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LEGAL EDUCATION, REALPOLITIK, AND THE PROPAGATION  
OF THE EMPEROR'S JUSTICE <sup>1</sup>

by

Matthijs Wibier

Narrative histories of the Principate often stress that one of the big transformations of the period was the increasingly central role of the emperor in relation to the law. While the writers of such narratives may see it as their task to disagree vehemently about many finer points, it is hard to deny that a third-century emperor such as Diocletian, in taking legal and legislative initiatives, found himself in a situation that was significantly different from that of an earlier princeps such as Augustus. The casting of the latter's famous legislative programme in the form of *leges*, rather than as rules simply instituted by decree, followed Republican tradition in recognising several established loci of legal authority that coexisted with a certain independence, such as the praetors, the senate, and the jurists.<sup>2</sup> The source record indicates that later emperors were increasingly interested in asserting their presence and in monopolising legal authority. For example, Hadrian ended with his Perpetual Edict the prerogative of praetors to produce their own edict, while also intensifying the issuing of imperial rescripts. The Severan emperors worked so closely with the jurists Papinian, Paul, and Ulpian that they were practically speaking imperial employees. Finally, Diocletian, after stabilising his position, not only organised his bureaux so that they might address petitions at an unprecedentedly large scale, but in the process he also encouraged lawyers to produce the big collections of imperial rescripts known as the *Codex Gregorianus* and the *Codex Hermogenianus*.<sup>3</sup> The studies of scholars such as Millar, Honoré, Peachin, and Tuori have traced in much greater detail the changing nature of the emperor's activities,

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<sup>1</sup> I am grateful to the organisers and participants of *Impact of Empire* 13 in Ghent for a wonderful and stimulating workshop, and to O. Hekster and K. Verboven for their feedback. Due to limitations on the length of this paper, I have had to keep footnotes and engagement with the scholarship to a minimum. All translations are mine.

<sup>2</sup> The programme's exact legal nature is in fact controversial, since later sources depict Augustus more like a sole legislator. A recent starting-point is K. Tuori, 'Augustus, legislative power, and the power of appearances', *Fundamina* 20:2 (2014) 938-945.

<sup>3</sup> On legal culture under Diocletian, including the collections, see S. Corcoran, *The Empire of the Tetrarchs: Imperial Pronouncements and Government, AD 284-324* (Oxford 2007, rev. ed.).

emphasising in particular their role as adjudicators.<sup>4</sup> The precise focus of these studies ranges from Millar's concern with laying out emperors' daily routines to Tuori's analysis of the discourses about the emperor as supreme judge, and of the complex ways in which these affected imperial and legislative ideologies. Overall, however, this scholarship has approached the issue mainly through the top of the hierarchy, studying the emperor and his bureaucrats while paying less attention to those at the receiving end. The perspective of recipients and audiences has been served primarily by studies of the petitioning process, which have examined questions about who took the step to file a petition as well as why, and what happened once a rescript had been received.<sup>5</sup> Yet it is important to note that as soon as issues of ideology and shifts in power balances are on the table, further questions emerge about how and why those in lower positions felt pressure or saw advantages in echoing and amplifying the idea of the emperor's centrality.<sup>6</sup>

One way to approach this rather large question is to analyse the socialisation through education of those who would go on to have dealings with the law and the emperor's presence in the legal world. It has been pointed out ubiquitously that educational texts and practices convey a particular view of the world. The issue has been well studied for Latin literary education, for which scholars have shown that it provided a type of cultural knowledge to engage with the socially privileged, who were often in control of resources and in positions to bestow benefits.<sup>7</sup> Education in Roman law has been much less

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<sup>4</sup> F. Millar, *The Emperor in the Roman World* (London 1984, 2nd ed.); M. Peachin, *Iudex vice Caesaris: Deputy Emperors and the Administration of Justice during the Principate* (Stuttgart 1996); T. Honoré, *Emperors and Lawyers* (Oxford 2003, 2nd ed.); K. Tuori, *The Emperor of Law: The Emergence of Roman Imperial Adjudication* (Oxford 2016).

<sup>5</sup> e.g. S. Connolly, *Lives behind the Laws: The World of the Codex Hermogenianus* (Bloomington 2010); B. Kelly, *Petitions, Litigation, and Social Control in Roman Egypt* (Oxford 2011); A. Bryen, *Violence in Roman Egypt: A Study in Legal Interpretation* (Philadelphia 2013).

<sup>6</sup> Good observations at C. Ando, *Imperial Ideology and Provincial Loyalty in the Roman Empire* (Berkeley 2000) 374, addressing in more general terms the question why people accepted Roman rule. See on this also O. Hekster, *Emperors and Ancestors: Roman Rulers and the Constraints of Tradition* (Oxford 2015).

<sup>7</sup> From the vast bibliography, see first and foremost G. Woolf, *Becoming Roman: The Origins of Provincial Civilization in Gaul* (Cambridge 1998); R. Hingley, 'Cultural diversity and unity: empire and Rome', in S. Hales and T. Hodos (eds.), *Material Culture and Social Identities in the Ancient World* (Cambridge 2010), 54-75

studied from this perspective, even though much the same must be true for it as well. Most straightforwardly, acquiring knowledge of the law and of legal procedure empowered the individual in various ways, for example to take action in court, to advise friends, or to seek employment in the Empire's bureaucracy. An additional aspect is, however, that the way in which Roman law is expounded in legal textbooks also projects a certain view of Roman society, of power structures, and of Roman self-perceptions, much like literary education provides an introduction to narratives about the world from a Roman perspective.

This paper explores in more detail how texts that were used for legal instruction communicate particular views of the sources of law and justice, how views of the power structure changed over time, and how the elite audiences of these texts deliberately appropriated and exploited changing ideas about the relation between the princeps and the law in their own interest. The survival of the so-called *Fragments of Autun (FA)*, lecture notes based on the *Institutes* of the second-century CE jurist Gaius, is particularly helpful here. First of all, they allow us to trace how a later educational text uses and adapts Gaius' work for its own purposes and in new times and settings. Furthermore, the work's dating and circulation offer a precious opportunity for further contextualisation. We will see in the next section that the work should be dated to the late third/early fourth century, and that it can with some confidence be located in a Western provincial setting. This means that we are in a position to compare and contrast our text meaningfully with several works stemming similarly from the world of higher education, namely the Tetrarchic speeches from and about the rhetorical school in Autun that have been preserved as part of the *Latin Panegyrics*. As we will see, reading these texts in the light of one another not only allows us to explore to what extent forensic rhetorical education projected a similar view of power as did the more technical legal handbooks,<sup>8</sup> but it also provides some invaluable insights into the motivations of individuals to internalise and promote the message they were being exposed to. To put it differently, any analysis of the increasing centrality of the princeps in relation to the law raises rather fundamental questions about the relation between shifting discursive ideologies and power shifts in “real”, material terms—not least questions about agency and “enforcement”. The evidence allows us to make a good case that many educated people were fully aware that they needed a sense of the right way to speak to the powerful, i.e. to play a political game, in order to be successful in elite circles.

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<sup>8</sup> On the forms and formats of legal education in the Roman Empire, see the next section below.

Lecture notes and legal education: a very brief introduction to the *Fragments of Autun*

The *FA* are the remains of a set of lecture notes used for fairly elementary instruction in Roman private law, probably in the context of a rhetorical school. It is clear from references to Gaius by name and the presence of commentary-style lemmas that the *FA* are based on Gaius' *Institutes*, a work that was written in the later second century CE and that enjoyed great popularity in legal circles until at least the age of Justinian.<sup>9</sup> Spanning 25 pages in the edition of Krüger,<sup>10</sup> the *FA*'s text survives as the lowest layer of writing on fifteen palimpsest folios. At some point, these were joined with further parchment sheets to form a larger codex carrying the *Institutes* of Cassian as its over-text.<sup>11</sup>

The background of the *FA*, both in terms of its geographical origins and its dating, cannot be established with great precision. Several observations, however, point to a circulation in Gaul in the fourth century. In the first place, it has been argued repeatedly that the handwriting of the manuscript preserving the *FA* is consistent with fifth-century hands known from South-Eastern France and Northern Italy.<sup>12</sup> This puts us on firm ground for locating an effort to pass down and preserve the text in Roman Gaul.

Secondly, even if the manuscript may well date to the Later Roman world, there is in fact little reason to suspect that it is the author's original copy. On the basis of considerations of legal doctrine, Nelson has convincingly shown that the *FA* must predate the fifth century and therefore the manuscript witness.<sup>13</sup> Most importantly, the surviving text deals extensively, in the present tense, with a legal institution known as *cretio* (34-60).

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<sup>9</sup> On the *FA*, see first and foremost J.-D. Rodríguez Martín, *Fragmenta Augustodunensia* (Granada 1998), who also reprints Krüger's ed. The appreciation of Gaius' work is illustrated most strongly by Justinian's decision to base his *Institutes* on those of *Gaius noster* (*C.Imperatoriam* 6).

<sup>10</sup> P. Krüger, 'Fragmenta interpretationis Gai Institutionum Augustodunensia', in P. Krüger, Th. Mommsen and W. Studemund (eds.), *Collectio librorum iuris antejustiniani in usum scholarum* (Berlin 1923, 7th edn.), vol. 1, xlii-lxvi. Repr. in Rodríguez Martín 1998, op.cit. (n.9).

<sup>11</sup> The *FA* are preserved by folios 97-98, 98b-110 of Autun, Bibliothèque Municipale S 28 (24). Paris, Bibliothèque Nationale de France, Nouvelles acquisitions latines 1629, belongs to the larger Autun ms. as well.

<sup>12</sup> Latest discussion at S. Ammirati, *Sul libro latino antico: ricerche bibliologiche e paleografiche* (Rome 2015) 104.

<sup>13</sup> H.L.W. Nelson, 'Das Fragment über die *cretio* in der Autuner Gaiusparaphrase', *Subseciva Groningana* 2 (1985) 15, with further references about doctrinal points.

This was a formal declaration of heirs that they accepted the inheritance. As Nelson has pointed out, however, the *cretio* fell out of use in the earlier fourth century. Similarly, the *FA* include a lengthy treatment of the law of actions, the procedural *actiones* (79-114). While Gaius' *Institutes* devote the entire fourth book to the *actiones*, Nelson signals that this type of procedure was abolished in 342 if not before. In short, then, both these cases concern legal instruments that had become outdated by the fifth century, when the manuscript was produced. Could they have been included as legal-antiquarian digressions, something Gaius himself seems to have had an interest in as well? This suggestion becomes implausible as soon as we consider the consistent use of the imperfect tense in the discussion of the *ius Latii*, the existence of which is clearly located in the past. This indicates that the *FA* cast legal-antiquarian notes in the past tense. The ample presence of the *cretio* and the *actiones* in the *FA* suggests, therefore, that the work should not be dated much later than the first half of the fourth century. In addition, the extinction of the *ius Latii* at the time of writing points out that the *FA* must be placed after the Constitutio Antoniniana granted near universal citizenship in the year 212. All this leaves a window stretching from the mid third to the first half of the fourth century.<sup>14</sup>

Finally, much less certainty is possible about where the text can be located before the production of the manuscript. But if the manuscript was produced in Southern Gaul over the course of the fifth century, it is very well possible (although it cannot be proven) that its immediate exemplar had been in circulation in this area earlier on, perhaps already in the fourth century.<sup>15</sup> In any case, a provincial readership is likely, since the work consistently pairs the praetor and the provincial governor as legal authorities.

The vagaries of the transmission process have resulted in a text with many gaps. Nonetheless, the modern edition by Krüger gives us a text that runs and reads well. In terms of content, the extant parts cover several main areas of Roman private law, in particular the law of status, the law of succession, and the law of actions. The notes, which at certain

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<sup>14</sup> Further precision seems impossible. Although Nelson 1985, op.cit. (n.13), 15 suggested that the note on the family *sacra* in the perfect tense points to a mostly Christian (and hence later rather than earlier) context, Gaius already discussed them in the past tense. There is thus no marked contrast. See Liebs, *Römische Jurisprudenz in Gallien (2. bis 8. Jahrhundert)* (Berlin 2002) 123.

<sup>15</sup> A more complex argument can be made: J. de Churruca, *Las instituciones de Gayo en San Isidoro de Sevilla* (Bilbao 1975) 125-134 demonstrates on the basis of comparing various adaptations of Gaius that the *FA* draw from an earlier Gaius adaptation of Western circulation.

places are attached to lemmas taken from Gaius' *Institutes*, are extensive explanations of legal doctrine; they paraphrase Gaius, they explain and update legal doctrine, and they provide examples. In this way, the work projects for itself an audience of those who were studying the basics of Roman legal doctrine at a fairly elementary level.

It is likely that we should situate this type of basic legal instruction in Roman law primarily in the rhetorical schools. The source record about legal education in general is very thin and extremely polemical. Authors such as Cicero, Quintilian, and Libanius repeatedly insist that forensic rhetorical education and technical legal training were completely separate affairs, and that the teachers of the one specialism were highly competitive, if not outright hostile, towards those of the other. However, it has been pointed out on the basis of scattered evidence that technical legal training could be obtained via various routes that did not necessarily involve law schools.<sup>16</sup> One important avenue was to take up an apprenticeship with an experienced forensic lawyer so as to observe the ways of the forum (*tirocinium fori*). This is the form Cicero's legal education took, and Quintilian and Tacitus say it was still prevalent in their days.<sup>17</sup> Another important venue were the rhetorical schools. The surviving declamatory speeches show that rhetorical education consisted for a large part in training students to argue in favour of one of the parties in fictitious legal cases. While the case descriptions often involved fictitious legal provisions, there are nonetheless cases in which it is clear that the declaimer had considerable technical knowledge of Roman law.<sup>18</sup> Moreover, Libanius appears to have employed a law tutor in his school on a steady basis.<sup>19</sup> The legal instruction offered in these schools must have been relatively elementary; Libanius tells of some of his students that they had forensic careers

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<sup>16</sup> Recent surveys and discussions: A. Riggsby, 'Roman Legal Education', in W.M. Bloomer (ed.), *A Companion to Ancient Education* (Chichester 2015), 444-451; J. Harries, 'Legal Education and Training of Lawyers', in C. Ando, P. du Plessis, and K. Tuori (eds.), *The Oxford Handbook of Roman Law and Society* (Oxford 2016), 151-163; and M. Wibier, 'Legal culture and legal education in Gaul during the Principate', in K. Czajkowski, B. Eckhardt and M. Strothmann (eds.), *Law in the Roman Provinces* (Oxford 2020).

<sup>17</sup> Cic. *Lael.* 1.1, Cic. *Brut.* 89.306; Quint. *Inst. or.* 12.6; Tac. *Dial.* 34.

<sup>18</sup> Most importantly, ps.-Quint. *Decl. mai.* 13; with B.W. Frier, 'Bees and Lawyers', *Classical Journal* 78 (1983) 105-114.

<sup>19</sup> Lib. *Epist.* F433/B162.

before they sought more profound legal expertise in the law schools of Beirut or Rome.<sup>20</sup> This suggests that schools such as those of Libanius, perhaps in combination with apprenticeships of some sort, may have provided a basis in law solid enough to sustain a forensic career up to a certain point. Finally, a third route for obtaining legal knowledge was to study extensively with a well-known jurist. We hear about the possible existence of a *schola* for legal studies, run by the jurist Cassius Longinus, in Rome in the days of Pliny,<sup>21</sup> and the jurists Pomponius and Gaius both make references to two circles of law teachers that Gaius calls *scholae* as well. While it is impossible to say in detail what these *scholae* were, it is reasonably clear that they offered in-depth study of Roman law.<sup>22</sup> The same is the case for the dedicated law schools that are attested later, those of Beirut, Rome, Constantinople, and possibly Alexandria and Caesarea.<sup>23</sup> At the end of the day, given the *FA*'s elementary character, and given that rhetorical schools must have been much more common than exclusive law schools, it is most plausible to consider the setting in which the *FA* were used the rhetorical schools for which Gaul was famous throughout the imperial period.<sup>24</sup>

The following final note about the *FA* as evidence is in place. The connection of the manuscript with Autun is suggestive, since the town was known as an educational centre in the period to which the *FA* should be dated. In a speech from approximately 298, an orator named Eumenius asked a high-ranking official, possibly the provincial governor, for permission to use part of his imperial salary to rebuild the school buildings in Autun.<sup>25</sup> As we will see further below as well, Eumenius and the contemporary anonymous author of *Panegyric 6* were both teachers of rhetoric at the school, displaying an interest in law as

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<sup>20</sup> e.g. Lib. *Epist.* F653/B164 and F1171/B166. See S. Bradbury, *Selected Letters of Libanius from the Age of Constantius and Julian* (Liverpool 2004), 201.

<sup>21</sup> Plin. *Ep.* 7.24.8.

<sup>22</sup> For a recent discussion of the evidence and the immense scholarly debate, see T. Leesen, *Gaius Meets Cicero. Law and Rhetoric in the School Controversies* (Leiden 2010).

<sup>23</sup> The school in Beirut is the best attested one; see P. Collinet, *Histoire de l'école de droit de Beyrouth* (Paris 1925). On Alexandria and Caesarea as sites of legal education (in unspecified format), see Justinian's *C.Omnem 7*.

<sup>24</sup> See Wibier 2020, *op.cit.* (n.16).

<sup>25</sup> *Pan. Lat.* 9. See the introduction to and notes on this speech in C. Nixon and B. Rodgers, *In Praise of Later Roman Emperors: The Panegyrici Latini* (Berkeley 1994).



well.<sup>26</sup> It should come as no surprise, then, that the discovery of the *FA*'s manuscript was hailed by some scholars as confirming that intense law teaching took place at Autun in Eumenius' days.<sup>27</sup> This is certainly not impossible. But given the uncertainties of where exactly the manuscript was written as well as about when it came to Autun, the presence of the manuscript may not be the right evidence to support this claim. Rather, we have seen that the ancient record shows that, more generally speaking, rhetorical schools facilitated legal instruction. It is plausible that this was also the case in Autun—as it must have been in other towns, such as Lyon and Bordeaux. The *FA* should thus be seen as a concrete example of the type of text that was used for basic legal instruction. The school of Autun, in turn, is a concrete example of the type of setting in which this happened.

#### Legal textbooks on the princeps and the law

In order to present the clearest picture of how legal textbooks present the position of the emperor in relation to the law, including shifts in the discourse over time, I begin with an analysis of Gaius' *Institutes* and their reception by the *FA*. I will then address the question of how representative the case of Gaius is of legal textbooks more widely,

Gaius opens his *Institutes* with a series of definitions of law. After making a distinction between law that is common to all mankind (*ius gentium*) and law that is specific to each individual people (*ius civile*), he lists the various sources of law that make up the *ius civile* of the Romans. These include *leges*, *plebiscita*, *senatusconsulta*, imperial constitutions, edicts of the magistrates, and the *responsa* of the jurists. This enumeration is followed by a brief discussion of each of these in turn. We should note, as Ibbetson has pointed out, that Gaius has a profound interest in *leges*, statutes approved and enacted by the *populus* as a whole. Not only does Gaius put the *leges* at the front of his list and his discussions, but he also proceeds to define almost all the other forms of legal rule explicitly by means of the term *lex*.<sup>28</sup> Thus we hear that, while a *plebiscitum* originally did not bind patricians, the *lex Hortensia* elevated this type of act to the status of *lex* (*legibus exaequata*, 1.3). Next, *senatusconsulta* are said to have the force of law (*legis vicem*, 1.4). Emperors

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<sup>26</sup> The authors of *Panegyric* 5 and 8 were also teachers in Autun.

<sup>27</sup> e.g. H.L.W. Nelson, *Überlieferung, Aufbau und Stil von Gai Institutiones* (Leiden 1981) 123.

<sup>28</sup> D. Ibbetson, 'Sources of Law from Republic to Dominate', in D. Johnston (ed.), *The Cambridge Companion to Roman Law* (Cambridge 2015), 29-33.

can similarly issue constitutions with the force of a *lex* because the people grant them the right to do so *per legem* (1.5). Finally, the views of the jurists, who had the authority to establish law (*quibus permissum est iura condere*), are said to have the force of *lex* in the cases in which a view is universally held (1.7).<sup>29</sup> Gaius' treatment indicates strongly that he considered *leges*, laws based on popular consent, the ultimate source of legal authority. And while the pronouncements of emperors clearly carried the weight of laws as well, they did so, according to Gaius, because they ultimately derived their status from a *lex* in which the *populus* authorised the princeps to legislate.<sup>30</sup> In sum, even though the princeps was an important presence in the world of law, Gaius presents him as a sort of agent for the *populus*, who remain the top of the legal hierarchy.

For the purposes of this paper, it would be extremely interesting to compare the explanations that the *FA* gave on these programmatic passages. Unfortunately, however, this part of the text has been lost. The surviving text offers a different opportunity to see how the *FA* rewrites Gaius' own treatment of the princeps' legal importance. On the possibility for those under the age of 25 to renounce an inheritance that was unexpectedly debt-ridden (*damnosa hereditas*), Gaius writes as follows:

*nam huius aetatis hominibus, sicut in ceteris omnibus causis deceptis, ita etiam si temere damnosam hereditatem susceperint, praetor succurrit. scio quidem divum Hadrianum etiam maiori XXV annorum veniam dedisse, cum post aditam hereditatem grande aes alienum, quod aditae hereditatis tempore latebat, apparuisset.*

(Gai. *Inst.* 2.163).

For the praetor comes to the help of people of this age; just as in all other cases with a catch, so also if they by accident have accepted an inheritance that is debt-ridden.

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<sup>29</sup> Strikingly enough, Gaius does not use the term *lex* in his discussion of the edicts. Perhaps, as Ibbetson 2015, op.cit. (n.28), 34 suggests, this reflects a conception on Gaius' part of the edict as a procedural rather than legislative source.

<sup>30</sup> It has been debated whether Gaius' remarks correspond precisely to Roman political practice, including such epigraphically attested statutes as the *Lex de imperio Vespasiani*. As a starting-point see M. Pani, 'L'imperium del principe', in L. Capogrossi Colognesi and E. Tassi Scandone (eds.), *La lex de Imperio Vespasiani e la Roma dei Flavi* (Rome 2009) 187-204.

Indeed, I know that the deified Hadrian relieved even a person older than 25 years when, after entering on the inheritance, a great debt appeared that lay hidden at the time of acceptance.

Rounding off the discussion of a legal remedy known as *restitutio in integrum* for inheritances with unforeseen financial burdens, the last sentence appends a brief report about the existence of a Hadrianic rescript that granted a similar solution to heirs over 25. The information about this piece of imperial law is very succinct; the next sentence starts a new discussion on the topic of extraneous heirs. When we turn to the *FA* for the parallel discussion, a marked difference is that the *FA* focus their audience's attention almost completely on the imperial rescript by discussing it at much greater length. After a brief mentioning of the doctrine, an elaborate reworking follows at sections 29-33. I quote at some length:<sup>31</sup>

**28.** *quod si maior [fuerit] extraneus qui adierit vel suus qui miscuerit se bonis, [in integrum] restitui non potest, omnimodo tenetur oneribus hereditariis, quia deest ill[i] auxili]um nec potest maiori, nisi exhibeantur interdum iustae causae, [in in]tegrum restitui; nec enim maioribus [-----] generale beneficium d[-----]tor quidem hoc contigit. 29. quidam, cum maior esset aetate, contra opin[ionem] adiiit hereditatem, quam putabat non esse damnosam. ideo [puta]bat eam non esse damnosam, quod aes alienum in occul[to erat]. emerserunt plures creditores, coeperunt proferre t[abulas] \* cum debitum fecit apparere hereditatem damnosam. [heres, qui] maior adierat, tenebatur. dedit ergo preces impera[tori -----] non sit quod fuerat, meruit speciale rescriptum, ut recede[ret] ab hereditate. 30. ita dixit: ignorans, cum lateret aes alienum, [adii] hereditatem, postea emersit grande debitum, apparuit damnosa [ea hereditas]. ergo a te peto ut liceat mihi discedere. concessit ei imperator. 31. hoc ergo [exem]plo hodieque, si tali re procedis, possumus dare consilium ut [suppl]icetur. nam facile impetrantur ab imperatore ea quae iam ab [aliis] impetrata sunt: aliud est novum beneficium petere, aliud est id pe[tere cui]us extant exempla. 32. nam per gratiam factum est, ut si maior [sit qui] licet per ignorantiam omnimodo heres fit, ei discedere ab hereditate [-----] cum*

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<sup>31</sup> Krüger's ed. Square brackets indicate supplements of damaged parts, not deletions.

*habet. propter quod exemplo eius alii possunt in integrum restitui a praetore. 33. ergo ubi [is mi]nor est qui adiit vel qui se miscuit, per praetorem vel per praesidem provinciae potest [in integrum] restitui; sed qui maior est sine beneficio principali non poterit in [integrum restitui neque] auxilium exorari ei heredi, secundum ea quae tractavimus.*

**28.** because if a legal major was an extraneous (heir) who had accepted or an immediate (heir) who had meddled with the estate, he cannot be restored *in integrum*, he is bound entirely to the burdens of the inheritance, because help is not available to him nor is it possible for a major to be restored *in integrum*, unless a just cause is revealed in the meantime; for neither to legal majors [-----] a general favour [-----] covered this. **29.** Someone, though of legal age, accepted an inheritance ignoring advice, thinking that it was not debt-ridden. He thought it was not debt-ridden for this reason, namely because the debt was concealed. Many creditors appeared: they began to bring forth legal documents; since the debt made the inheritance appear debt-ridden, the heir, who accepted while of legal age, was bound. Therefore, he sent a petition to the emperor [-----] is not what it had been, he deserved a rescript for his specific situation so that he might withdraw from the inheritance. **30.** He said thus: “I accepted the inheritance out of ignorance, because a debt lay hidden; afterwards a great debt came to light, this inheritance turned out to be debt-ridden; therefore, I ask you that I be allowed to give it up”. The emperor granted this to him. **31.** Therefore, on the ground of this precedent we can still give the advice, if you move forward with such a case, to petition. For those things are easily obtained from the emperor that have already been obtained by others: it is one thing to seek a new favour, it is another thing to seek that of which there exist precedents. **32.** For it was done out of goodwill, if for instance there was a legal major who became heir to the full extent through ignorance, that for him (it was made possible?) to withdraw from the inheritance [-----] (?) he had; hence, on account of that man’s precedent, others can be restored *in integrum* by the praetor. **33.** Therefore, when he who accepts or he who meddles is a minor, he can be restored *in integrum* by the praetor or by the governor of the province; but he who is a legal major cannot without a favour of the emperor be restored *in integrum*, nor can help be obtained for this heir, according to what we have discussed.

The text is considerably expanded from Gaius' original. Perhaps most strikingly, Gaius' allusion to the existence of Hadrian's rescript has been transformed into a fairly extensive dramatised interaction between petitioner and the emperor, who then by way of climax concurs with the petitioner.<sup>32</sup> Next, the author dwells extensively on how effective it is 'in his time' (*hodie*) if one can get a rescript from the emperor. While we hear that it is more difficult (but possible) to obtain a rescript in cases for which there is no precedent yet, it should be relatively easy to get one if there are precedents. The point is then repeated three or four times more, thus conveying that it is really of central importance to address the emperor in this type of case and in others as well. The term *beneficium* occurs three times in this short text, with *gratia* expressing a similar idea as well. On the other hand, the source passage in Gaius makes no such claims. And although his *Institutes* repeatedly reference imperial rescripts, they are not very interested in the emperor's legislative position other than what we have already seen above. The *Institutes* also do not offer explicit encouragements to obtain one's justice from the emperor. In this way, the *FA*'s rewriting of Gaius here projects a different view of the relative importance of the sources of law, giving much more prominence to the emperor than Gaius did. It is true that this is only one case, and that it does not explicitly mention the emperor in relation to *leges*. But given how much Gaius' single sentence has been inflated, and given the repeated advice about approaching the emperor, it is likely that other parts of the *FA* also stressed the emperor's privileged position in the world of law.

An obvious question at this point is: how representative are the perspectives that we find in Gaius' *Institutes* and the *FA* of legal instructional texts more generally? The main problem in answering this question is that almost no texts of a similar type survive that are not highly fragmented.<sup>33</sup> Any inference beyond the comparison of these cases must thus

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<sup>32</sup> It is not known whether the author drew on a source that contained more information about the rescript and the case that prompted it, or whether this is first and foremost a case of rhetorical amplification.

<sup>33</sup> The Ulpianic *Liber singularis regularum* (also known as the *Tituli ex corpore Ulpiani*) is a short work that survives in a single manuscript and probably has its main source in common with Gaius' *Institutes*. Unfortunately, the opening section of this work dealing with the sources of law is damaged. Neither does it mention the Hadrianic rescript. On this text, see first and foremost M. Avenarius, *Der pseudo-ulpianische liber singularis regularum: Entstehung, Eigenart und*

remain somewhat speculative. Yet we might see traces of a similarly shifting discourse in some of the fragmentary juristic texts. An example is the so-called *Fragmentum Dositheanum* (*FD*), a sizeable fragment that mainly (but not exclusively) discusses manumission and that was excerpted from a longer legal handbook dating to the second century. A careful study of the presentation and the order of topics has revealed that the *FD* and Gaius' *Institutes* both go back to the same handbook tradition and are hence relatively closely related.<sup>34</sup> But unlike Gaius' focus on *leges*, the *FD* quite clearly foregrounds imperial constitutions as the most important sources of law. The text mentions the *leges* last, without defining what they are but just mentioning the *Lex Iulia et Papia* as an example.<sup>35</sup>

The attention of the *FD* for imperial constitutions is of interest for at least two reasons. In the first place, it should be reiterated that the *FD* and the *Institutes* stem from the same source tradition but that they used and adapted the source material in very different ways. This observation goes to underscore an important conceptual point, namely that discourses about the emperor and the law are not monolithic entities.<sup>36</sup> On the one hand, Gaius' widely circulating work is relatively reticent about the emperor's prominence, and it was up to users such as the author of the *FA* to reformulate things and shift the emphasis. On the other hand, the *FD* show that more emperor-centric texts were already produced by Gaius' time as well.

Secondly, we should note that the *FD* has survived through the manuscript tradition not as part of a legal collection but through its inclusion among materials used for teaching Latin in Antiquity. The work was thus able to broadcast its assumptions about the power structure of the Roman state to a considerable audience of students throughout the Late Antique world, also beyond the wide readership of popular legal handbooks such as that of Gaius.

It is harder to find further examples that are as illustrative as the *FD*. Perhaps Pomponius' listing of the sources of law and his repeated mentions of *lex* suggest a perspective somewhat similar to that of Gaius, while the persistent interest in bringing up

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*Überlieferung einer hochklassischen Juristenschrift* (Göttingen 2005) and Nelson 1981, op.cit. (n.27), 338-361.

<sup>34</sup> Nelson 1981, op.cit. (n.27), 361-370.

<sup>35</sup> This is an observation of P. Mitchell, "*Fragmentum Dositheanum*" (forthcoming).

<sup>36</sup> See on this Tuori 2016, op.cit. (n.4).

imperial rescripts in the fragments of Marcian's *Institutes* could point to an outlook closer to that of the *FA* or *FD*.<sup>37</sup> Any inferences drawn from these last instances must, however, remain somewhat speculative. Finally, from the later second century, we also begin to see juristic works that collect and disseminate the legal views and outputs of emperors. Important cases are Papirius Justus' *Constitutiones* and, a generation later, Paul's *Decreta* and *Imperiales Sententiae*.<sup>38</sup>

### Power structures and the game of politics

I have tried to show, by focusing on Gaius and the *FA*, a development in legal educational textbooks towards a more emperor-centric representation of the legal system. In unpacking the question of how and why this happened, we may at first simply suggest that it reflects—if not merely follows—developments in the “real” political system. This must certainly be part of the explanation. Yet studies of discourse and ideology have emphasised consistently that discursive practices may also be constitutive of “reality”, thus suggesting that the process analysed above must have been more complex and interactive.<sup>39</sup> If this is indeed a plausible point of view, we will have to face several thorny questions about who did what: who were the players driving and cementing the change? Here we cannot simply point to the emperor or the “state”, except perhaps for creating a critical mass and/or providing a reward structure for certain types of behaviour. After all, matters such as education and public oratory were not really state run, let alone that there was anything like a state-approved curriculum in the third and earlier fourth century. If we want to resist the idea that following “reality” is the full explanation, we should consider in more detail the role of authors, orators, teachers, and their audiences in echoing and amplifying discursive shifts. In order to explore this matter, I would like to reframe the question one more time: can we find any contextual evidence that shows self-awareness about the need to play along—to

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<sup>37</sup> Pomponius, *Ench. l.s.* (*Dig.* 1.2.2.12); for the fragments of Marcian's *Institutes*, see O. Lenel, *Palingenesia iuris civilis* (Berlin 1889), 1.652-675.

<sup>38</sup> On Paul's *Decreta* and *Imperiales Sententiae*, see the contribution of E. Daalder to this volume.

<sup>39</sup> For a conceptual discussion from the field of communication studies, see the classic account of O. Craig, ‘Communication Theory as a Field’, *Communication Theory* 9:2 (1999), 124-132. For an exploration of the usefulness of this model for studying Roman imperial ideology, see Hekster 2015, *op.cit.* (n.6), 29-36.

make the emperor look more and more central in relation to justice and the law, as well as why? I think such evidence exists. I limit myself to the following observations, drawn from educational texts.

For starters, there is the so-called second treatise on composing epideictic speeches associated with Menander Rhetor, dating to the late third/early fourth century. The work contains among other things instructions for writing a good βασιλικὸς λόγος. As part of its advice to praise the emperor's virtues, it emphasises that it is a productive strategy to dwell on the emperor's justice. One way to bring out the emperor's excellence in this respect, the text continues, is to highlight his 'humane stance towards those who are petitioning' (τὴν πρὸς τοὺς δεομένους φιλανθρωπίαν, 2.375). The work never makes very explicit what the precise purpose of such speeches is, and what would constitute success, but it is probably safe to infer that acclaim and perhaps benefits in a more material sense were among them. This is at least the point that is rather extensively made at the end of the sixth *Latin Panegyric*, written by an anonymous author from Autun in the year 310.<sup>40</sup> The text rehearses the importance of the emperor in relation to justice and alludes to the kind of material benefits a self-respecting emperor will give, which include a cityscape replete with splendid public buildings that are said to rival those of Rome.<sup>41</sup> The longer passage below from the same speech is more shameless about the benefits to be obtained, namely working in the emperor's bureaucracy and as such being involved in the very process of administering the emperor's justice.

*1. sed enim ista felicitas viderit an adhuc meae debeatur aetati. interim quoniam ad summam votorum meorum tua dignatione perveni, ut hanc meam qualemcumque vocem diversis otii et palatii officiis exercitam in tuis auribus consecrarem, maximas numini tuo gratias ago tibi, quod superest, commendo liberos meos praecipueque illum iam summa fisci patrocina tractantem, in quem me totum transtulit pietas, cuius felix servitus, si quando respexeris, maxime tuae conveniet aetati. 2. ceterum quod de omnibus liberis dixi, lata est, imperator, ambitio; praeter illos enim quinque quos genui, etiam illos quasi meos numero quos provexi ad tutelam fori, ad officia palatii. multi quippe ex me rivi non ignobiles fluunt, multi sectatores mei etiam provincias tuas administrant. quorum successibus laetor*

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<sup>40</sup> See the introduction to this speech in Nixon and Rodgers 1994, op.cit. (n.25).

<sup>41</sup> *Pan. Lat.* 6.22.5-6.



*omniumque honorem pro meo duco et, si forte hodie infra expectationem mei dixero, in illis me confido placuisse. 3. si tamen hoc quoque mihi tuum numen indulserit, ut ex hac oratione non eloquentiae, quod nimium est, sed quantulaecumque prudentiae et devotae tibi mentis testimonium referam, cedant privatorum studiorum ignobiles curae; perpetua mihi erit materia dicendi, qui me probaverit, imperator.*

*(Pan. Lat. 6.23)*

**1.** But for that reason let that good fortune see whether it is owed to still my lifetime. In the meantime, since I have through your esteem arrived at the fulfilment of my wishes, in order that I devote to your ears my voice here, of whatever quality it may be, well-practised through the diverse duties of intellectual life and the palace, I give the greatest thanks to your divine majesty; and as for what remains, I commend to you my children and most of all him who is now in charge of the supreme guardianship of the fisc, to whom my parental feelings have been completely directed, whose propitious service, if you ever look at him, will fit perfectly with your age. **2.** Moreover, as for what I have said about all my children, Emperor, my desire for honour is wide; for apart from those five that I have fathered, I count even those as if they are mine who I have led on the path to guardianship of the forum, to official positions in the palace. For many not undistinguished streams flow out of me, many of my retinue even govern your provinces. I am joyful about their successes and I hold the honours of all of them as my own, and, if by any chance I say anything today below what was expected of me, I trust that through them I have pleased. **3.** However, if your divine majesty would show me such courtesy as well that I may carry away from this oration evidence not of eloquence, which is too much to expect, but of some small degree of good judgment and of a mind devoted to you, let base concerns about private studies make way; the emperor who has shown me his favour will give me material for orations for all time.

The text is crystal clear about how education in a school such as that of Autun is in the interest of the emperor, and how employment in the imperial bureaucracy is something that has the interest of those in the school. The speaker in sections 2 and 3 leaves no doubt that

he wants and expects jobs for his students; section 3 has not unreasonably been read as the speaker fishing for a job for himself. Apparently, then, these positions were very desirable—probably not simply in remunerative terms but also for the prestige and honour that came with them. In short, the speaker must have considered that flattering and extolling the emperor is part of the game if one wanted to make a career in the bureaucracy. In other words, the speech implies that rhetorical-legal education, especially that offered by the speaker, will make the reinforcement of the emperor's position efficient in practice.

Finally, two passages from the orator Eumenius and the historian Ammianus Marcellinus are quite unabashed about the fact that some saw this as a political game. Eumenius mentions how 'minds' are being 'carefully cultivated by singing the emperor's praises' (*ut ingenia quae canendis eorum virtutibus excoluntur*, Eum. Pan. Lat. 9.9.1). It may sound somewhat absurd to those raised in liberal democracies that Eumenius would claim that this is such a central part of education. But he is probably quite serious about it; for it is hard to avoid the impression that this is the kind of thing his audience, which included the provincial governor and presumably others in control of potential benefits, would like to hear. The following passage of Ammianus then suggests that such claims were indeed frequently made, but that it was a public secret that it was all somewhat of a sham: 'and as part of the heaping-up of idle praises and of the parading of things that were clear as day to all, they puffed up the emperor as usual' (*interque exaggerationem inanum laudum ostentationemque aperte lucum inflabant ex usu imperatorem*, Amm. 16.12.68).

It is my contention that the *FA*'s rewriting of Gaius should be seen in a similar light. Rather than simply reflecting a changed political system, the text is implicated in the political historical changes by teaching its students to think in a more emperor-centric way than older texts did, as becomes particularly clear from the advice to petition the emperor whenever possible. The work itself plays a role in the complex process discussed above.

#### By way of conclusion: law books and their readerships

This paper has offered an exploratory analysis of how juristic textbooks reflect and affect changes in the ideology surrounding the emperor's importance in relation to justice and the law. Throughout, I have focused on the use of these books in educational settings and on their role in socialising students. This is arguably the prototypical situation in which they were used. But we should also keep in mind that legal textbooks were used widely as works

of reference by professional lawyers and administrators.<sup>42</sup> As such, their contents and their representations of the legal world must have reached a potentially immense audience. Although they may come across as highly technical texts with little connection to a very specific and concrete historical here and now, approaching juristic texts as works that were widely read should make clear that they have the historian a lot to offer.

Pavia, February 2018

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<sup>42</sup> See e.g. Lact. *Div. Inst.* 1.1.12; the papyrus and parchment fragments of Gaius' *Institutes* may very well be the remnants of such user copies.