BURGUNDIAN LAW-MAKING, 451-534

Ian Wood
University of Leeds
i.n.wood@leeds.ac.uk

The old picture of law-making at the end of Late Antiquity was of two different traditions: one Roman, represented primarily by the Theodosian Code, the Justinianic Code and the imperial Novels, on the one hand, and on the other the *Leges Barbarorum* or *Leges Nationum Germanicarum*, as the *Monumenta Germaniae Historica* termed them, which were assumed in origin to be traditional law[1]. This, of course, has long been understood to be a simplistic picture. For over a generation the royal origins of even the earliest of the so-called Germanic codes have been emphasised: Michael Wallace-Hadrill and Patrick Wormald stressed the fact that to issue a law-book was itself an act modelled on Roman precedent, and the influence of Roman law was identified in numerous individual clauses of the so-called *leges barbarorum*[2]. Above all, the issuing of the *Breviary* of the *Theodosian Code* by Alaric in 506, pointed to the extent to which Roman law was recognised by post-Roman rulers[3].

Equally important, of course, was the growing acknowledgement of the presence in the sub-Roman codes of what is called Vulgar law, first discussed at length by Ernst Levy, though his discussion concentrated on particular legal issues (notably the laws of Obligation and Property) rather more than the broader question of non-imperial law[4]. The simple point is that the Theodosian and Justinianic Codes are compilations of imperial legislation. There was plenty of other Roman law. Above all, there was provincial law and custom[5], uncodified in the fifth and sixth centuries, and

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[1] This paper is based on a lecture at the University of Roma Tre in November 2017. I would like to thank Luca Loschiavo and Francesco Stella in particular for their comments.

[2] Wallace-Hadrill, 1962, pp. 179-81: id., 1971, pp. 43-4: Wormald, 1977, p. 106.

[3] Rouche and Dumézil (ed.), 2009.

[4] Levy, 1951: id., 1956,

[5] See the reference to *vetus consuetudo* in *Forma et Expositio Legum*, XXVI, § 2, ed. De Salis, *Monumenta Germaniae Historica*, *Leges Nationum Germanicarum*, II, Hannover, Hahn, 1892.

varying from region to region, as we can see in the Burgundian *Forma et Expositio Legum*, better known as the *Lex Romana Burgundionum*, where we find the statement that *gesta autem secundum locorum consuetudinem fieri placuit* ('it has been agreed that acts should take place according to local custom')[6]. A clear indication of the extent to which the sub-Roman law codes were dependent on Roman practice can be found in Walter Ashburner's edition of the Byzantine Farmer's Law, where parallels between the Byzantine legislation and that of the early medieval West are extensively noted[7].

Despite the awareness of the Roman background to law-making in the successor states, the image of two distinct legal traditions is ingrained. It is an image that gains much from a tendency to concentrate on Frankish law (*Lex Salica*, *Lex Ribvaria* and their derivatives), for most of which we have no absolutely certain context, rather than on those law-books where the process of legislation is more apparent. The obscure origins of the *Edictum Theodorici* have tended to mean that it is left out of discussion[8], and the great collections of Visigothic and Lombard law belong to the seventh century, as do the earliest Anglo-Saxon laws, although the latter present the additional complication that they are in Old English, and not in Latin. There was, of course, earlier Visigothic legislation, but, leaving aside the *Breviary of Alaric*, which is essentially a reworking of the *Codex Theodosianus*, other legislation from before the reign of Recceswinth, including the laws of the so-called *Codex Euricianus*, has to be reconstructed from later collections or from fragments.

Our fullest evidence for the context and process of legislation in the earliest years of the successor states comes from the Burgundian legal material, which is, however, confused and confusing. But it is actually the complexities that the Burgundian evidence reveals that make it most informative.

The so-called Burgundian Code is better called the *Liber Constitutionum*, which is what the manuscripts term the legal collection. The title has no ethnic reference, and indeed the law book is almost entirely Roman in its

[6] *Forma et Expositio Legum*, XXII, § 4.

[7] Ashburner, 1910, 1912.

[8] But see now Lafferty, 2010: id., 2013.

provisions, and in places even imperial: Book I of the *Codex Theodosianus* opens with a section *De constitutionibus principum et edictis*. The author of the *Liber Constitutionum* was, therefore, implying either that he was acting in an imperial manner, or more likely, given that we know that the Gibichungs continued to regard themselves as imperial subjects as late as the 520s[9], that he was acting as an agent of the Roman emperor resident in Constantinople.

He was also legislating for all those under his jurisdiction. Although the *prima constitutio* talks of the Romans being subject to Roman law, there is nothing to imply that the *Liber Constitutionum* is addressed only to the non-Romans of the Gibichung province – and I use the term province deliberately, rather than kingdom, because the Gibichungs did not see themselves as ruling an independent state. Certainly some clauses of the *Book of Constitutions* specifically concern non-Romans. It is worth noting that these are not simply Burgundians: the legislator also talks of *populus noster*, and of *barbari*[10]: all three terms are used effectively as synonyms to define the non-Roman followers of the legislator. In all probability this reflects the fact that the non-Romans in question were not simply Burgundians, but also Alans (who we know were settled in Valence)[11], Goths (who were accepted into the Gibichung province at various moments)[12], and indeed men who had originally been part of the military following of Ricimer and subsequently of Gundobad[13]. Although 80,000 Burgundians are said to have reached the Rhine in the 360s[14], by the time of their settlement they were probably a relatively small group. Referring to events of the third decade of the fifth century Socrates Scholasticus talks of a Burgundian army of 3,000 men[15]. They constituted only a portion of the non-Roman settlers of the Rhône valley.

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[9] Wood, 2014.

[10] Wood, 2011.

[11] *Chronicle of 452*, s.a. 440, ed. Burgess, Aldershot, Ashgate, 2001.

[12] E.g. *Liber Constitutionum*, *constitutio extravagans*, XXI, § 4, , ed. De Salis, *Monumenta Germaniae Historica*, *Leges Nationum Germanicarum*, II, Hannover, Hahn, 1892.

[13] Wood, 2011, pp. 44-5.

[14] Orosius, *Historia adversus Paganos*, VII, 32, 11, ed. Arnaud-Lindet, 2003.

[15] Socrates, *Historia Ecclesiastica*, VII, 30, *Patrologia Graeca*, 67.

In any case a very considerable number of the laws in the *Book of Constitutions* are applicable to all of the ruler's subjects, Roman as well as non-Roman. Moreover, the *prima constitutio* states explicitly that one function of the *Book of Constitutions* was to provide legislation to be followed by all the *administrantes* in matters relating to relations between Burgundians and Romans:

> §3, *Omnes atque administrantes ac iudices secundum leges nostrae, quae communi tractatu compositae et emendatae sunt, inter Burgundionem et Romanum praesenti tempore iudicare debebunt.*
> 'All the administrators and judges must from now on judge between Burgundians and Romans according to our laws which have been set forth and corrected following public discussion …'[16].

The *prima constitutio*, which opens the collection, was reconstructed by De Salis to indicate that the law-book was issued by Gundobad. This coincided with the general assumption that the whole code could be identified as the so-called *lex Gundobada*, about which Agobard wrote in the early ninth century[17]. The bishop of Lyon, however, was not talking about the law-book as a whole, but about one clause, authorising trial by battle, because of the problem of perjury (Gundobad's followers – *homines nostros* – were supposedly only too happy to swear false oaths). This is the subject of a specific law, XLV, *De his qui obiecta sibi negaverint et praebendum obtulerint iusiurandum* ('Of those who will have denied charges made against them, and will have offered to swear an oath') for which we have a date of the consulship of Abienus, in other words 502, which certainly would fall in the period of Gundobad's rule[18].

In fact the manuscripts are deeply divided over the ruler who issued the *Liber Constitutionum*. The main variants of the opening clause are as follows:

> *In Dei nomine anno secundo regni domni nostri Sigismundi regis liber*

[16] *Liber Constitutionum*, *prima constitutio*, § 3. The translations are derived from Katherine Fischer Drew, 1949, sometimes with corrections.

[17] Agobard, *Liber Adversus Legem Gundobadi*, *Patrologia Latina* 104. Wood, 2016, p. 4.

[18] *Liber Constitutionum*, LXV.

> *constitutionum de praeteritis et praesentibus atque in perpetuum conservandis legibus et datum sub die IIII kalendas Aprilis Lugduno.*
> 'In the name of God, in the second year of the reign of our lord king Sigismund/Gundobad, the *Book of Constitutions* concerning laws past and present, and to be conserved for all time, issued in Lyon on 29th March'[19].

Fortunately, although the only date given is the day of a particular month (29th March), together with a regnal year, we find this same day together with a consular dating elsewhere in the code:

> *Liber Constitutionum* LII: *De mulieribus desponsatis, quae ad aliorum consortium adulterio instigante transierint … Data sub die IIII kalendas Aprilis Lugduno. Agapito consule.*
> 'Concerning betrothed women who enter into a union with others, set on by adultery … Issued on 29th March in Lyon, in the consulship of Agapitus'[20].

The consulship of Agapitus provides a date of 517, and since we know that 517 was the second year of Sigismund, we can be certain that the law was issued on the same occasion as the *Liber Constitutionum*.

We therefore have legislation by *Sigismund* 'rex', which is signed by 31 *comites*. We know that legislation was issued by the king to (or perhaps 'with') his *comites* on other occasions: thus *constitutio extravagans* XIX, *de reis corripiendis* ('on the arrest of criminals') has a heading, *Gundobadus rex Burgundionum omnibus comitibus*[21]. The information that Gundobad directed legislation to his counts is surely accurate, for they would have been responsible for its enforcement, even if one might wonder whether this was the original title. Although sources from the Rhône valley sometimes (though rarely) call Gundobad *rex*, they do not call him *rex Burgundionum*. The ethnic label (which, after all, implied that the jurisdiction of the ruler was limited to a particular people) is rather to be found in non-Burgundian sources, for instance those written in Ostrogothic

[19] *Liber Constitutionum*, *prima constitutio*, § 1

[20] *Liber Constitutionum*, LII. On the date of the *Liber Constitutionum*, see most recently Heather, 2011: Wood, 2016. See also, Saitta, 2006, pp. 82-94; Favrod, 1997, pp. 24-8; Kaiser, 2004, pp. 126-33.

[21] *Liber Constitutionum*, *constitutio extravagans*, XIX.

Italy[22].

It is worth noting that all the names of the *comites* appended to the *prima constitutio* are Germanic, even though the *prima constitutio* itself states that there were Roman as well as Burgundian *comites*: §5 talks of *obtimates, consiliarii, domestici et maiores domus nostrae, cancellarii etiam, Burgundiones quoque et Romani civitatum aut pagorum comites vel iudices deputati, omnes etiam et militantes* ('nobles, councillors, officers and mayors of our household, as well as secretaries, counts, Burgundian as well as Roman of cities and *pagi*, all judges, delegated and military')[23]. *Constitutio extravagans* XIX in referring to Gundobad legislating with all the *comites* ought to include Romans as well as Burgundians. We might, however, note the title of *constitutio extravagans* XXI: *Capitulus quem domnus noster gloriosissimus Ambariaco in conventu Burgundionum instituit* ('the article which our most glorious lord established at the gathering of Burgundians in Ambérieux') which again indicates a specifically Burgundian gathering[24].

The *Liber Constitutionum* and the related constitutions, therefore, seem to be the legislation of the ruler acting with his Burgundian *comites*. That does not mean, however, that Roman officials, both *comites* and other functionaries, had no influence on the legislation of the *Book of Constitutions*. One should remember that, according to §3 of the *prima constitutio*, the laws contained in the collection were 'set forth and corrected following public discussion', *communi tractatu compositae et emendatae sunt*[25]. It was surely Romans who drew up most of the contents, just as they can be shown to have played a role in the creation of the so-called *Lex Romana Burgundionum*, as we will see. We can also infer that men other than Burgundian *comites* were present at the official promulgation of the law-book because of an important chronological indicator in clause LII (the edict issued on the same day as the *Liber Constitutionum* itself). This, we are told, was promulgated during a religious festival (*sub hac condicione sanctorum dierum*) – as it so happens

[22] Wood, 2016, pp. 10-11.

[23] *Liber Constitutionum*, *prima constitutio*, § 5.

[24] *Liber Constitutionum*, *constitutio extravagans*, XXI.

[25] *Liber Constitutionum*, *prima constitutio*, § 3.

that of Easter[26]. We know from the letters of Avitus of Vienne that the presence of the ruler in one's city during the festival was thought to be highly desirable[27]. And we should note that bishops could be involved in Sigismund's law-making, as is clear from another clause, *constitutio extravagans* XX, *de collectis edictum*, 'on the protection of foundlings', issued on March 8th in the consulship of Peter, 516, which was a response to lobbying by Gemellus of Vaison[28]. Bishops, of course, had their own legislative assemblies, and a council was held in Epaon on 15th September 517[29], and another in Lyon at some point between 518 and 523[30], which openly defied the ruler. In other words, the *prima constitutio*, as we have it, is the prologue to a collection of law issued at Easter 517. It was drawn up following public discussion, and then signed by a group of Burgundian *comites*. It may be that the law-book was publically received by a wider group, since there were plenty of other high status individuals present at court at the time.

In addition to noting these complexities, we should be careful how we use the *prima constitutio*: we can date it firmly enough, but we need to recognise that the collection of laws contained in the manuscripts is not just the legal compilation for which the prologue was originally composed. We can see this very clearly from the fact that the manuscripts include law LII, *De mulieribus desponsatis*[31]*,* even though it cannot have been part of the *Liber Constitutionum* issued in 517, for the simple reason that the judgement was made on the same day as the promulgation of the law-book. Manuscripts of the Code also include a law of 10th June 517[32], that is two and a half months after Sigismund had issued his *Liber Constitutionum*.

Exactly what Sigismund's collection of 517 contained is unclear. If we are to assume that the order of the laws to be found in the manuscripts of the *Book of Constitutions* in some way represents the order in which they

[26] *Liber Constitutionum*, XXII.

[27] Avitus of Vienne, epp. 76, 77, 85, ed. Peiper, *Monumenta Germaniae Historica*, *Auctores Antiquissimi*, VI, 2, Berlin, Weidmann, 1883.

[28] *Liber Constitutionum*, *constitutio extravagans*, XX.

[29] Council of Epaon, ed. Gaudemet and Basdevant, Paris, Cerf, 1989.

[30] Council of Lyon I, ed. Gaudemet and Basdevant, Paris, Cerf, 1989.

[31] *Liber Constitutionum*, LII.

[32] *Liber Constitutionum*, LXII.

were gathered, we would have to conclude that Sigismund's compilation included most of clauses 1-51[33], in other words up to the law on the breach of betrothal agreements which was issued on the same day as the *Liber Constitutionum* itself. We will return to the question of the first 41 clauses, which seem to constitute a single entity, which may well have been made before Gundobad's death. If, however, it is a correct assumption, which may not be the case, that Sigismund's law-book was made up of clauses 1-51, the collection omitted some edicts that had already been issued. Apart from the two edicts already mentioned, which date to 517[34], and could not have been included in the Code, we have clauses dated to 501[35], 502[36], 513[37], 515[38], 516[39], and there is a good case for thinking that *constitutio extravagan*s XXI was issued in 508: of these edicts only those of 501 and 502 are to be found in the first 51 clauses of the law-book. Laws issued in 513, 515, and perhaps in 508, come later in the manuscripts than the 517 law on breach of betrothal. Thus the ordering of clauses and the inconsistent inclusion within the manuscripts of the so-called *constitutiones extravagantes*, suggest that some earlier law was not initially included within Sigismund's law-book, and that later recensions added clauses that had been omitted from the *Liber Constitutionum* of 517.

What was Sigismund doing in issuing his law book? We can make some guesses. This was the second year of his reign, so it was not issued immediately after his accession. But it was early in the second year. We know that Gundobad died early in 516[40], before 8th March, when Sigismund issued *constitutio extravagans* XX. If Sigismund deliberately wished to issue his law-book at an Easter court, which would seem to have been the highpoint of the Gibichung political year, he may well not have enough time to commission a new legal compendium between his

[33] Heather, 2011, pp. 127-8.
[34] *Liber Constitutionum*, LII, LXII.
[35] *Liber Constitutionum*, XLII
[36] *Liber Constitutionum*, XLV.
[37] *Liber Constitutionum*, LXXVI
[38] *Liber Constitutionum*, LXXIX.
[39] *Liber Constitutionum*, *constitutio extravagans*, XX.
[40] Marius of Avenches, *Chronicle*, s.a. 518, ed. Favrod, Lausanne, Université de Lausanne.

accession and the immediately following Easter. Of course any new ruler had reason to assert his authority early in his reign, but Sigismund may have had particular reasons for doing so. As we will see, his father ruled as *magister militum*[41]: in time Sigismund held the same title, but although Gundobad had petitioned the emperor Justin to transfer it to his son, there was some delay in this taking place. Sigismund, in other words, did not rule as *magister militum* on his accession. This may explain the relatively unusual use, by Gibichung standards, of the title *rex* in the *prima constitutio*. It may also provide a context for the promulgation of the law-book. Perhaps Sigismund was using the law-book to assert his credentials as a Roman-style ruler: and perhaps he was doing so because he had not yet been recognised as *magister militum*, or alternatively because he had recently received that recognition.

Sigismund, then, authorised a collection of laws to be issued in 517: but it did not contain all the legislation issued by Burgundian rulers prior to that date. The manuscripts make it clear that the law-book was subsequently expanded. We should also note, as many have done[42], that Sigismund was probably not the first to commission such a collection: his father would seem to have done so before him – which might explain why some manuscripts of the *Liber Constitutionum* attribute the law-book to Gundobad.

Gregory of Tours records that following the civil war of the year 500 Gundobad, having defeated and killed his brother Godegisel, and having had the senators who had supported his rival executed, instituted milder laws among the Burgundians, to prevent unjust treatment of the Romans: *… interfectis senatoribus Burgundionibusque, qui Godigiselo consenserant. Ipse vero regionem omnem, quod nunc Burgundia dicitur, in suo dominio restauravit. Burgundionibus leges mitiores instituit, ne Romanos obpraemerent* ('the senators and Burgundians who had consorted with Godegisel were killed. He [Gundobad] took back under his control all the region which is now called Burgundy. He instituted milder laws for the Burgundians, so that they should not oppress the Romans')[43]. These milder

[41] Wood, 2006, pp. 65-9.

[42] See above, n. 19.

[43] Gregory of Tours, *Decem Libri Historiarum*, II, 33, ed. Krusch and Levison,

laws have often been identified with the *Liber Constitutionum*. As we have seen, however, the collection that we have cannot be a compilation of the year 500, or shortly after – there are several edicts that are firmly dated to a later date, and the *prima constitutio* belongs to 517. It has, however, been noted that laws 1-41 look like an initial compilation[44]. Unlike many later laws in the collection they do not contain references back to previous clauses. The first clause to do so is law XLII, for which fortunately we have a specific date: September 3rd in the consulship of Abienus, that is 501. The law was issued at Ambérieux, which was also where *Constitutio extravagans* XXI was issued, and which must have been the site of a royal centre, whose existence is also indicated by one of the largest concentrations of Burgundian inscriptions in nearby Briord[45]. If we are right in thinking that the first 41 clauses constituted an initial law-book, which was then incorporated into Sigismund's collection, the fact that clause XLII is dated to 501 might well be taken to support Gregory's statement that Gundobad issued milder laws after the civil war of 500.

On the other hand, we do not have to assume that Gregory was actually talking about a law-book: he might instead have been referring to a number of individual edicts. There are several such laws that might well be seen as improving the lot of indigenous population, largely because they prevent the improper interference of barbarians in law-suits involving Romans[46]. We might also note that clause XLV, which introduces trial by battle because of the light-hearted way that *homines nostros*, perhaps members of the ruler's retinue, and presumably non-Romans, were swearing oaths in court, could be read as protecting Romans from injustice. This clause has a date of 502. We can, therefore, see that Gundobad did issue laws to support Romans in the law-courts. And this can certainly be taken as justifying Gregory's account.

But taken as a whole, the first 41 clauses are scarcely focussed on problems of Roman-barbarian relations. If we accept that clauses 1-41

Monumenta Germaniae Historica, *Scriptores Rerum Merovingicarum*, I, 1, Hannover, Hahn, 1951..

[44] Heather, 2011, pp. 127-8.

[45] Escher, 2005, vol. 1, pp. 150-1.

[46] *Liber Constitutionum*, XXII, XXVIII, XXXI, XXXVIII, LIV, LV, LXXXIV. Wood, 2016.

constitute a collection on their own, and there seems to me to be a strong case to believe that, and if we note that the collection was made before September 501 (the date of clause XLII), we should, I think put the collection in a broader context than the protection of Romans. Indeed we might note that immediately before his comments on the institution of milder laws, Gregory talks of the execution of Roman senators. The protection of Romans might have been just one aspect of Gundobad's use of law to affirm his authority following the conclusion of the civil war of 500. It should, however, be acknowledged that clause XLII only provides a *terminus ante quem* of 501 for the putative law-book of Gundobad. A date earlier than 500 and a different context is possible.

The conclusion of the civil war may, however, provide a context for some of the legislation to be found in the other legal compilation of the Gibichungs, the so-called *Lex Romana Burgundionum*, a compilation that should perhaps be called *Forma et Expositio Legum*, since clause 8 of the *prima constitutio* of the *Liber Constitutionum* states that Romans are to be judged by Roman laws, as established by legislator's *parentes*, and that judgement should follow the *formam et expositionem legum conscriptam* ('the form and explanation of the laws set down in writing')[47].

Before considering the origins of the *Forma et Expositio*, it is useful to describe its contents, because it is not simply a transcription of earlier Roman Law. In fact it is a collection of quotations from and references to a large number of legal texts, including not only the *Codex Theodosianus*, but also imperial novels issued after the promulgation of the Code in 438, by Valentinian III, Majorian, Marcian, Leo and Libius Severus, as well as earlier imperial laws that are not to be found in the Theodosian compilation, but which were later to be included in that of Justinian. In addition there are passages from Gaius, Paul, the *Codex Gregorianus* and the *Codex Hermogenianus*. In many cases the *Forma* simply provides a précis of a specific law, and sends the reader to the full text. But there are also clauses (some of them explicitly taken from Roman legal texts) for which the editor De Salis could only write *ex fonte ignoto*. Some of these may be new pieces of legislation, because on two occasions the laws speak of a *praeceptio domni/domini regis*. One remarkable clause, on rates of compensation,

[47] *Liber Constitutionum*, *prima constitutio*, § 8.

states directly that Roman law does not deal with the issue (*et quia de preciis occisorum nihil evidenter Lex Romana constituit, dominus noster statuit observandum*: 'because Roman Law has not evidently laid down anything concerning the monetary value of those who are killed, our lord has established for observation …')[48]. In other words the contents of the *Forma et Expositio* have been carefully prepared from a wide range of legal resources, some of them extremely up-to-date – the most recent law is one issued in 465[49]: the source material has been edited, and on at least one occasion a gap has been filled.

Assuming that the *Lex Romana Burgundionum* is essentially the written text referred to in the *prima constitutio*, we can make a number of deductions about the origins and nature of the compilation. The collection has no preface, but clause 8 of the *prima constitutio* of the *Liber Constitutionum* states that that Romans were to be judged by Roman law, as had been established by the legislator's *parentes*: *Inter Romanos vero … sicut a parentibus nostris statutum est, Romanis legibus praecipimus iudicari* ('Indeed we order that judgement should be made between Romans according to Roman laws, as was commanded by our *parentes*')[50]. The plural makes it quite clear that we are not just dealing with laws established by the ruler's father, but by other relatives as well, in other words by Sigismund's grandfather Gundioc, and by his great-uncle Chilperic, both of whom held the office of *magister militum per Gallias* as well as the *patriciate*. Thus, we know that Burgundian *magistri militum* were involved in legal activity in the third quarter of the fifth century, and that this activity involved the recognition of Roman law.

This allows us to make a connection with Sidonius' description of his friend Syagrius: *Adstupet tibi epistulas interpretanti curva Germanorum senectus et negotiis mutuis arbitrum te disceptatoremque desumit. Novus Burgundionum Solon in legibus disserendis …*. ('The bent age of the Germans is astonished at you interpreting letters, and it chooses you as an arbitrator and mediator in their mutual negotiations. A new Solon of the

[48] *Forma et Expositio Legum*, II, § 5.

[49] *Forma et Expositio Legum*, XLVI.

[50] *Liber Constitutionum*, *prima constitutio*, § 8. See Saitta, 2006, p. 83, although he assumes that the *prima constitutio* is the work of Gundobad and not of Sigismund.

Burgundians in elucidating law …')[51]. André Loyen dated the letter to 469 and suggested that it was written in Lyon[52]. Certainly it belongs to the period before Sidonius' election as bishop of Clermont, that is in c.470. At that moment it is probable that Gundioc was still *magister militum* – although we cannot be sure when he died, or when his brother Chilperic took over his office.

Sidonius' description of Syagrius as a new Solon tends to be regarded as a slightly comic piece of hyperbole, but I think we should take it very seriously, all the more so because the epitaph of the bishop of Clermont himself states:

> *Illustris titulis, potens honore,*
> *Rector militie forique iudex,*
> *Mundi inter tumidas quietus undas,*
> *Causarum moderans subinde motus*
> *Leges barbaros/barbarico dedit furori.*
> ('Noble in titles, potent in honour,
> A ruler of soldiers and a judge in the forum,
> Steady among the swelling waves of the world,
> Then moderating the motion of cases,
> He gave laws to barbarian fury/he gave barbarian laws to fury ….')[53].

In other words Sidonius himself had been a law-giver for the barbarians. And the epitaph states explicitly that this was before he was elected bishop. Although we tend to think of the Visigoths rather than the Burgundians when we think of the barbarian associations of Sidonius, we should remember that most of the time between 461 and the take-over of Clermont by Euric in 474 he was in territory that was controlled by a Gibichung *magister militum*[54]. That is to say that Sidonius, like Syagrius, had provided legal advice to Gundioc or possibly to Chilperic. When Sigismund stated that his *parentes* had authorised the application of Roman law in the area under their jurisdiction, we should imagine that he is referring to a tradition of legislation that goes back to Sidonius and

[51] Sidonius Apollinaris, ep. V, 5, 3, ed. Loyen, Paris, Belles Lettres, 1970.
[52] Loyen, 1970, vol. 2, p. 180.
[53] Prévot, 1993.
[54] Ian Wood, forthcoming.

Syagrius.

This helps us to understand both the legal sophistication and also the up-to-date nature of the *Forma et Expositio*. Sidonius would have been extremely well-versed in Roman law: after all he held the office of City Prefect in 468[55], at a time that he may well have represented the interests of Gundioc at the court of Ricimer, who was also the uncle of Gundobad[56]. As we have already noted, the collection refers to material not included in the *Codex Theodosianus*, including novels issued by Valentinian, Majorian and Libius Severus, the last of whom died in 465. Sidonius, and indeed the Gibichung *nagistri militum* (most especially Gundobad, who was *magister militum praesentalis* from 472) would have been fully aware of major imperial pronouncements.

It is worth pausing on the involvement of Sidonius and Syagrius in Burgundian law-making. This must have occurred before 476. Patrick Wormald argued that barbarian legislation was a mark of the end of the Roman Empire in the West: for him it was a seizure of imperial prerogative[57]. In the case of Gibichung law-making, however, that is clearly not the case. Given Sidonius's commitment to the Empire, he is highly unlikely to have participated in activity that was in conflict with imperial authority. In other words, the first legislative actions by barbarian leaders should be placed within the framework of the Empire. Roman emperors themselves had legislated for barbarian groups – the *Panegyrici Latini* state clearly that Constantius gave laws to the Franks (*receptus in leges Francus*)[58], and there is a possibility that there are traces of that legislation in the *Pactus Legis Salicae*, which may perhaps derive from a fifth-century treaty between Romans and Franks, as suggested by Jean-Pierre Poly[59]. But Gibichung legislation is different, for it is Burgundians, and not Romans, who are issuing the law, and they are doing so for Romans and Burgundians. That they could do so is best explained by the fact that

[55] Harries, 1994, pp. 141-66.

[56] Wood, forthcoming.

[57] Wormald, 1977, p. 133.

[58] *Panegyrici Latini*, VIII (V), 21.

[59] Whereas Poly's argument (Poly, 2015) that the origins of the *Pactus* lie in an arrangement between Franks and Romans is compelling, his attempt to identify the precise context of that arrangement lacks any firm evidential basis.

Gundioc and his brother Chilperic in turn held the office of *magister militum per Gallias*, as well as the patriciate[60]. Chilperic may have been followed in his Gallic office by Gundobad, but the latter already held the title of *magister militum praesentalis*, and he may not have relinquished it when he left Italy for Gaul in 474. It seems that he was still claiming to be *magister militum* in his letters to the emperor immediately prior to 516, when his son Sigismund asked that the title be conferred on him[61]. Theodoric blocked the request, but we know from the letters of Avitus of Vienne that by the end of 517 Sigismund had been granted his father's title by the emperor Justin. Before and after 476 the Gibichung leaders were officials of the Roman Empire. When they legislated, initially with the aid of Sidonius and Syagrius, they must have done so in their capacity as *magistri militum*, or perhaps as *patricii*: they were agents of the emperor applying imperial law.

If it appears problematic that the Gibichungs seem to have been acting not only in the military but also in the civilian sphere, one can point to Sidonius's description of Chilperic in c.474 as *tetrarcha noster*[62], and to a passage in the *Vita Patrum Iurensium*, where it is said of Chilperic's rule that 'public power had at that time been handed over to royal authority' (*sub condicione regia ius publicum tempore illo redactum est*)[63], and 'the purple fasces have been transformed under a skin-clothed judge' (*mutari muriceos pellito sub iudice fasces*)[64]. If we take this statement literarily it would seem to suggest that there had been a transfer of some civil authority to men whose posts were officially military. And since the reference is to Chilperic and not to Gundobad, it is highly likely that this had occurred before 476. Certainly, we know that Gundioc, as *magister militum*, intervened briefly in the case of a disputed episcopal election at Die[65]. Late Roman military law has been recognised as influencing other

[60] Wood, 2006, pp. 65-9.

[61] Avitus, epp. 93, 94

[62] Sidonius Apollinaris, ep. V, 7, 1.

[63] *Vita Patrum Iurensium*, 92, ed. Martine, Paris, Cerf, 1968.

[64] *Vita Patrum Iurensium*, 94.

[65] *Epistolae Arelatenses*, 19, ed. Gundlach, *Monumenta Germaniae Historica*, *Epistolae* III, Berlin, Weidmann, 1892: Heinzelmann, 1976, p. 226: Mathisen, 1989, pp. 216-7.

aspects of early medieval legislation[66], not surprisingly, given the fact that the post-Roman kingdoms developed out of military arrangements between the Empire and barbarian groups[67]. The Gibichung evidence can properly be set within a context in which military and civilian jurisdictions were being eroded.

The *Forma et Expositio* is essentially a compilation of Roman law, although it may not have been an official legal code. Whatever its status, the involvement of the Gibichungs is clear enough in some of its clauses. It is worthwhile looking at the passages where this is the case. On two occasions royal legislation is explicit. Clause II, *de homicidiis*, concludes with the phrase hoc ex *praecepto domini regis convenit*, 'this is agreed following a precept of the lord the king'[68]. The law itself, which is closely linked to *Liber Constitutionum* II, X, L, contains direct references to Novel 19 of Valentinian III and to *Codex Theodosianus* IX, 45. But it also contains a passage which is the king's own addition.

> 5. *De ingenuo vero homicida intra ecclesiam posito de interempti precio principis est expectanda sententia; et quia de preciis occisorum nihil evidenter Lex Romana constituit, dominus noster statuit observandum; ut si ingenuus ab ingenuo fuerit interemptus, et homicidia ad ecclesiam confugerit, is ipse, qui homicidium admisit, cum medietate bonorum suorum occisi heredibus serviturus addicatur; reliqua medietas facultatis eius homicidae heredibus derelinquatur.*
> 'Concerning a free man who is a homicide and has placed himself within a church, the following sentence of the *princeps* has been issued with regard to the monetary value of the dead man. And because Roman law has not obviously laid down anything concerning the monetary value of the dead, our lord had stated that the following should be observed: that if a free man is killed by a free man, and the homicide has fled to church, he who has admitted the murder should be handed over to serve the heirs of the dead man, together with half of his goods. The remaining part of his property is to be passed to the heirs of the killer';
> 6. *Si vero servus cuiuscumque occisus fuerit ab ingenuo, et ipse homicida ad ecclesiam convolaverit, secundum servi qualitatem infra scripta domino eius precia cogatur exsolvere, hoc est: pro actore C solidi, pro ministeriale LX*

[66] Esders, 2008: Botta and Loschiavo (ed.), 2015 (especially the article of Esders).
[67] Loschiavo, 2016, pp. 143-8.
[68] *Forma et Expositio Legum*, II.

> *solidi, pro aratore aut porcario XXX, pro aurifice electo C, pro fabro ferrario L, pro carpentario XL solidi inferantur. Hoc ex praecepto domini regis convenit observari.*
> 'But if someone's servant/slave has been killed by a free man, and the homicide has fled to a church, he should be compelled to pay the following monetary value set down by our lord according to the quality of the servant/slave: that is, 100 solidi for an agent, 70 for an officer, 30 for a ploughman or a swineherd, 100 for a choice goldsmith, 50 for a smith, 40 for a carpenter. This is agreed following the injunction of the lord the king.'

Although this is clearly Gibichung legislation, and although it deals with blood money, we should beware of describing it as Germanic. First, the concept of compensation for *iniuria* existed in Roman Law[69]. Second, and more important, these additions are concerned with Church asylum, and, therefore, they cannot be traditional for a Germanic people. Third, of course, the law appears in the *Forma et Expositio* and not in the *Liber Constitutionum*.

One might add, even though the term itself is not cited in the clause of the *Forma et Expositio*, that Christophe Camby has raised serious questions about whether the concept of *wergeld* is Germanic[70]. He points to the phrase *aut poena capitis sui aut facultatum amissione compenset* ('either by capital punishment of himself or by the forfeiture of his property'), to be found in the *interpretatio* of *Codex Theodosianus* IX, 1, 14 (though the idea is clearly contained in the law itself)[71]. The same concept is to be found in the phrase *aut se redemat aut de vita componat* of the *Pactus Legis Salicae* (LI, §3, 'either redeem himself or make composition with his life')[72]. In other words, the lacuna in Roman law identified by the Gibichungs is not the general concept of blood money, but a specific tariff.

A second clause of the *Forma et Expositio*, XXX, *de apparitoribus*

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[69] See *Lex Aquilia*, Justinian, *Digest*, 9, 2, ed. Mommsen and Krüger, Berlin, Weidmann, 1872.

[70] Christophe Camby, 2013.

[71] *Codex Theodosianus*, IX, 1, 14, ed. Mommsen and Meyer, Akademie der Wissenschaften, Berlin, 1905.

[72] *Pactus Legis Salicae*, LI, § 3, ed. Eckhardt, *Monumenta Germaniae Historica*, *Leges Nationum Germanicarum*, IV, 1, Hannover, Hahn, 1962.

('concerning public servants') also refers to a royal *praeceptio*[73]:

> 2. *Et ab his, quos conveniunt, si ad praeceptionem domni regis de causis singulis, seu divisis, seu in unum consortes, qui pulsati fuerint, teneatur, non amplius ab executoribus, quam solidus in sportola requiratur.*
> 'And from those against whom they have convened, (whether on a single issue or on separate issues according to the injunction of the king), or those who have been compelled together as partners, let it be understood that no more should be required as a gratuity from the executors than one solidus.'

Here, however, we are not dealing with an issue for which the ruler had found no precedent in Roman Law: and de Salis was able to cite several parallels from the *Codex Iustinianus*[74].

In addition to the two explicit references to a *rex*, the *Forma et Expositio* refers on a number of occasions to *princeps*, one of which we have already noted in the context of the clause dealing with the asylum of homicides. One might expect this term to be used for the emperor himself. That is the case in the letters of Avitus of Vienne[75]. But the bishop does use the word *principatus* to refer to Gundobad[76]. Moreover, it is clear from the context that the reference in the *Forma et Expositio* must be to the Gibichung ruler. Thus, in the case of homicide, judgement is to be referred to the *princeps*[77]: *Si vero homicidiam casu vel vitande mortis causa forte dicatur admissum, ad principis notitiam per relationem iudicis est referendum, et eius sententia expectanda, secundum legem ex corpore novellarum Theudosii et Valentianiani ad Maximum patricium datum*.

'If indeed homicide has been confessed and is said to have been committed by accident or to avoid death, it should be referred to the notice of the *princeps* through the account of the judge, and his sentence should be awaited, following the law of the Novels of Theodosius and Valentinian issued to the *patricius* Maximus.'

There are three references in the *Forma et Expositio* to the judgment of

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[73] *Forma et Expositio Legum*, XXX.

[74] *Forma et Expositio Legum*, ed. de Salis, p. 149: *Codex Iustinianus*, I, 3, 25, § 2; 32, § 5: XII, 19, 12, §1: XII, 21, ed. Mommsen and Krüger, Berlin, Weidmann, 1872.

[75] Avitus, epp. 8, 47.

[76] Avitus, *Contra Eutychianam Haeresim*, I.

[77] *Forma et Expositio Legum*, II § 2. The reference is to *Novella Valentiniani*, XIX.

the *princeps* in cases that have been referred to him, in clause XXXIII, *de interpellationibus et appellationibus* ('of interruptions and appeals')[78]. Of one of these references (§ 5. *Iudici quoque neque suam neque alienam sentientiam liceat refragare, quia haec discussio soli principi reservatur; quia legum est, litigia sententiis vel transactionibus terminata non posse iterum revocare*. 'A judge is not allowed to break his or another's sentence, because this revision is allowed only to the *princeps*, because it is established in law that cases concluded with sentences or agreements cannot be called into question again.') De Salis, stated simply *ex fonte incerto*. There is also a clause on the *liberti principis*[79], and there are three references to the *princeps* in clause XXX *de apparitoribus*[80]. In all these cases the *princeps* must be the Gibichung ruler.

By far the most interesting information is to be found in clause VII, *De obiectione criminum vel inscriptionibus ingenuorum sive servorum* ('concerning the charging of crimes and the accusations of free men and servants/slaves')[81]:

> 6. *Crimina vero maiestatis haec sunt, quae legibus designantur; id est: salus principis, traditio regionis aut adeptio tyrannidis.*
> 'These are the crimes of treason designated by the laws: that is the safety of the *princeps*, the betrayal of the region and the establishment of a tyrant.'

This is another clause for which de Salis could find no direct Roman source, although he did note similarities with passages in the *Sententiae Pauli*[82]. In classifying as *crimina maiestatis* the crimes of threatening the safety of the *princeps*, betrayal of territory, and usurpation, this seems to be referring to a specific set of circumstances, which surely suggests that we are dealing here with a law issued following the attempt by Godegisel to overthrow his brother in 500[83]. This clause, then brings us back to the

[78] *Forma et Expositio Legum*, XXXIII, § 5.
[79] *Forma et Expositio Legum*, III, 2.
[80] *Forma et Expositio Legum*, XXX.
[81] *Forma et Expositio Legum*, VII, § 6.
[82] *Forma et Expositio Legum*, ed. de Salis, 1892, p. 130, citing *Sententiae Pauli*, V, 29, 1: *Digest*, XLVIII, 4, l. 10. 11.
[83] Gregory of Tours, *Decem Libri Historiarum*, II, 32-3.

possibility that Gundobad authorised the compilation of law-books in the aftermath of the civil war.

There is perhaps one other clause of the *Forma et Expositio* which might relate to the crisis of 500[84]:

> *Titulus* VIII *De violentiis*
> 1.*Si quis violentiam ita convincitur admisisse, ut collectis turbis per vim inruens deiciat possidentem, nec eum civili, ut legum est, actione pulsaverit, capitali sententia feriatur*.
> 'If anyone is convicted of having committed violence, so that having gathered a mob he charges in with force and dispossesses an owner, and has not driven him out thought civil action, according to the law, let him be subject to capital punishment.'

De Salis suggested that the origins of this clause lay in *Codex Theodosianus* IX 10, *Ad legem Iuliam de vi publica et privata*[85]. There are, however, distinctive phrases in the Burgundian law that find no parallel in the Theodosian Code. In particular there are the words *collectis turbis*, which might point us back to the civil war.

How can we sum up the evidence we have for the actual process of law-making in the Burgundian province? First, we should stress its Roman origins. By this I do not simply mean that Burgundian law cites Roman law. Rather, what we see is Gibichungs, as Roman officials, even before 476 gathering and editing Roman law with the help of senior members of the senatorial aristocracy, Sidonius Apollinaris and Syagrius. That law was applicable to all those subject to the jurisdiction of the *magister militum per Gallias*, which seems to have meant an extension of authority not just over the military, but over the general population of the valleys of the Rhône and Saône under his control. There was also a need to provide new legislation to deal with Roman/non-Roman relations. This may have been necessary from the moment of the Burgundian settlement[86]. We know that Burgundians had been involved in law suits before 451, because *Liber Constitutionum* XVII states that all cases involving Burgundians from before

[84] *Forma et Expositio Legum*, VIII, § 1.

[85] *Codex Theodosianus*, IX, 10.

[86] On the question of the Burgundian settlement, Goffart, 1980, pp. 127-61: Wood, 2013.

the Battle of the Catalaunian Plains are to be dismissed[87]. It became more necessary in the aftermath of the civil war between Gundobad and Godegisel, when the latter received a good deal of senatorial backing. Gundobad clearly had to appease the Romans, as Gregory of Tours tells us. This may have prompted the compilation of an early version (not necessarily the first) of the *Liber Constitutionum*. Certainly it led to the issuing of a number of edicts intended to stop barbarian interference, involving force or threats, in court cases.

It also, I would suggest, prompted the famous clause authorising trial by battle in place of oath-taking, because the non-Romans (*nostri homines*) were taking perjury lightly[88]. I would not argue that this was a reversion to a traditional Burgundian practice. There clearly were some Burgundian legal traditions, as can be seen in the handful of Germanic words to be found in the *Liber Constitutionum* (*malahereda* ('marriage ornaments')[89], *wittiscalc* ('royal servant')[90], *witttimon* ('wedding gift')[91]. Interestingly two of these three words are concerned with marriage, which may suggest that Burgundian tradition was most firmly entrenched in matters relating to the family. There are also important references to *consuetudo*. For instance, we find references to *consuetudines* that were apparently Burgundian in clauses LI, *de his qui debitas filiis substantiae suae non tradiderint portiones* ('on those who have not given their children the portions of their property due to them', on male and female inheritance)[92], LVII, *De libertis Burgundionum* ('on Burgundian freedmen)[93], LX, *De adhibendi donationum testimoniis* ('on employing witnesses of gifts')[94], and LXXVII, *de inscriptionibus* ('of accusations')[95] – although none of these seem to have been peculiarly archaic. But we have no reason for thinking that ordeal by

[87] *Liber Constitutionum*, XVII, § 1.
[88] *Liber Constitutionum*, XLV.
[89] *Liber Constitutionum*, LXXXVI.
[90] *Liber Constitutionum*, LXXVI.
[91] *Liber Constitutionum*, LXIX.
[92] *Liber Constitutionum*, LI.
[93] *Liber Constitutionum*, LVII.
[94] *Liber Constitutionum*, LX.
[95] *Liber Constitutionum*, LXXVII.

battle was a Germanic custom (if indeed there was any such thing)[96]. In the case of trial by battle it may well be that Gundobad was activating a form of dispute settlement that was in use in the army, a suggestion that again points to the significance of the military origins of Gibichung authority.

So too, in one other well known clause, which is often regarded as un-Roman – clause XCVII, on the theft of pedigree dogs, *De canibus veltravis aut segutiis aut petrunculis*, with its infamous penalty of making the criminal kiss the dog's backside in public[97] – there is absolutely nothing, not even in the language, to suggest that the custom was Germanic in origin: more likely we are looking at a form of public humiliation that was current within the hunting fraternity – the three adjectives, *veltravus*, *segutius*, and *petrunculus*, look like the slang of Roman huntsmen. *Veltravus* is surely related to *veltris* ('greyhound'), which Notker identified in the ninth century as a Gallic word[98]: *segutius* ('sleuthhound') probably derives from the verb *sequor*: and *petrunculus* has been understood as *canis petronius*, which is attested in the *Cynegeticon* of the Augustan poet Grattius Faliscus[99].

When we consider the law-making of the Gibichungs it is much more useful to look for precise contexts than to juggle with assumed concepts of Roman and Germanic law – although the legislation itself very largely belongs to one or other Roman legal tradition. Gundobad was dealing with the aftermath of civil war, and with a need to reassert his authority, and this surely is the context for his considerable legislative activity. Sigismund likewise needed to establish himself after his accession. Thus, while there is evidence for a Gibichung involvement in law-making from before 476 down to the 520s, we see two periods of particularly energetic legislative activity: c.500 and c.517. But, in addition, an earlier period of activity, when Gundioc or Chilperic were acting under the guidance of Sidonius and Syagrius surely provided a model for what came later.

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[96] *Liber Constitutionum*, XLV.

[97] *Liber Constitutionum*, XCVII.

[98] Notker, *Gesta Karoli*, I, 20, ed. Rau, Darmstadt, Wissenschaftliches Buchgesellschaft, 1960.

[99] Grattius Faliscus, *Cynegeticon*, l. 202, ed. Wright and Wright, Cambridge, Mass., Harvard, 1934.

Whether the Gibichungs were unusual in the extent of their legislative activity is unclear: our evidence for the law-making of the early Visigothic, Vandal and Ostrogothic rulers is not so rich. What we can say is that Gibichung legislation is to be found right at the start of the tradition of sub-Roman law-making: it even begins in a Roman context, as the actions of imperial officials advised by high-ranking senators. Although there are some precise practices that may have their origins in barbarian custom, by far the majority of the legislation is drawn from Roman practice, and when a Gibichung could find no model in Roman law (as in the case of the compositions to be paid by homicides who had sought asylum) we should not look for some Germanic custom, but rather to the work of Roman bureaucrats trying to apply existing law or custom to new situations. This is already true in the case of the legislation included within the *Forma et Expositio*, and it also underlies the new legislation of the *Liber Constitutionum*, where we see the result of legal experts trying to deal with relations between Romans and non-Romans. That our main monument to their work, the *Liber Constitutionum* was issued by Sigismund and signed by his Burgundian *comites* is not an indication of the Germanic nature of the *Book of Constitutions*, or that it should be treated as a separate category of law from that contained within the *Forma et Expositio*. It simply marks one moment in an almost continuous history of law-making in the Gibichung province of the Roman Empire.

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