

Corpus Iuris Civilis Romani

About Controversies During the Creation of the Justinian's Codification

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Before doing anything else, the history must make a thorough purge – in order to remove all those inventions which, despite tend to be 'history', are nothing more than ordinary improvisation.

Theodor Mommsen (1817–1903)

Abstract

Ludwig Feuerbach (1804–1872) has said that there are three books in the entire European history which must not be pushed into oblivion: The Christian Holy Bible, Justinian's Corpus Iuris Civilis and Marx's Das Kapital, because, "they mostly feed humanity". Perhaps that is the reason why every single attempt to criticize these colossal works, even if it pretends to be called 'scientific', must be written by a hand that trembles. The intention of this work is, through a historical-comparative and logical-teleological approach, to explore the question which was ignored so far: How is it possible, in six short years, to create such a magnificent legal work, at least three times bigger than the Bible? Our goal is to add deepness to what has been, at least in Macedonian literature - so far a disappointingly shallow debate about the way and circumstances in which the famous Justinian Codification was created (6th century). In addition, the main point of argumentation is that solicitors, called to create this codified work, leaned on a solid base of previously created legal codices. These codices were used in the legal education in the Higher Law Schools, i.e. Faculties which existed in the Eastern part of the Roman Empire.

Key-words: Codex, Digesta, Institutions, Novellae, commissions, iurisprudentes.

PRAELECTIO
(INTRODUCTION)

In the History of Law as a scientific area, and especially among the romanists and byzantologists, not only terminological, but also essential arguments about the following question are being conducted: Does Justinian's work (Iustinianus Primus Maximus /482–565 AD), which after ten centuries became known as *Corpus Iuris Civilis*, represent a **codification**, compilation or we can consider it as his contemporary legislative, as an objectively valid law in the Eastern Roman [Byzantine] Empire respectively? Due to differences between the Justinian's attempt and the modern legal codifications, some authors, such as the Dutch professor Hans Ankum, from the University of Amsterdam, avoid the word 'codification'¹ and use the term *Justinian legislature* instead.

At the very beginning we should mention that up to now research in this area has mainly been permeated with a **panegyric** tone in which the character and work of 'the Divine Justinian' are praised. The critical approaches concerning the very short time required to create such a monumental legal work are almost unnoticeable. And, because we do not want to be a victim of what Arthur Koestler (1905–1983) rightly calls *the law of diminishing returns*, we will try to cast a different light on the process of the creation of the Justinian codification, with special emphasis on the origin of its voluminous and crucial part known as *Digestae*.

1. About the work of Byzantine jurists on the Justinian's Codification

[The historian] ...*ne quid falsi dicere audeat, ne quid vera non audeat – nor should it say something false, or to conceal something true.*

Marcus Tullius Cicero (1st c. BC)

The voluminous work on the *Justinian Codification* was actually realized with the help of the educated **jurists-codifiers**, who had both practical and theoretical experience. During this painstaking task, Justinian relied mainly on the best two High Legal Schools then in existence, one in Constantinopolis (today

¹ The term *codification* originates from Jeremy Bentham (1748–1832), and before it the Greek terms *pannomion* and *pandikaion* = which also means "codification" were used.

Istanbul, Turkey) and the other in Berytos (today Beirut, Lebanon).² Lawyers who gathered were led by the knowledgeable Tribonian (Tribonianus / about 475–547) who possessed knowledge of the Roman law and was the main creator and editor of the Codification.³

But, this legal monument or ‘legal fresco’ (*monumentum iuris*), as it has been called by some historians of law, was not produced by one person but a Commission. The goal of this commission, according to Justinian himself, was to create a “clear and vivid” law. But in fact, there were many *de facto* **Justinian commissions** with various number of members and different personal attitudes, who worked in different time periods. This means that they worked successively and independently, thus creating one after another, the four parts of the Codification:

1) *Commission of Ten members* – Justinian, shortly after the official acceding to the throne in February 528 AD, gave an order for a Commission to be formed. The goal of this commission was to codify the already passed imperial constitutions (*constitutiones principum*). The principal aim was to make a collection of all the Emperor's decisions (*constitutio haec quae necessario*), primarily those called “emperor’s law”. This commission consisted of high-ranking lawyers, those of Tribonian’s calibre, the future chief of the compilation, and Theophilus, a famous professor at the Constantinopolis law school. Unfortunately, the work created a result of the first commission was not preserved.

2) *Commission of Sixteen members* – This commission worked on the creation of the famous work also known as *Digestae*. Their members were mainly selected by the chief Tribonian and consisted of sixteen ‘judicious men’ because, according to Justinian, “only free people can build the memory of the history”.⁴ Eleven of them were lawyers (*advocates*); four of them were eminent professors (*antecessores*) with the highest reputation; two of them were doctors of law (*iuris doctores*) at the Law School of Constantinopolis, among them the already mentioned Theophilus; and two of them, Dorotheus and Anatolius, came from the

² Beside these schools, a Law Faculty also existed in Alexandria (today Egypt). See also: Gábor Hamza and András Földi, “Justinian’s Codification and its Subsequent fate”, *Proceedings of the International Symposium ‘Contemporary Law, Legal Science and the Justinian’s Codification’*, Vol. 1, Skopje, University “Ss. Cyril and Methodius”, Faculty of Law “Iustinianus Primus”, 2004, 461.

³ About details of his life we learn mostly from the writings of the personal Justinian’s secretary and simultaneously imperial historian – Procopius (6th c.), primarily in his controversial book *The Secret History (Anecdota)*. See: Прокопиј Кесариски, *Тајната историја*, Скопје, Ѓурѓа, 2007 - especially Chapters XIII и XX.

⁴ Jordan Plevneš, *Юстиниан Первый*, Skopje, Prosvetno delo, 2006, 99.

Law School in Beirut. Only one of the sixteen members, the chief Tribonianus who had been appointed *Magister sacri palati* in 529, was a senior government official.⁵

3) *Commission of Three members* – This specialized commission of “the trinity of law” was in fact the one who produced the part of the codification known as *Institutiones*. The commission was appointed by Justinian himself during the preparations for the Digest, with the s.c. *Constitutio Omnem*. Tribonian was its chief and the other two members were the above mentioned law professors Theophilus and Dorotheus.

4) *Commission of Four members* – This commission worked on the publication of the second Justinian Codex, also known as *Codex Repetitio Praelationis* which means “the codex adopted after the second reading”. The work created by this commission is preserved until today.

2. About the structure of Codification

ONH ΘΥΤΕΟΝ ΤΗ ΑΛΗΘΕΙΑ, ΕΙ ΤΙΣ ΙΣΤΟΡΙΑΝ ΓΡΑΦΩΝ ΕΤΣΙ
One who intends to write history must offer the sacrifices only to the truth.
Lucian (2nd c. AD)

According to the German law-philosopher Gerhard Dulckeit (1904–1954) the parts of Justinian’s Codification were developed according to the following schedule: *Codex I* was developed from 528 to 529; *Digesta* from 530 to 533; *Institutiones* in 533; *Codex II* in 534, and finally, *Novellae* were collected from 535 to 555.⁶ The Justinian Codification that we are familiar with, in fact is a systematically created compilation, made through various **stages**, and therefore contains 4 [and not 5] parts, each of which can act as separate, independent

⁵ In professional literature this issue remains unclear, because various numbers about the personal composition of the Commission are being noticed: some figure with the number of 15 and the other with 17 members!?. Also, there are different theories about the numerical proportion: there are theories (eg G. Hamza and A. Földi) that famous judges of the High Courts and the so-called *Comes sacrarum largitionum* were involved, that managed with *Res privata* – the personal goods and property of the Emperor, as well as his *Patrimonium* – “heritage”.

⁶ Cited by: Гоце Наумовски, „Концептот на Societas во Јустинијановото законодавство“, *Зборник на трудови од меѓународен симпозиум ‘Современото право, правната наука и Јустинијановата кодификација’*, Том I, Скопје, Универзитет „Св. Кирил и Методиј“, Правен факултет „Јустинијан Први“, 2004, 516.

segments.⁷ In the following section we will say a few words about each part separately, but we will focus mainly on the controversy concerning the Digest, as the most important and extensive part of the Codification.

2.1 Codex

The *Codex of Justinian*, often causes confusion when mentioned, because of the fact that there are two Justinian's codices: one passed in April 529, which text is lost and unfamiliar for us, and the other one passed in December 534 which text is preserved:

1) **Novus Codex Iustunianus**, known as *Codex Vetus* or abbreviated as *Codex I* actually represents the beginning of the imperial codified work, which intensively continues in the following few years of Justinian's reign. The only thing known about the creation of the *Codex I* and its part in the future planning codification is that Justinian in *Constitutio Summa rei publicae*, says:

*The strongest protection of the state comes from two things: the weapons and the laws passed – which then, supplied with their strength, allow the fortunate Rome people to impose on all peoples and rule them not only as they ruled in the past, but also with God's mercy, to rule them in the future – forever! In the reference of both, may one be strengthened by the help of other – so that war in general be governed by laws, and the laws themselves be held by protection of weapon.*⁸

The Codex is actually a collection, comprised exclusively of imperial constitutions, or a display of the positive-legal order of the late Roman *leges*. It replaced the Theodosius Codex (*Codex Theodosianus* / 438), which was valid for almost a century and had been created in approximately one decade. The first Justinian Codex was created by the Commission of ten members in an interval of

⁷ Иво Пухан и Мирјана Поленак-Аќимовска, *Римско право*, Скопје, УКИМ, Правен факултет „Јустинијан Први“, 2008, 63.

⁸ *Summa rei publicae tuitio de stripe duarum rerum, armorum atque legum veniens vimque suam exinde muniens felix Romanorum genus omnibus anteponi nationibus omnibus dominari tam praeteritis effecit temporibus quam deo propitio in aeternum efficient. Istorum etenim alterum alterius auxilio semper viguit, et tam militaris res legibus in tuto collocata est, quam ipsae leges armorum praesidio servante sunt.*

one year, an extremely short time for such delicate and complex work. Because of this, we think that the members of the commission used some of the already existing codices. But the first Codex of Justinian did not last for long since it was replaced by the newly passed 'Second Codex' five years later, in 534.

2) **Codex Repetitae Prelactionis**, abbreviated as *Codex Iustinianus* or *Codex II*, was passed by *Constitutio Cordi nobis* and is actually a rearranged edition of the first Codex. The *Codex II* was passed under Tribonian's influence, after the previous attempt had failed, with the famous '50 decisions' (*Quinquaginta decisiones*) to resolve the conflict that existed between the Digest and the Institutions on the one hand and *Novus Codex Iustinianus* on the other.⁹ The *Codex II* was compiled by the Commission of four members and its size reaches a half of the Digest. *Codex II* is constructed chronologically and in terms of the subject matter of decrees (*decreta*), and it covers over 4,652 imperial constitutions, of which only 150 are written in Greek.¹⁰ With the exception of Justinian's decisions, all former decrees were thoroughly rewritten and shortened by their compilers, through the method of interpolation (see part 3 below).

2.2 *Digesta*

The second and the largest part of the Justinian codification is called *Digesta* or *Pandecta*. The Greek term *Pandektae* actually comes from *pan dechesthai* - "to cover all". The Digest was published on December 16th, 533, but came into force 14 days later on December 30th, 533. The collection has a general encyclopedic character and actually represents one big legal bulletin, *sui generis*. From the aspect of **structure**, it is divided into seven parts (*pars*) and contains overall 50 books (*libri*), which are independent from the parts and where all the issues from the public and private law are processed. Pars I (*Prota*) contains the books from 1 to 4; Pars II (*De iudiciis*) contains the books from 5 to 11; Pars III (*De rebus*) contains the books from 12 to 19; Pars IV (*Umbilicus* - 'the middle') the books from 20 to 27; Pars V (*De testamentis*) the books 28-36; Pars VI (untitled) contains the books

⁹ But also for these "50 solutions", that are not saved and are considered as lost, has no unified position in science: for example, the professors Hamza and Földi from University "Eötvös Loránd" of Budapest (Hungary), believe that they have been separately issued, an official collection, in 531 – and were a miscellany of decrees referred to the preparation of cumbersome material on the Digest. See: G. Hamza and A. Földi, op. cit., 463.

¹⁰ Hamza and Földi, op. cit., 465.

from 37 to 44; and finally Pars VIII (also untitled) the books 45-50.¹¹ The material of the Digest served as educational goals and so was not necessarily very thematic. For example as we can see, some parts, VI and VII, do not have special titles.

The books are further divided by titles (*titulus*), though three of them contain only one title. Some titles are divided into fragments or excerpts (*fragmentum*), moreover, the name of the author and the work from which the specific fragment is taken are meticulously marked.¹² In the Middle Ages, the lawyers called these fragments *leges* and divided them into further units called paragraphs (*paragraphos*). But often fragments consist of only one sentence, and the longer ones can be composed of an 'Introduction' (*principium*) and subsequent paragraphs were highlighted with the well-known symbol §.

In order to manage this sea of regulations, a common way of quoting the Digest was standardized and is generally accepted, a procedure professionally known as an **inscription** (*inscriptio*). For example, the abbreviation D. 50, 17, 110, 4 indicates: *Digesta*, book 50, title 17, fragment 110 and paragraph 4. Variants of the quotation are also available. For instance, stating the abbreviated form of the name Dig. (rather than just the letter D.), and it is specifically that the books from 30 to 32 belong to one common *titulus* ("De legatis et fideicommissis"). If a few fragments of the same *titulus* are quoted, the letter D. and the first two digits are replaced with the sign-code "eod.", which means *eodem titulo* = 'in the same *titulus*' (for example: Pomp. Eod. 5,2). We can see that in a case where the author of the text or quotation is marked, his name comes before the part of the source, and it is written in the abbreviated form (for example: Paul. D. 50, 17, 110, 4§ or Ulp. D. 38, 6, 1, 7).

If more than one paragraph is quoted from the same fragment, a full stop, instead of comma is placed between the paragraphs, as in this example: Marci. D. 39, 4, 16, 2.6.9. If the first paragraph or introduction of a fragment which is divided in several paragraphs is quoted, at the end we add the shortcut "pr." (from *principium* = 'principle / introduction part'): Ulp. D. 15, 4, 1 pr. Sometimes the number of the fragment is written in front with a letter *l* (from *lex* = "law"): L. 9. §2. D. 4. 8.¹³

¹¹ Hamza & Földi, op. cit., 472.

¹² Precisely this fact has helped the German legal historian of Jewish origin - Otto Lenel (1849–1935) in restoring the lost works of Roman jurists. Therefore, his famous work in two volumes *Palingenesia iuris civilis* (1887–1889), which puts fragments into their indirect context, are an essential tool in the analysis of "the sources of law" (*fontes iuris*). Referenced in: Hamza & Földi, op. cit., 464.

¹³ Иван Борисович Новицкий, *Римское право – Учебник*, Москва, Wolters Kluwer, 2009, 36.

This visible system enabled later jurists to reconstruct many works from the classic lawyers (*iurisprudentes*), like the edicts of the magistrates-pretors (*pretores*). Therefore the Justinian codification is especially significant for historical studies of the entire Roman law order. Alongside the Holy Bible the Digest is one of the carrier poles on which the entire European cultural heritage rests.

The scope of the **material** that is collected, speaking from past and present perspective is enormous. One extant version contains about 3 million rows of text. These then, in the phase of *redigation*, were reduced on only 150,000 rows. But this is still one and a half time bigger than the entire Bible. And 95% of the works are taken from authors who wrote between 100 and 250 A.D., namely the legendary five grand iurisprudentes, the so called ‘Senate of the dead lawyers’ as noted in the famous Law quotation (*Lex citationis* / 426). The five are Papinian (Aemilius Papinianus) whose quotations included 1/8 of the Digest; Ulpian (Domitius Ulpianus) who contributed a record-breaking 1/3 of the Digest; Paul (Iulius Paulus) with 1/6 of the overall material; Gai (Gaius); and finally Modestian (Herrenius Modestianus). But at the same time, as can be seen from the collected fragments, the Sixteen-member Commission not only resorted to ‘borrowing’ teachings of these five legal authorities (*iuris auctoritatis*), but also reviewed the work of all lawyers who had imperial authority to provide legal answers (*ius respondendi*), as well as several other prominent *iurisconsulti*, starting from the most quoted author Scavola (Q. Mucius Scaevola / died 82 BC), as well as two other not very famous Roman lawyers who probably worked in 4th century, one of whom was post-classical lawyer Arkady (Arcadius Charisius).¹⁴

2.3 Institutiones

Parallel with the publication of the Digest, the Institutions (*Institutiones*), an official **legal textbook**, or ‘handbook’ of Roman Law, was published. The Institutions were said to have been written the same year, as the Digest was published. The difference between them is that Institutions are composed by the Commission of three members, and not sixteen. In *Constitutio Imperatoriam maiestatem*, Iustinian introduces the Institutions with the following:

¹⁴ Magdolna Sič, „Odnos Iusa i Legesa od Justinijana do danas“, *Proceedings of the International Symposium ‘Contemporary Law, Legal Science and the Justinian’s Codification’*, Vol. 1, Skopje, University “Ss. Cyril and Methodius”, Faculty of Law “Iustianus Primus”, 2004, 367.

*Imperator's grandness should be decorated not only with weapon, but with laws, at any time, in war and peace. It could rule properly so that Rome Princeps would come out as a winner, not only in battles with the enemy, but also on the road of law – exiling the unfairness of fraudsters. To become the most faithful law guardian and winner over defeated enemies.*¹⁵

These Iustinianus Institutions actually represent a short legal script for students, and has an introductory **character** designed for “youth eager to study laws” (*cupida legum iuventus*). Their purpose was primarily pedagogical, to educate young beginners. So we can conclude that the Iustinianus project, as a draft textbook, was created on the basis of Gai’s institutional model, with its well-known and relevant tripartite division of “all the laws we use today”: *Ius quod ad personas pertinent* (Personal law); *Ius quod ad res pertinent* (Property law) and *Ius quod ad actiones pertinent* (Procedural law).¹⁶

This practicum was intended for beginners or students in their first year of studies, as an elementary introduction to the basic legal institutes. From the present point of view it constitutes a kind of introduction to the law, or as the *Constitutio Imperatorium maiestatem* says (4): “the first beginnings of the law science [ut sint totius legitimae scientiae prima elementa]”.¹⁷ Not only is a dogmatic processing of the law included, but also the presentation of its historical development, as seen in the many uses of the phrase “law that once was true”. But the curriculum studies given in *Constitutio Omnem rei publicae* (2–5), again advise teachers to teach the subject matter found in the 36 books in the Digest. Interestingly Iustinian gave the force of law [“plenissimum nostrarum constitutionum robur eis accommodavimus”] to his own Institutions.

¹⁵ *Imperatoriam maiestatem non solum armis decoratam, sed etiam legibus oportet esse armatam, ut utrumque tempus et bellorum et pacis recte posit gubernari et princeps Romanus victor existat non solum in hostilibus proeliis, sed etiam per legitimos tramites calumniantum iniquitates expellens. Et fiat tam iuris religiosissimus quam victis hostibus triumphator.*

¹⁶ Gai, *Inst.*, 1, 8.

¹⁷ Read more in: Антун Маленица, „Актуелноста на Јустинијановиот институционален модел“, Зборник на трудови од меѓународниот симпозиум ‘Современото право, правната наука и Јустинијановата кодификација’ (Том I), Скопје, УКИМ, Правен факултет „Јустинијан Први“, 2004, 289.

Structurally speaking, Justinian's Institutions consist of 4 books (*libri*) covering the problems of private law (*Ius privatum*).¹⁸ The books are also separated into *titulus* and paragraphs (§). The fragment separation does not exist, but some titles were later separated in *principium* and *fragmentum*. In this regard, this part differs from the Digest because the origin of some quotes is not specified. Nevertheless, this can often be easily revealed.¹⁹ The usual way of *inscription* or quoting is the following one: Inst. or just I, 2, 22, 1 = *Institutiones*, book 2, title 22, §1.

2.4 *Novellae*

In the history of law, *Novellae* (from Latin *novus* meaning “new”) is also known as *Novellae leges* or *Novellae constitutiones*, New laws, New constitutions or just Novels. They represent the last collection, made at the end of the codification, after the Digest, the Institutions and the Codex were completed. The novels are miscellaneous laws concerning the decisions that were a part of Justinian's **legislative** mission. According to some authors, they cover the time period of 535–557 though only 134 Novels are mentioned.²⁰ Others claim the period between 534–565 with about 168 Novels. A third author says that the constitutions were published after Justinian's death in 565. Most of the Novels are written in Greek, some in Latin, and some in both. They represent a systematic work, collected by private people, or collection of laws passed on myriad of cases which cover almost all the areas of dynamic legal life.²¹

These “new laws” are not arranged in books rather they were **arranged** in heads (*caput*). They are quoted in this way: Nov. or just the letter N. 18, 4 = *Novela* num. 18, head 4; or, with indication the novel number, head number and at the end, the paragraph number: N. 28. C 4. §2.²² But these Justinian novels should not be confused with the novels added to *Codex Theodosianus* (5th c.), which are preserved only in fragments.

¹⁸ Provisions of Public Law contain only one title, in the last book.

¹⁹ Бери Николас, *Вовед во Римско право*, Скопје, Просветно дело, 2009, 42.

²⁰ For example: Ана Шукарова, „Јустинијана Прима според Кодексот на Јустинијан“, *Зборник на трудови од меѓународен симпозиум ‘Современото право, правната наука и Јустинијановата кодификација’*, Том I, Скопје, УКИМ, Правен факултет „Јустинијан Први“, 2004, 481.

²¹ Barry Nicholas, *op. cit.*, 42–43.

²² И. Б. Новицкий, *op. cit.*, 36.

3. About the ‘shortened procedure’ of making the Digest

The historian, compared to the poet, should strive towards the truth – not towards the beauty.
Procopius (6th c. AD)

Only a year after the first *Novus Codex Iustinianus* was created, it was decided that a new collection should be made, supposedly by the influence of Tribonianus. Primarily because they wanted to take into consideration the most valuable parts of the Roman law, starting from the oldest legendary Code on the Twelve Tables (*Lex XII tabularum* / 450 BC) and moving through to the sources of law in post-classical Rome. The **idea** was to include the so-called “Old [juridical] Law”, the most confusing and at the same time valid order of Roman *Ius*.²³ To this end, the Commission of sixteen members was formed, to create the Digest, the biggest and the most significant part of the Codification. The Digest is the Codification’s central topological dimension, which represents an anthology of excerpts mainly from famous jurists. On the occasion of the creation of this colossal law collection, Justinian himself says in *Constitutio Deo actore* :

Among all things, we cannot find anything worth to pay attention as the rule of law is, which brings the divine and human things well in order and removes all unrighteousness – now, we turn ourselves towards transferring the laws, which runs since the founding of the City of Rome and from the Romulus ages.²⁴

When referring to the **process of the creation** of the Digest, the initial plan and assessment is that these lawyers would have needed a time period of a decade to research, study and edit, the resources from the classical Roman legal literature. But surprisingly this enormous work was finished in just three years. The sources tell us

²³ See also: Antun Malenica, *Praktikum iz Rimskog prava*, Prvi tom, Novi Sad, Pravni fakultet Novi Sad, 1997.

²⁴ *Const. Deo actore* (1): Cum itaque nihil tam studiosum in omnibus rebus invenitur quam legume auctoritas, quae et divinas et humanas res bene disponit et omnem iniquitatem expellit, repperimus autem omnem legum tramitem, qui ab urbe Roma condita descendit temporibus.

that the Commission worked tirelessly from 530 until 533 AD. In this relatively short period of time they have managed to comb through around 2,000 legal books written by 39 law authors. These books were mainly found in Tribonian's personal library, but the commission also found material in their own private collections and state registries. Dr. Berry Nicholas, from the University of Oxford, says that, amazingly, the major part of these quoted books were unfamiliar even for the most educated people from that time.²⁵

Justinian calls it "the biggest, almost impossible attempt". Since this period of three years is quite a short time interval for creating such an epoch-making work, we ask the question, how it was accomplished? We are then drawn to the conclusion that the members of the Commission used already half-prepared material for the Codification, since some of these **codifying works**, *Codex Gregorianus*, *Codex Hermogenianus* and *Codex Theodosianus*, were used at the Universities of Constantinople, Beirut and Alexandria:

a) *Codex Gregorianus* (3th c.) – The Gregorian Codex is an unofficial, private collection of imperial constitutions representing material from the reign of Hadrian to that of Diocletian. It was composed around 291, in the reign of Diocletian, but it was named after its creator Gregorian (Gregorius). It is still unknown if Gregorian was an officer in the central administration or professor at the Law School of Beirut.

b) *Codex Hermogenianus* (3-4th c.) – The Hermogenian Codex is also a collection of imperial decisions, composed around 293–294, which is named after its creator Hermogenian (lat. Hermogenus - it is not yet firmly confirmed whether Hermogenianus was the same famous lawyer). Apart from the fact that the Codex contains constitutions from Diocletian reign, passed between 291 and 294, it also consists other imperial constitutions applied afterwards, until 365. And this Codex, just like the previous one, has the character of a private legal collection.

c) *Codex Theodosianus* (5th c.) – Theodosian Codex is a large pre-Justinian codification of the late Roman legal system called *leges*, which was developed in the reigns of Theodosius II and Valentines III. Unlike the previous two codices, this codex is an official collection of imperial constitutions which had the force of law. It contains the constitutions of the Christian emperors which were passed from the time of Constantine I [the Great] until Theodosius II.

In the history of law, many authors hold opposing beliefs, hypotheses and **theories** about how the Justinian's Commission managed to create this legal monument for such short period of time:

a) The researcher Friederich Bluhme (XIX c.), the originator of the so called *Massentheorie*, believes that the codifiers divided all excerpts into three basic and one additional group – so-called 'masses' (*Sabinus*–, *Papinianus*–, *Edicta*– and

²⁵ B. Nicholas, op. cit., 41.

'Supplements'—). He also claims that appropriate Committee worked separately on each group under final supervision of Tribonianus. In 1818, Bluhme, using this theory, and by examining the references of the quotes used in the Digest, organized it into the four masses. He proved that there were also three 'groupings' and an additional one; He was able to show that even though the order of the groups varies, within each group, it is usually the same schedule. He concluded that the creators were divided in three groups, each group responsible for setting certain excerpts from the separate 'mass'. He presumed that the Sixteen-member Commission gathered only once, for the purpose of issuance of the whole. At the end, he says, the whole thing was poorly done. In addition, the Russian professor Ivan Novicki, from Moscow State University Lomonosov, says that the whole material in the Digest consists of three major groups: *Libri ad Sabinum*, classical works that contain comments on civil law; *Libri ad edictum*, classical works dedicated to praetor's order; and *Libri ad Papinianum*, with additional works of other lawyers, which cannot be classified in the previous groups.²⁶

b) Authors such as F. Hofman, H. Peters and V. Arangio Ruiz assume that there must have been some so called *Pre-Digest texts (Praedigesta)*, [proto]texts from the early beginnings, which were re-written and polished by the compilers.

c) Some other authors, like G. Diósdí and A. Honoré, maintain that no matter how difficult this work had been, it was not an impossible mission, while not forgetting that certain collections existed previously, created primarily for educational needs, which contained allusions to other sources at the time.²⁷

The developed Digest received the force of law, and as an **official confirmation** of the final version, the legislator Justinian - in the *Constitutio tanta* - confidently says:

*We order that our laws, we've put into this legal collection i.e. in Institutions or Foundations and Digest or Pandects, to take effect at the time of our third extraordinarily happy consulate, in the current twelveth induction on the third day before January's calends, and be valid forever, in the future, and be used at courts in all disputes, with equal value as our constitutions used to.*²⁸

²⁶ Новицкий, op. cit., 35.

²⁷ Hamza & Földi, op. cit., 463.

²⁸ *Const. Tanta* (3, 23): *Leges autem nostras, que in his condicibus, id est Institutionium seu Elementorum et Digestorum vel Pandectarum posuimus, suum optinere robur ex tertio nostro felicissimo sancimus consulate, praesentis duodecimae indictionis tertio*

Because the original authentic texts which served as a basis of the Digest, were written over a time span of three and a half centuries and had become quite confusing and contradictory, the Emperor advised the compilers to avoid the repetitions and the contradictions. This order gave them discretionary accreditation and even authorized them to change the original quotes, if they consider that it was necessary and appropriate, in order to remove obsolete rules. Justinian himself declares that “the man who corrects the thing that is imperfect, deserves greater honour than the actual author”. This [ig]noble activity of the compilers resulted in the controversial so-called **interpolation** procedure (from lat. *interpolare* = “interrupted / modified”). Just as an illustration of what has been said, in Justinian’s Digesta there is a fragment (D. 1. 7. 2) which is claimed to be drawn from the first book of the Gaius *Institutiones*. It is written that “the way of adoption is by means of order given by the princeps” (*principis auctoritate*). Fortunately, the Institutions of Gaius were found in a library in Verona, by the classic historian Niebuhr in 1816. Gaius actually said (1.98) that “the way of adoption is by an order given by the people” (*populi auctoritate*). Hence, it is not difficult to notice that the interpolators, simply, replaced the word “people” with the word “princeps”. This was done because during the 6th century the control of the Roman Assembly was dying and passed into the hands of the Emperor.²⁹

That is why the Justinian codification is not only a simple mechanical set of classical Roman law, but a law which is regulated according to the new social conditions that then existed. But the bad side of this methodological operation is that the collectors not only failed to remove the contradictions in the original texts, but they added new **weaknesses**. They adjusted some texts according to the new situation, and some left unchanged and inadequate. Despite the caution by the professors, they dragged through certain ‘errors’ or technical problems. Therefore in the final text repeated excerpts mentioned twice in the same text – i.e. *leges geminatae*; and there were also mixed excerpts that do not appear under the appropriate title – i.e. *leges fugivatae*.³⁰

calendas Ianuarias, in omne aevum validituras et una cum nostris constitutionibus pollentes et suum vigorem in iudiciis ostendentes in omnibus causis.

²⁹ Новицкий, op. cit., 34–35.

³⁰ Hamza & Földi, op. cit., 463.

C o n c l u s i o

After all that has been said about the codification work of Justinianus Primus, it is obviously that ‘The Great Emperor’ had two **incompatible goals**: first, he wanted to preserve the best of the Classical Roman legal literature; and, second, he wanted to reform and represent the law of his time. But, trying to achieve the both goals simultaneously, he, unfortunately, failed to achieve either of them completely, and this failure was more emphasized with the hastiness with what the work was completed. So, trying to preserve the splendor of the past, Justinian failed to create a practical codification, which could be widely used by his subjects; and trying to show the law of his time, he changed exactly what he wanted to preserve. Perhaps for that very reason the Digest, shortly after its official entry into force, was abandoned and forgotten, until its rediscovery in the Middle Ages, which led to the reception of the Roman legal heritage into the Euro-continental legal systems of that time.

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