Paderborn 1981, 81-83 is of the opinion that in spite of all attempts to legitimise the empire it kept its military origin. But the principle of the 'Rechtsgedanken' (85) and other imperial was constitutive for the relations between emperor and leading social levels. He does not enter further discussion on the constitutional basis of the emperor. A. Guarino, *Gli aspetti giuridici del Principato*, in *Aufstieg und Niedergang der römischen Welt* II/13, ed. H. Temporini, Berlin-New York 1980, 3-60, reprint in Studi do diritto costituzionale romano, Napoli 2008, 353-412, sees the emperor's competence founded on the conferment of powers by the people's assembly (*lex de imperio*), influenced by the senate (37/389). On the superstructure of the Republic the Roman empire grew autonomously. From Hadrian onwards (or before) the

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well be argued that Diocletian's Tetrarchy introduced the collegiate emperorship with cooptation but that would not solve the point of legislative and executive competence[5]. In my opinion, the competence (or authority) to legislate and judge is a good anchoring point. It is because the authority of the emperors was, from Augustus on, based on their *tribunicia potestas* and *imperium proconsulare*. Both powers included the faculty to issue edicts, hence to legislate. Hence to examine legislation may indicate the constitutional limitations of emperors. The emperors refer to these two faculties deep into the fourth century. In the East Valens was the last to celebrate this, in 379 his successor Theodosius did not. In the West Gratian (367-383) did, probably because he was elevated by Valentinian I, but with Valentinian II (375-392) there is no reference to these nor with his successor Theodosius[6]. So in 379 resp. 392 the tradition ended, but we may assume not the effect. The references were in practice empty because the Augustan state organisation had changed a long time ago. The ending reflects the unwritten constitutional power of the emperors, as Ammianus calls it: the *auctoritas imperatoria*. The underlying Augustan faculties buttressed not only their power to issue edicts but also, in the fourth and fifth centuries, the first and second of the three forms of legislation: the edicts, the *leges edictales* and the *orationes in senatu habita/proposita*[7]. They are clearly based on their *facultas edicendi* and support

comitia centuriata were no longer convoked to confer the *imperium proconsulare maius et infinitum* to the emperor, it was directly conferred by the senate, while the *concilia plebis* continued to confer the *tribunicia potestas*, which became an attachment to the *senatusconsultum* with the *imperium* (38/390). J.M. RAINER, *Römisches Staatsrecht*, Darmstadt 2006, is restricted to Republic and Principate.

[5] Diocletian introduced the system of collegiate emperorship. Notwithstanding that this was for some periods exercised by one person, as a collegium may be reduced to one person, it would explain why laws were always issued in the name of all emperors and why the approval or appointment of current emperors was required for new emperors. Yet this does not settle the competence of each emperor and that is the question here.

[6] D. KIENAST, *Römische Kaisertabelle*, Darmstadt 1990, 328-336. Valentinian II was only for Illyricum, Italy and Africa emperor, not for the Gauls and perhaps it is due to this that Gratian did not grant him the two legislative faculties. With Theodosius anew we no longer see the two faculties used.

[7] N. VAN DER WAL, *Die Textfassung der spätrömischen Kaisergesetze in den Codices*, in *BIDR*, 1980, 1-27; N. VAN DER WAL, *Edictum und lex edictalis*, in *RIDA*, 3e s. 28, 1981, 277-313.

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the assumption that the legislative authority still resided in the *potestas* and *imperium*. This means that this power was, in as far as based on the *imperium*, restricted to the areas under their direct control. The term *imperium* is further used to designate the authority of the emperor to order and regulate. Thus Justinian repeatedly speaks of *sub nostro imperio*. But already before it has this meaning[8].

3. *A constitutional division in 438, and in 395-438*

Thus the faculty to issue laws and by that exercise legitimate power is a sound criterion for defining constitutional authority. Indeed, in 435 and 438 the emperor Theodosius II referred to legislation as coupled with the division between East and West. In two constitutions, CTh. 1.1.6 of 435 and Nov. Th. 1 of 438, he declares that in the future laws of the East must be confirmed and promulgated in the West before they are valid there, and the same goes, vice versa, for western laws. In line with this he sends in 448 a bundle of his laws to Valentinian and Valentinian duly confirms these in 449. Here we have a division in legislation for the areas under the control of the emperors. Such a legislative division bears again on the administration, it comes down to separate administrations.

Lokin has a different view. Discussing the state of the law after the Code, new constitutions lacked exclusivity and universality. According to him 'the scope of validity and distribution was determined by the jurisdiction of the magistrate to whom the Novel was addressed'. As to the division in east and west, here new laws were not automatically valid in the other part[9]. The Post-Theodosian Novels were accompanied by Nov. Th. 2 and reciprocated by Nov. Val. 26. The way Lokin reads these texts, the transmission, subscription and pub-

[8] CTh. 12.13.6, 16.8.9; C. 4.63.4 pr., 4.63.4.1 (*imperio nostro subiectus*), 11.51.1.

[9] J.H.A. Lokin, *Codifications of late antiquity, Exclusive and universal*, edd. Th.E. van Bochove-F. Brandsma-A.-M. Drummon-P.E.M.S. Sassen, Groningen 2023, 127 (and 131) says that CTh. 1.1.5 still implied automatically a validity in the other part on the condition of distribution by edicts whereas Nov. Th. 1.5 restricted validity to the issuing part. But CTh. 1.1.5 was a mere plan, to make an all-embracing *magisterium vitae*, after which universal validity would follow. As we know, it never came to that, nor to an automatic universal validity, and it also implies that at that time (429) validity was (still) restricted to the part of the issuing emperor.

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lication were sufficient to have these laws observed in the west. No ratification is mentioned. Their legal force the transmitted constitutions obtained from Theodosius' subscription and Valentinian's publication[10]. The rubrics of these constitutions carry *De confirmatione*, which Lokin interprets as 'validation', 'declaration of validity', rather than as ratification[11]. Apparently Lokin assumes that Valentinian's letter in which the publication was ordered was merely executory. But he passes over an important point: the nature of Valentinian's publication orders. These were an integral part of his legislative authority. The publication order implies a legislative act. Then, what if Valentinian had refused to publish? The transmitted laws would not have become western laws. Lokin suggests Valentinian just had to do what Theodosius ordered and perhaps Theodosius thought that way, perhaps Valentinian was only too happy to please his father-in-law, yet it does not change the fact that that although Theodosius did not ask Valentinian to confirm his novels, Valentinian's order to publish implied confirmation.

This is confirmed by Nov. Anth. 2 of 468. The emperor Anthemius had asked his eastern colleague Leo for advice concerning *bona vacantia*. Leo gave the answer in the form of an issued novel which he sent to Anthemius. Anthemius said: *quoniamque mundanis compendiis proficit, ut circa regendum utrumque orbem id praecipue custodiendum credamus, quod deliberatio communis elegerit, legem defaecatam libenter amplexi* – 'Since it is profitable to the welfare of the world that We should believe that with regard to ruling both worlds We should observe especially that which Our common deliberation has chosen, We have gladly embraced this revised and emended law' (tr. Pharr). After which Anthemius orders the dissemination of the novel. It is clear that the approval of the receiving emperor was necessary, even if he had asked for the law[12]. Hence we must assume that Theodosius knew that approval was necessary. He may not have wanted to mention this just as he had imposed on Valentinian his codification project (whose consent, however, his praetorian prefect did not fail to mention). The rubrication of the two Novels as *confirmatio* in the usual sense of 'confirmation', 'corroboration', is correct.

[10] J.H.A. Lokin, *Codifications* cit., 129-130.

[11] J.H.A. Lokin, *Codifications* cit., 127 nt. 400.

[12] J.H.A. Lokin, *Codifications* cit., does not deal with this transmitted novel.

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Nov. Th. 2 also reveals something about the moment a law became valid. Theodosius says a) that ongoing lawsuits should be finished under the new law, and b) that lawsuits that have been terminated may not be resuscitated. If publication had been the moment a law became valid, ongoing lawsuits should be finished according to the old law because they started on that basis. Theodosius' prescription deviates from this principle, which implies that the published laws were already valid and that, consequently, the lawsuit should be done according to the new law. For the same reason people might argue that a finished lawsuit should be revived because it should have been dealt with according to the new law. The consequence would be an at random re-litigation, depending on the success a party expects. Theodosius blocks this possibility[13].

It has been suggested that the custom of each part to mention its own consul first in the dating of years would indicate territorial autonomy[14]. But this happened only after 411. Before the consular sequence was determined by seniority and the authors of Consuls in the Later Roman Empire suspect that after 411 difficult communications were the reason why each part now put its own consul first[15].

But did Theodosius create this division in 438? Rather not, then he would have made a decision in this matter for his son-in-law without even discussing it with him. Several references in earlier law show that the legislative activity of one *pars* interfered with that of the other *pars*. If laws had been valid everywhere, interference should not have posed a problem. If it did, it would demonstrate that there had been no communication before[16]. CTh. 6.23.4 of 437 refers expressly to

[13] See footnote 32 for the moment a law became effective (gained validity). M. Kaser-K. Hackl, *Das römische Prozessrecht*, München 1996², 609, under II.2, merely state that judgments should as to their contents apply the valid laws. They do not discuss the case of supervenient new law.

[14] I. Basić-M. Zeman, *What Can Epigraphy Tell Us about Partitio Imperii in Fifth-Century Dalmatia*?, in *Journal of Late Antiquity*, 12 (2019), 88-135, here 104, who base on this that the island of Lopud was part of the western *pars imperii*.

[15] R.S. Bagnall et al., *Consuls of the Later Roman Empire*, Atlanta 1978, 22.

[16] Demougeot herself, though saying *en passant* that all laws were valid everywhere (88), contradicts herself when speaking of Stilicho's measures as pertaining to the West (218: CTh. 11.1.26 jo 1.5.11; 15.3.4). This she apparently based on the place of issuing (Milan), the texts themselves give no ground for a geographically restricted application. But perhaps her first statement was meant only for the period up to 390.

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the constitution CTh. 6.23.3 of 432 and confirms the privileges of the decurions and *silentiarii*, granted by Valentinian III: *i.e.*, those in the East received what had already been granted to those in the West. It demonstrates that a law was not *ipso facto* valid everywhere.

In CTh. 16.5.48 of 410 Theodosius II rejected the idea that Montanists (Priscillianists and other sectarians) had the right to enjoy an immunity from the duty to perform lower imperial staff or municipal functions. They apparently claimed this on account of their heresy in accordance with a law promulgated in the West (*ex lege quae in occidentalibus partibus promulgata*) – ergo: not issued by Theodosius (it is presumably CTh. 16.5.40, a. 407)[17]. Does this mean that this law was valid in the East until abrogated? But Theodosius does not abrogate anything, just rejects it. Even if one would assume that the western emperor could issue laws for the entire empire, the validity of these would also depend on his power to enforce them, or else we deal with a hollow definition of legislative power. The fact that Theodosius mentions that the law had been issued in the West says, actually, everything: he had not issued it. Riedlberger deduces from the rejection that Theodosius considered the law valid, scil. in the East[18]. That is too contrived: If any arguments in litigation are proffered, their rejection does not mean that they were good: wrong and invalid arguments will be rejected as well.

Another case is the western law CTh. 12.1.158 of 398 which relates that many city councils of Apulia and Calabria were tottering because Jews presented a law issued in the eastern part of the empire (it was CTh. 16.8.13 of 397) which granted them immunity: *quadam se lege, quae in Orientis partibus lata est*. Apparently, they pretended it exempted them too. The emperor orders the Jews to fulfill their municipal duties, 'while the said law, if it exists, which is sure to be harmful for my part, vanishes' (*eadem, si qua est, lege cessante*, *quam constat meis partibus esse damnosam*). The *si qua est* should be read as a legal proviso, not as an acknowledgement that the law existed and was valid in the West.

[17] *The Theodosian Code*, by C. Pharr et al., Princeton (NJ) 1952, mentions several constitutions, but these do not contain the stated prohibition, nor does CTh. 16.5.40 as suggested by P. Riedlberger, *Prolegomena zu den antiken Konstitutionen, Nebst einer Analyse der erbrechtlichen und verwandten Sanktionen gegen Heterodoxe*, Stuttgart-Bad Cannstatt 2020, 100-101. Riedlberger *ibid*., 100 nt. 152 bases his reference on the exclusion of these heretics from public life.

[18] P. Riedlberger, *Prolegomena* cit., 100-101. This point really did not deserve a treatment of two pages.

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Lokin cites these two constitutions as proof that the inclusion in the Code gave every constitution a universal scope through the universal scope of the Code. Thus they could be cited by people in the other part[19]. However, at the moment these constitutions were issued there was not yet a Code and the constitutions had in any case a limited area of application; as Lokin also admits. His hypothesis of universality as the consequence of the inclusion in the Code only relies on his argument that because the compilers deleted the final formula and the dispatch order, every law became applicable everywhere. But why did they delete this? Because, so Lokin, they were superfluous since the Code applied everywhere[20]. This seems to me rather a circular argument. Since the Code was, as Van der Wal defined, a collection of imperial constitutions that retained their original legislative force, and not a codification that replaced their original force with a new legislative force (through the Code), the included constitutions cannot have gained universal validity as Lokin argues[21]. Moreover, there is no text of Theodosius or Valentinian which declares this.

Another example is CTh. 7.16.1 and 2. In the first of 408, the western emperor Honorius lifts the surveillance of harbours and coasts, set up by Stilicho, so that commerce from the East may have unhindered

[19] J.H.A. Lokin, *Codifications* cit., 110.

[20] J.H.A. Lokin, *Codifications* cit., 106-107. This grounds on Lokin's view that these elements defined the area of application, although he undoes this argument by mentioning the remains of distribution orders (as in CTh. 7.7.1, on 108): apparently the addressee did not necessarily have to be the only addressee. I agree with him that the Code could be cited everywhere in the empire after 438. The question is: for textual correctness only or also for its contents?

[21] J.H.A. Lokin, *Codifications* cit., 110. Lokin's claim on 50 nt. 169, 'Any incorporated constitution, obsolete or not, has become a valid law through incorporation.', is obscured by his admission on 51 that the lex posterior rule saved the committee the difficult task of finding and deleting the obsolete rules. I concede to Lokin that the Code contains contradictions (J.H.A. Lokin, *Codifications* cit., 111) but I have difficulty with his statement that an obsolete rule became valid through inclusion: what is, after that, obsolete? Perhaps Lokin thinks this leads to contradictions, after which, thanks to the dates, the later rule sets aside the older. But if all rules are by a single act valid, they lose their original date of validity, they compete on the same level and the final validity must be decided by a synthesis of the law through the lex specialis derogat legi generalis rule etc. It is not impossible that this happened in the early sixth century in the east (cfr. the *Summaria Antiqua*). However, I cannot agree with Lokin's claim since I accept, as he does, Van der Wal's characterisation of the Code.

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access; in the second, of 410, the eastern emperor Theodosius sets a similar system for the East and closes access from the West unless the traveller has a letter from Honorius for the emperor. Both emperors agreed to this. Here we see how each *pars imperii* acts for his own part, in the West by a decree of the prefect, in the East by a constitution of the emperor. Both emperors first admonished the other repeatedly (*inter me domnumque et patruum meum Honorium vicissim recurrente admonitione convenit*). If Honorius could have acted also for the eastern part, admonishing would not have been necessary. It implies that he had no legislative or administrative authority in the East. The same would then go for the East. Here legislation is explicitly connected with and restricted to the East or the West, or, as the emperors (or more likely, their chanceries, Honorius and Arcadius were 14 and 20 years old) say, the *partes occidentales* and *orientis*. That allows us to speak of East and West in the Roman empire, be it restricted for the moment to legislation and consequently administration.

Another example: if every emperor had legislative power for the entire empire and laws were consequently valid in both *partes*, why was CTh. 5.18.1 with its division of offspring of *coloni*, which served later in the West as the ground for the colonate as a personal status, not also at once applied in the East? Why would Justinian have had to introduce a division of the offspring of a marriage between *coloni* from different estates in 539 in Nov. 132.3, if CTh. 5.18.1 had been valid in the entire empire? One may say: because it was abolished by not being included in Justinian's Code, but that is not an answer because it implies that it was valid in the East and would require also an explanation why it was abolished. If the problem was evident in 539, it will also have been evident in 534 or 529. Further, in the East under Justinian existed the colonate as developed during the fourth century with its link to the poll tax[22].

In connection with this: In the East in 371 existed the legal institution of the 'free' colonate, in which people were no longer as *coloni* subjected yet had to remain on a plot of land or in a village and had to work the land (C. 11.53.1). That institution was imposed on three provinces, but as such it could have been imposed elsewhere too. Perhaps it was: the relevant constitutions in Justinian's Code must have been included in Book 5 of Theodosius' Code. If the institution had been valid everywhere, why was it not applied in the West, making the later

[22] See my *The colonate in the West after 500 AD*, in *ZSS*, 141, 2024, 285-348.

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personalisation of the colonate through CTh. 5.18.1 superfluous?

These texts date from after 395 and fit Demougeot's thesis if we assume that it implied also a constitutional division (which, however, is not clear). Yet there is a difference. If we take her view, such cases might merely reflect differences in policy and not a constitutional division of legislation, and they might disappear at a wink. If it is constitutionally founded, however, the difference remains, even if policies align. That is what the above-cited cases show.

4. *A constitutional division before 395: 364*

On the other hand, is there a moment before 395 where such a division might have taken place? Leaving aside the moments when the administration of the empire was temporarily divided[23], let us focus on the year 364 which offers itself as more suitable than 395. In that year Valentinian had been elevated to the emperorship and he elevated his brother to the same status (*particeps legitimus potestatis*)[24]. On 1 June he met his brother Valens in Mediana in Thrace. From then on a series of divisions occurred. In Mediana they divided the *comites* between them, that is, they divided the army, whereby Valentinian got the West and Valens the East. After that they moved to Sirmium: *diviso palatio, ut potiori placuerat, Valentinianus Mediolanum, Constantinopolim Valens discessit*, which I interpret as: 'after having divided the administration as it pleased the stronger, and Valentinian left for Milan while Valens left for Constantinople'[25]. Then, they had already divided the army between them which implicitly fixed their residence. *Palatium* may stand for the actual building but also for the court and administration, the *militia palatina*; and it is not likely that they split up the imperial buildings. The equality between the brothers is nicely mirrored in the official forms of address and legislation etc. Valentinian and Valens met

[23] See A. Demandt, *Die Spätantike*, Berlin 2007², 259: 313 till 324 between Constantinus and Licinius, 337 till 351 after the death of Constantius, in 364 after the elevation of Valentinian, 375 (till 392?) after Valentinian's death (this was in effect in the West, not in the East), and finally in 395 after Theodosius' death.

[24] Amm. Marc. 26.5.3.

[25] Amm. Marc. 26.5.3 and 4 (*Et post haec cum ambo fratres Sirmium introissent, diviso palatio, ut potiori placuerat, Valentinianus Mediolanum, Constantinopolim Valens discessit*).

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in Mediana in Thrace 1 June 364. On 24 August 367 Valentinian raised his son Gratian to the rank of Augustus. He made him, as with his brother in 364, the equal of himself (*sibi pari potestate collegam*) and not a Caesar. Only Marcus Aurelius before had raised Lucius Verus to the same rank as Augustus (*absque diminutione aliqua auctoritatis imperatoriae socium fecit*)[26].

5. *Characteristics of a constitutional division: the* auctoritas imperatoria *and the validity of laws*

Could Valentinian divide his powers? In the Republic, consuls had full *imperium* and could annul at any moment the decisions and edicts of the other, but they could also agree to rule alternatively in times of war, namely one day one consul, the other day the other consul. If they could restrict their *imperium* there is no reason to assume that the emperors could not have decided similarly regarding their *imperium* or, as Ammianus calls it, their *maiestas imperatoria*. We are already in a time where the authority of the emperor is formally still based on the *potestas tribunicia* and *imperium proconsulare*, but in reality on unwritten constitutional law. In line with that is the later expression *subiecti imperio nostro* for the inhabitants, particularly used by Justinian[27] but previously also by Theodosius[28] and Leo[29]. It covers both Romans and non-Roman residents (the Scyri, the Goths, etc.) and visitors and is based on the *imperium* which extends to all[30]. The

[26] Amm. Marc. 27.6.16: *In hoc tamen negotio Valentinianus morem institutum antiquitus supergressus non Caesares sed Augustos germanum nuncupavit et filium benivole satis. Nec enim quisquam antehac adscivit sibi pari potestate collegam praeter principem Marcum qui Verum adoptivum fratrem absque diminutione aliqua maiestatis imperatoriae socium fecit*; in the same sense A. Demandt, *Antike Staatsformen*, Berlin 1995, 571 and A. Demandt, *Spätantike* cit., 259 without, however, references for the civil servant careers.

[27] C. 1.27.2.4, 4b; 1.51.14; 3.28.34.1; 3.33.16.2; 5.4.23; 5.27.9; 6.30.22.16; 6.51.1.14a; 7.24.1; 7.40.1.1b.

[28] C. 4.63.4 pr.-1: *Mercatores tam imperio nostro quam Persarum regi subiectos*.

[29] C. 4.42.2.1.

[30] It is seductive to see here the equivalent of the later term 'Untertanen'. Constitutionally the inhabitants had now only on local level autonomy and for the rest were indeed subjected to an autocracy.

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emperors may have agreed not to hinder the other in the administration including warfare and legislation, restricting their authority to their own part. Constitutionally we have here a good anchoring point to speak of East and West in the Roman empire, and the emperors express themselves in this sense. It does not have to mean that this division had wider consequences in the sense that the empire was divided. Valentinian and Valens may have considered themselves as forming a *collegium*, a unity, like the consuls, but each with his own task. As long as this pretense of a *collegium* is upheld, the unity of the empire is upheld as well: it is one *corpus*.

Assuming that the link between legislation and the *potestas tribunicia* and *imperium proconsulare*, later comprised as *auctoritas imperatoria*, is correct, it implies in reverse that these were, as in the early Principate, restricted to the areas for which the *imperium* was granted. Later constitutions use the expression *imperio nostro* in the context of the executive imperial authority[31]. This does not have to mean that the *collegium* of the emperors did not mean anything. As said before, considering that the appointed emperor always needed the approval of sitting emperors, this could have been the (only) constitutional function of the imperial collegium. But their *imperium* was restricted and so was their legislative power.

Another argument follows from the validity of the law. This did in those days not depend, as in our days, on its publication. It was valid from the moment the emperor issued it[32]. I do not want to exclude the

[31] See CTh. 12.13.6, 16.8.9, C. 4.63.4 pr.-1, 11.51.1; Post-Theod.: C. 1.14.12 pr.; 1.17.2 pr., 1.17.2.23, 1.27.1.8, 1.27.2.4a, 1.51.14 pr., 2.27.5 pr., 2.58.2 pr., 3.1.13.6, 4.41.2 pr., 4.42.2.1, 5.4.23 pr., 5.5.9, 5.27.9 pr., 6.30.22.16, 7.40.1.1b (many under Justinian).

[32] According to Kreuzsaler new laws were at once valid by the *datio*, viz. the moment the emperor approved the text by, apparently, signing it (e.g., signing the letter to an official as the *Novellae* demonstrate). But it was necessary to publicise new laws, usually by hanging out the text, in order to make the law known to the people. For legal acts, done between the moment of becoming valid and publication, one could plead ignorance of the law as an excuse. See C. Kreuzsaler, *Aeneis tabulis scripta proponatur lex*, *Zum Publikationserfordernis für Rechtsnormen am Beispiel der spätantiken Kaiserkonstitutionen*, in *Selbstdarstellung und Kommunikation*, ed. R. Haensch, Vestigia 61, München 2009, 209-248, here 209-220, who gives examples from the Posttheodosian Novels with orders to publish the law, but these merely serve the efficacy of the law and appear not to be a condition for its validity. Its purpose is to take away the possibility of invoking *ignorantia iuris* as excuse.

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possibility that Valentinian thought that when he issued a law, it would be valid in the entire empire, whether as such or by assuming that he dominated his brother (if their relation was as historians assume). But issuing a law is one thing. The other thing is publication and enforcement. Here the division would at once have set the limit. When the two brothers divided the prefectures amongst them, this would not have excluded communication between all of the prefects. But the fact that the emperor's *imperium* which included the authority to appoint functionaries was restricted to his *pars* made that the prefects and governors of one half were not under the authority of the other half's emperor. An issuing emperor could not order the prefects of the other part to publish his *leges edictales* or enforce them in his court. Although the prefects formed a college across both parts, and their ordinances (*edicta*) were issued in the name of all, each was solely responsible for and authoritative in his own prefecture. That they had in common with the provincial governors. This division meant further that the judicature was divided. A case in one part of the empire could only be appealed within the judicial framework of that part. If one emperor could not appoint functionaries in the other part he could not judge there in appeal and consequently, he would be not the supreme judge in that part. It would be strange if he nevertheless had the power to issue laws there: how might he enforce their contents? An eastern or western case remained in the eastern or western judicature. That restricted *ab initio* the validity of a law, as the case of CTh. 12.1.158 (see above) shows where the constitution is denied application in the other part and by that validity. To maintain that any law was valid everywhere unless not applied in the other part is merely theory: validity is only there where the issuing emperor has the power to enforce his constitutions and that was not the case. If a law of one part was put before the court of the other part, it would not be valid unless accepted by the emperor, which acceptance would be an act of implicit legislation. Perhaps Valentinian I and Valens did not realise it when they split the empire, but *in nuce* the constitutional division was there and it will have become apparent in the course of time. This may already have been the case in the Tetrarchy

The fact that this excuse might be used proves already that the norm was direct with the *datio* valid (Kreuzsaler *ibid*., 230-233.). In a similar direction already M. Bianchi Fossati Vanzetti, *Le Novelle di Valentiniano III, I fonti*, Padova 1988, rejecting, however, both the moment of publication (63) as well as the moment of *datio* (66) as constitutive for the validity. See also above, at note 13, on Nov. Th. 2.

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but Constantine would have undone this[33]. Perhaps Theodosius I might have undone it too if he wanted to but the time he ruled alone over the empire was short and maybe he envisaged already from the beginning of that moment to have his two sons succeed him each in his own part.

6. *Examples of legislative division in 364-395*

We have indeed evidence that the legislation was also in this period restricted to the *pars* of the issuing emperor. There is the case of the famous rhetor Libanios. Libanios had a natural son who according to the law could not inherit. He asked the emperor Valens to confirm a law issued by Valentinian that allowed one to leave part of one's estate to one's natural son. Contrary to Riedlberger, who assumes that the law was also valid in the East[34], it is clear that neither Valens nor Libanius considered the law as *ipso iure* valid in the East: a confirmation or special grant, inspired by the law, was required, as Gualandi already in 1959 submitted[35].

Another example is CTh. 10.19.7 of 370 or 373 in which the western emperor Valentinian refers to a constitution issued by his brother Valens for the East (*dominus noster Valens per omnem Orientem ... iussit*), which Valentinian ordered Probus, the Praetorian Prefect of Italy and Illyricum, to establish the same by his edict in the provinces of his diocese of Illyricum and Macedonia, the latter forming part of the Illyrican prefecture until 395. The purpose of this constitution was to keep vagrant miners (*metallarii*) away from the property of landholders where they were hiding. Perhaps Valentinian had CTh. 10.19.5 in mind, established for the whole (of the eastern part) of the Empire (*nullam partem Romani orbis credidimus reliquendam*).

These two examples are strong but not unequivocally clear. However, a third example leaves no doubt about the territorial

[33] Constantine did away with Licinius' (eastern) laws or appropriated them: CTh. 15.14.1 pr.

[34] P. Riedlberger, *Prolegomena* cit., 77 ss. The assumption rests on the underlying assumption that laws were valid everywhere, for which see above.

[35] See for an extensive analysis B. Sirks, *Libanios' son and CTh. 4.6*, in *Scritti in onore di Mariagrazia Bianchini*, edd. M.P. Pavese-R. Laurendi, Torino 2023, 551 ss.

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limitation. Regarding to limitation of prescription, there existed Constantius' constitution of 349 which introduced a limitation of prescription of forty years for anything except money claims (CTh. 4.11.2, 349). In the West CTh. 12.19.2 of 400 modified Constantius' constitution. Fugitive *coloni* could be recalled, unless a limitation of prescription applied, namely thirty years within the same province and forty years in another province if they had served a town. In the East, it was replaced by Theodosius' constitution of 424 which introduced a general prescription of thirty years (CTh. 4.14.1, 424 E = C. 7.39.3) and replaced all former prescriptions[36]. This legislative difference was not set aside until Theodosius' constitution was copied in the West in 449 by Nov. Val. 27. It set aside for the West the law of 349 (in as far as it was not modified by CTh. 5.18.1)[37]. For claims which were already before the court, the law of his father Honorius, that is, CTh. 5.18.1 (419 W), as regards the period of limitation (thirty years for male, twenty for female *coloni*), as well as its section on the attribution of offspring, had to be observed (Nov. Val. 27.6).

Those who assume the Code contained also obsolete laws might argue that CTh. 4.11.2 was already out of date but then they have to assume either that CTh. 4.14.2 was universally applicable and outdated CTh. 4.11.2, in which case, however, Nov. Val. 27 would be superfluous; or, that CTh. 4.14.2 was only applicable in the East, in which case there is no reason why CTh. 4.11.2 should have been obsolete in 438: it would still be valid for the West and issuing Nov. Val. 27 would have made sense.

The case proves three things: a) that Theodosius' constitution was only valid in the East when issued (or else there would have been no reason to include Constantius' constitution in the Theodosian Code); b) that its inclusion in the Theodosian Code did not make it valid in both *partes imperii*; and c) the independence and continuity of the western legislation and, consequently, also of eastern legislation. If this was the case after 438, when Theodosius II was so keen to create a legal unity of the empire, is it then to be expected that before 438 there existed legal unity without more, notwithstanding the division since 364?

[36] M. Kaser, *Das römische Privatrecht*, I. Abschnitt, München 1971², 285-286.

[37] Yet Valentinian III had already in 451 to modify it by Nov. Val. 31 because *coloni originales* were lost by it and so the unity here was short-lived: see M. Kaser, *Privatrecht I* cit., 285.

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It may be clear that in the face of these arguments, the view that all constitutions were *ipso iure* valid everywhere in the empire needs a convincing substantiation, which has not yet been brought forward[38].

The fact that there existed regionally or provincially restricted regulations complicates this point, as does the fact that until 364 constitutions, unless restricted in this way, were valid in the entire empire, forming a foundation for later divergent regulations. Thus there were several *corpora* of *navicularii*, each with its own structure. Only the rules for that of *Oriens* were included in Justinian's Code, not that of *Africa*[39]. The same we see occur with the *coloni originales* where in as far later dispositions which do not build on general dispositions but are new for a *pars* (CTh. 5.18.1, 5.19.1) are not included in that Code if not eastern[40]. Justinian did not have a reconquest of the West in mind previous to 534 and was therefore not interested in including western rules in his Code[41]. In 554 he simply imposed his eastern code on Italy and so realised the legal unity Theodosius II had wished for.

[38] One last point: is it possible that Theodosius I, who after the death of Valentinian II in 392 ruled as sole emperor, united constitutionally the empire before dividing its government again over his two sons? Theoretically it might be, being legislatorially visible in a universal validity of all constitutions. But no such effect is visible and considering that he appointed already in 393 Honorius as his co-emperor, to be the emperor in 395 for the West, it is not likely. The division of the empire was a military and administrative necessity, with political risks, but these could be constrained if the emperors were related by family ties.

[39] A point not dealt with in Chr. Heuft, *Spätantike Zwangsverbände zur Versorgung der römischen Bevölkerung, Rechtshistorische Untersuchungen zu Codex Theodosianus 13.5-9 sowie 14.2-4*, Hildesheim-New York 2013. Likewise, he has not seen the real innovation and importance of these *corpora*, namely that they formed long-term aggregations of capital, destined to perform public services; as were the *curiae*. To focus on the 'Zwang' is missing the point and continue walking the trodden path of Waltzing.

[40] The constitutions particular to Illyricum, Thrace, and Palestine (C. 11.51-53) were of course restricted to these areas but introduced the 'free' colonate as such, which was expanded in application in the East (C. 11.48.19). Such an application we do not see in the West. There the emphasis lay at the beginning of the fifth century on recall after a long time, which, since children were now involved, included descent as a decisive criterion. Descent was also important in the East but always next to an agreement and administrative proof. The solution of the 'free' colonate was not chosen in the West. Such a choice would have offered itself if the relative constitutions had also been valid in the West.

[41] See the contribution of Noethlichs in M. Meier, *Justinian*, Darmstadt 2011.

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Apart from Lokin's hypothesis that inclusion in the Theodosian Code made constitutions universally valid (a hypothesis not proven)[42], it is undeniable that some western laws were included in Justinian's Code. But some refer to a particular western situation as C. 11.14.1-2 (the *decurii* of Rome), C. 11.15.1 (the *corporati* of Rome), C. 11.23 (the *canon frumentarius urbis Romae*) or C. 11.27 (the *nautae Tiberini*; although one wonders why, at a moment Italy had not been retaken, such laws would be included. Then, Justinian expressly says when a constitution should apply outside of the East (as in Nov. 14; or in C. 1.3.51.2). Others may have been chosen as a useful elaboration of a constitution, valid for the entire empire. Inclusion in the Code would have given it validity in the East anyway because Justinian confirmed his Code as exclusive[43].

7. *The question of a constitutional division in legal history since 1939 discussed*

It is interesting to see that the division was for a long time simply a recorded fact. It was only after Demougeot in 1951 that ancient historians began to focus on East and West as a distinctive partition. But why did they not pay attention to the legal aspects? One reason is our trade: for us legal historians the question of whether there was a formal division is before all a constitutional one. It was no one less than Arnaldo Biscardi who already in 1939 broached that question when discussing the Lex Citandi of 426[44]. That lex raises the

[42] See above, note 21.

[43] Noteworthy are C. 1.14.2 and 3, 1.20.7, 6.56.5, wherein the addressee *ad senatum* the words *urbis Romae* were not copied. Assuming that a copy of the Theodosian Code was used, we must assume that on purpose these words were left out. The same puzzle gives C. 6.51 on the abolition of the *caduca*. It was addressed to both senates, although in 534 Rome had not yet been retaken.

[44] A. Biscardi, *Studi sulla legislazione del Basso Impero*, I. *La legge delle citazioni di Valentiniano III*, in *Studi senesi*, 53, 1939, 406-417. Against the current assumption that any emperor could legislate for the other part, Biscardi maintained that he could ascribe the *Lex Citandi* to Valentinian III alone, that is, his chancery, and not to Theodosius who might have sent it to the Senate of Rome (408). According to him this constitution was occasioned by the low standard of the western law school, originated in the western part, and was applied in the western part. Biscardi thus questioned as the first scholar the current opinion.

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constitutional question of what valid law is and consequently who can issue law. Other legal-historical articles followed. Luzzatto showed in 1946 that some constitutions applied only in some provinces[45], while de Dominicis observed in 1954 that constitutions in the Theodosian Code were addressed to functionaries of that part of the empire ruled by the emperor who issued the enactment[46]. Gaudemet reacted to that in 1955[47]. Differentiation according to provinces existed in the field of taxation, as we know from Déléage in 1945[48]. A similar phenomenon can be observed in the case of the *corpora navicullariorum*. The studies by Volterra in 1937 and Gaudemet in 1954 and 1975 concerning the rights of mothers regarding succession to the estates of their deceased children, or concerning the duties of Jews towards the town council (*curia*)[49], show that in these sectors of the law differences existed between East and West[50]; likewise a study of Voci of 1989 on marriage and natural children shows the difference[51]. It is a pity these studies

[45] G.I. Luzzatto, *Ricerche sull'applicazione delle costituzioni imperiali nelle provincie*, in *Scritti i.o.d. Ferrini*, Milano 1946, 265-293.

[46] M.A. de Dominicis, *Il problema dei rapporti burocratico-legislativi tra «Occidente ed Oriente» nel Basso Impero Romano alla luce delle inscriptiones e subscriptiones delle costituzioni imperiali*, in *RIL*, 87, 1954, 329 ss.

[47] J. Gaudemet, *Le partage législatif au Bas-Empire d'après un ouvrage récent*, in *SDHI*, 21, 1955, 317-354.

[48] A. Déléage, *La capitation au Bas-Empire*, Mâcon 1945.

[49] E. Volterra, *L'efficacia delle costituzioni imperiali emanate per le provincie e l'istituto dell'«expositio»*, in *Studi Besta*, Vol. I, Milano 1937, 447-477 (*Scritti giuridici*, Napoli 1993, Vol. IV, 389-417); J. Gaudemet, *Le partage législatif dans la seconde moitié du IVème siècle,* in *Studi De Francisci II*, Milano 1954, 319-354 (= *Études de droit romain*, I, Napoli 1979, 129-165); J. Gaudemet, *La législation du IVème siècle, programme d'enquête*, in *AARC*, 1, Perugia 1975, 143-159.

[50] The example of CTh. 12.1.158 (a. 398 W), see text above; see on this E. Volterra, *L'efficacia* cit., 447-477; further literature: J. Gaudemet, *Partage* cit., 328-329; J. Gaudemet, *Législation* cit., 150-151 with notes; further J. Gaudemet, *La formation du droit séculier et du droit de l'église aux IV^e^ et V^e^ siècles*, Paris 1979[2], 29-30; P. Voci, *Polemiche legislative in tema di matrimonio e di figli naturali, Nuovi Studi sulla legislazione romana del Tardo Impero*, Padova 1989, 219-249 on CTh. 3.7.3 and 4.6.7-8, dealing more with the Post-Theodosian era. For Voci 1989, 219 it is a matter of fact that each emperor legislated for his part only and that his laws were valid only for his part. The laws could become universal by extension, but also lead to a conflict.

[51] P. Voci, *Polemiche* cit., 219-249.

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have escaped the attention of ancient historians, even of Drijvers who, some time ago, made the for himself surprising observation that the empire might have been divided already in 364[52].

8. *Conclusions*

Although the constitution of the Roman empire of the fourth and fifth centuries is rather diffuse, some distinctions are visible. Legislation, since it is connected with *imperium*, is a good focussing point to look for constitutional elements; leaving the military command aside. Assuming that Diocletian's collegiate structure survived would explain the later formal unity in legislation, or we must assume that in 364 and 393 such a collegiate structure was (re-) created. Laws were valid at the moment of issue but their geographical extent depended on publication and judicature. The first was to let the inhabitants know there was a new law, the second was to apply the new law. These factors restricted the legislative power of an emperor to his own *pars imperii*. Although a law of one part might be used in the other part in a procedure, it depended on the emperor of that part whether it was acceptable and consequently, it had no validity there on its own. Later Theodosius II wished to restore legal unity in the empire, keeping the legislative autonomy of East and West (and also their administrations) but wishing that all legislation would be reciprocally sent over and confirmed. If that had been fully executed (which is not the case), he would have concretised the concept of collegial emperorship by creating legal parallel worlds.

[52] J.W. Drijvers, *The divisio regni of 364: The End of Unity?*, in *East and West in the Roman Empire of the Fourth Century. An End of Unity?*, edd. R. Dijkstra-S. van Poppel-D. Slootjes, Leiden-Boston 2015, 82-96. He gives a good survey and sets out the arguments for a real division in 364. It amounts according to him to a division of imperial courts, administrative bureaucracies, and armies. That is certainly correct but the division entailed more and it does not say anything about a constitutional division. The first suggestion outside the legal-historical circles for a division in 364 came from A. Pabst, *Divisio Regni, Der Zerfall des Imperium Romanum in der Sicht der Zeitgenossen*, Bonn 1986. This divide between the two disciplines is most unfortunate.

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Sintesi

Per il V secolo è comune supporre, sulla scia dell'opera fondamentale di Demougeot, una divisione dell'impero romano in una parte orientale e in una occidentale, ciascuna con il proprio imperatore e il proprio destino politico. Seppure il suo lavoro si basi su elementi storici e politici, la domanda rimane: se e quando l'impero fu diviso costituzionalmente. Per la storia giuridica questa questione è importante in quanto determina non solo l'aspetto esecutivo, ma anche e soprattutto le competenze legislative e giudiziarie degli imperatori e, successivamente, la validità e l'applicazione delle loro leggi. Questo, ancora una volta, è importante per lo studio delle leggi del Codice Teodosiano.

Parole chiave

Costituzione – Divisione – *Pars imperii* – *Codex Theodosianus* – *Imperium* – Legislazione.

Abstract

For the fifth century it is common to assume in the wake of Demougeot's seminal work a division of the Roman empire in an eastern and western part, each with its own emperor and its own political fate. Yet her work is based on historical and political elements and the question remains, whether and if so, when the empire was constitutionally divided. For legal history this question is important since it determines not just the executive but also and foremost the legislative and judicatory competencies of the emperors and, subsequently, the validity and application of their laws. That, again, is important for the study of the laws in the Theodosian Code. It is submitted that the legislative and judiciary competencies serve well as indication of the constitution framework of the empire, and further, that as soon as the prefectures were divided amongst emperors, it implied that these competencies were restricted to these prefectures and hence to the areas covered by them, dividing constitutionally the empire in two parts, the East and the West. Regarding the moment this took place, the year 364 serves better as the beginning of the division than Demougeot's 395.

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KEYWORDS

Constitution – Division – *Pars imperii* – *Codex Theodosianus* – *Imperium* – Legislation.

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