

On Compiling Justinian's Digest (5)*: The Constitution *ad senatum* of 22 July 530

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On 22 July 530 Justinian published a constitution addressed to the Senate (1). This was a rare event. And when it happened the constitution was usually of exceptional importance. There were few precedents, most of them quite old. The only previous occasion on which Justinian had addressed a constitution to the Senate was on 13 February 528 when the Constitution *Haec quae necessario* publicly announced the plans for a new Code. Prior to

*) Since I began this research into the compilation of Justinian's Digest in December 1989 my views have changed on a number of points, as will be clear from what follows. I have become increasingly convinced that it is not sufficient merely to revise traditional views; it is necessary to re-write the story altogether. Many of my ideas have been tried out on a variety of audiences in lectures at universities in England, France, Belgium, the Netherlands, Switzerland, Italy, Austria and the U.S.A. I am grateful to colleagues for the invitation to give the lectures and for the stimulating discussions afterwards. The ideas in this article were prompted by a question from Professor Georges MACOURS after a lecture at Louvain on 27 April 1994.

1) Seven fragments survive: CJ 2.44.4; 3.38.12; 5.4.24; 6.25.7; 4.65.35?; 8.41.8; 11.48.21? Two of them are undated, but there were so few constitutions *ad senatum* that they almost certainly belong here.

that there are no other constitutions *ad senatum* until we get back to the reign of those other great lawmakers Theodosius and Valentinian (2). The Law of Citations on 7 November 426 was addressed to the Senate of the City of Rome (3). It was preserved in Justinian's first Code (4). The constitution setting out the plans for the Theodosian Code on 26 March 429 was addressed to the Senate (5). Clearly the Constitution *ad senatum* of 22 July 530 was intended to be of exceptional importance.

By contrast, the Constitution *Deo Auctore* of 15 December 530 was not addressed to the Senate. It was not even addressed to the praetorian prefect, as was standard practice. In the version in the preface to the Digest, *De Conceptione Digestorum*, on the plan of the Digest, it was addressed simply to Tribonian, quaestor. The language is extraordinarily stark and plain, particularly in the context of the triumphant and boastful language in the Digest prefaces. It is true that in the version in the second Code (6) it has become more pompous and official: Tribonian, that most eminent man, quaestor of the sacred palace. But it is unlikely that the extra words were deleted for the celebrations of the first occasion. It is far more likely that they were added in the second version. And that only serves to underline the simplicity

2) CJ 12.2.2; 12.3.1 (both undated); 1.14.8 (17 October 446) *Humanum esse probamus*, but this really is addressed to the senate: it concerns legislative procedure and it twice addresses the senators as *patres conscripti*.

3) CTh. 1.4.3.

4) P. Oxy. 1814.

5) CTh. 1.1.5.

6) CJ 1.17.1.

and abruptness of the original wording. It sounds more like the style of an internal administrative memorandum than that of a formal public document.

After *Deo Auctore* Justinian gave up altogether his practice of announcing in advance his plans for future works. There are no constitutions to mark the beginning of work on the Institutes or the second Code. But he maintained the practice of issuing constitutions addressed to the Senate in the most important cases. The constitutions *Tanta* and *Cordi* mark the successful completion of the Digest and the second Code. The change is clear: he told the Senate when he started work on the first Code; he did not tell them until he finished work on the Digest and the second Code (7).

How are we to explain these phenomena?

The simple and natural explanation is that the plans to codify the writings of the classical jurists were first announced in the Constitution of 22 July 530 addressed to the Senate in accordance with previous practice. Something went wrong or circumstances changed; and the original plans were quietly dropped and just as quietly replaced by the plans in *Deo Auctore*. But there must have been at least some adverse publicity. And Justinian decided that it must never be allowed to happen again. There were no more constitutions when work was started, but only when it was successfully completed.

7) There are two other constitutions *ad senatum* in this period: CJ 6.30.22 (27 November 531); and CJ 6.51.1 (1 June 534).

In that case the Constitution *ad senatum* of 22 July 530 must have contained a general part setting out the plans, and a special part introducing specific detailed reforms. The detailed reforms have survived, scattered through the second Code; but in the nature of things the old plans have disappeared. There is just a hint of them at the end of CJ 5.4.24:

Sic etenim et antiqui iuris contentio dirimetur et immensa librorum volumina ad mediocrem modum tandem pervenient.

For so, on the one hand, dissension in the old law will be disposed of, and, on the other, enormous volumes of books will at last be reduced within a small compass.

The text does not expressly mention any classical disagreement or any problem of an excessive number of books, so that the conclusion is surprising. But if the constitution had announced the Fifty Decisions and a code of the writings of the classical jurists, the conclusion would fit perfectly (8).

What else can we say about the Constitution *ad senatum* of 22 July 530?

8) Cp. SCHINDLER, *Justinians Haltung zur Klassik* (Cologne, Graz, 1966), p. 62(a): "According to the final sentence the constitution disposes of a dispute in the old law *et immensa librorum volumina ad mediocrem modum tandem pervenient*. According to this account one must assume that the dispute occupied large portions of legal literature, although one is not told at all what it really involved.... The Justinianic account is so unclear, that there may be other problems hidden behind it". There may indeed, and not of the kind envisaged by SCHINDLER.

As in any study of the compilation of Justinian's Digest we must start with Bluhme's Masses (9) and particularly the commentaries *ad Sabinum* and *ad edictum*: see Table I [p. 328].

In D. 50.16 and D. 50.17 it is undeniable that the inscriptions follow a regular order. Almost everywhere the series of texts in numerical order show that the original order of the excerpted works has not been altered; and even the different works themselves normally follow each other in the same order in both titles. On this last point there is only the difference that in D. 50.16 the books on the beginning of the Edict come first, while in D. 50.17 they only appear after the Sabinianic works and Papinian's *quaestiones*. If we then look at D. 45.1, we find the same regular order, but the books on the Edict come between Sabinus and Papinian.

In the other Digest titles the only difference in the inscriptions appears at first sight to be that one part of them are in a certain order *inter se*, the other part refers to a miscellaneous collection of books from which the fragments are taken. Closer inspection, however, not only shows that those three main Masses recur everywhere, but leads to the indisputable result that **all** the works that were used in the Digest can be distributed in three groups. The commentaries on Sabinus and the Edict and the works of Papinian appear at the beginning of these

9) *Zeitschrift für geschichtliche Rechtswissenschaft*, 4 (1820) 257, reprinted in *Labeo* 6 (1960) 50, 235, 368.

groups; we can therefore call them the Sabinianic, Papinianic and Edictal Masses ⁽¹⁰⁾.

On this basis it now seems possible to explain why the commentaries on the Edict were divided between two Masses; for the previous curriculum did not make it clear why the section *De Rebus*, On Things, was transferred as well. Now it can hardly be denied that the whole of the middle third of the commentaries on the Edict was intentionally dealt with immediately after the commentaries on Sabinus.

There can be no doubt that this was the third whose content most closely coincided with the commentaries on Sabinus. But that in itself does not completely explain the compilers' arrangement. We must also assume that Ulpian at least, with his great learning and attention to detail, repeated word for word in his commentary on the Edict much of what he had said in his commentary on Sabinus, or that in one work he referred to what he had said in the other. This assumption is certainly justified by the way in which the commentaries on Sabinus and the Edict are woven together in D. 15.1, 17.2 and 18.1 ⁽¹¹⁾.

Finally we must note that, in the case of excerpts from the commentaries on the Edict, some of the books from the middle of these works are not dealt with in the right

10) *Labeo*, 52-53.

11) *Labeo*, 59-60.

place but right at the end, even after the commentaries on the Edict of the curule aediles. The appearance of arbitrariness in this order disappears to a large extent in the light of the fact that those commentaries were in any case split up and assigned to different Masses; for the section put at the end comes immediately after the section assigned to the S Mass. There is a simple explanation for all this: when the compilers provisionally decided to transfer part of the commentaries on the Edict to the S Mass, the E compilers transferred rather more than was necessary on closer inspection, so that the excess was transferred back to them again. But that does not explain why that section is further divided into two parts, of which the second is excerpted before the first (for example, Ulpian, books 54 and 55 before books 52 and 53). There must have been something else which, if it did not cause the whole transfer, at least contributed towards it. There are several circumstances, some of which can only be dealt with below, which make it probable that the compilers were originally undecided where to put the material contained in this section of books.

It seems quite natural that, before they took a final decision about these alterations, the compilers excerpted the other parts of the commentaries on the Edict, in order to get a clearer overall view; and in that case it is no surprise that they happened to deal with the titles *de publicanis* and *de liberali causa* before the other three even

though they came later in the commentaries on the Edict (12).

The existence of the Masses is clear and can be checked. Their names were chosen by BLUHME and are arbitrary. It is convenient to give names to the Masses, but these particular names have serious disadvantages. First of all they obscure the important question: why did the Sabinianic compilers begin with the commentaries *ad Sabinum*? At first sight the question is odd and the answer is obvious. It was not the compilers who chose the commentaries *ad Sabinum*, but the commentaries *ad Sabinum* which gave the name to the Mass and its compilers. But there is an important point behind the question, and it is easier to see if we give the Masses numbers rather than names. Why did the compilers of Mass I begin with the commentaries *ad Sabinum*? After all, the instructions in *Deo Auctore* were quite clear: Draft a work in 50 books, divided into titles, to be called Digest or Pandects, and following the order of the first Code and the Edict (13). Common sense suggests that, upon receipt of those instructions, the compilers should start by reading classical works which follow the order of the first Code and the Edict (of which there was a wide choice: not only the commentaries *ad edictum* themselves, but also the *Digesta*, *Quaestiones*, *Responsa*, and *Disputationes*), preferably called Digest or Pandects (of which there were half a dozen). But no: the

12) *Labeo*, 61-63.

13) *Deo Auctore*, 5, 12.

compilers of Mass I began with the commentaries *ad Sabinum*, which do not follow the order of the first Code or the Edict, and are not called Digest or Pandects. How are we to explain such an extraordinary decision?

I suggest that the commentaries *ad Sabinum* and *ad edictum* were read in the second half of 530 A.D. before *Deo Auctore* was issued: see Table II [p. 329]. That would help the compilers to plan the rest of the work and in particular to choose which order to adopt: Sabinianic or edictal. They opted for the latter. The name, Digest or Pandects, was chosen. And the instructions were set out in *Deo Auctore* accordingly: Draft a work in 50 books, divided into titles, to be called Digest or Pandects, and following the order of the first Code and the Edict. Whereupon the compilers, quite sensibly, began to read the Digests of Julian, Celsus and Marcellus, which not only have the merit of being called Digest and following the order of the edict, but also are seminal works by leading classical jurists.

Secondly, the names, Sabinianic Mass, Edictal Mass, are unsatisfactory because they prejudge the question of the contents of the two Masses. They suggest that the commentaries *ad Sabinum* belong in one Mass, and all the commentaries *ad edictum* belong in the other. There is then an anomaly because the middle third of the edictal commentaries, Ed(2), is in the Sabinianic Mass immediately after the Sabinianic commentaries (see Tables I & II), and that requires some explanation. BLUHME explains it partly on the ground that Ed(2) is very close to Sab in content. It is true that there is a considerable coincidence in

content¹⁴), but it is far from complete. For example, Sab groups together *furtum*, *lex Aquilia* and *iniuria* in the same order as the Institutes. And indeed *furtum* and *iniuria* appear together in the Digest in book 47. If content were the criterion, then they should be together here: but the *lex Aquilia* is in Ed(1), *furtum* in Ed(2), and *iniuria* in Ed(3)¹⁵. In fact Ed(2) is there, not because of its content, following Sab, but because of its size, balancing Ed(3). And if, instead of Sabinianic Mass and Edictal Mass, we spoke of Mass I and Mass II, it would be easier to see the parallelism between the two Masses. Compilers I read Sab while compilers II read Ed(1); then they split the rest of the commentaries on the edict fairly evenly between them, and compilers I read Ed(2) while compilers II read Ed(3).

There remains the problem of Ed(2a)(2b), which look as if they should have been read in that order by the Sabinianic compilers, but were in fact read in the reverse order by the edictal compilers. Again BLUHME tries to explain this on the basis of the content of those books. But the compilers seem to have been more concerned with size than with content. Indeed it was not until they came to draft book 20 of the Digest at the second, editorial stage of the compilation that they noticed that the edictal order was not altogether satisfactory and tried belatedly to

14) See the table in WIEACKER, ZSS 55 (1935) 292 at 296.

15) Indeed *iniuria* is in Ulpian book 56, right at the beginning of Ed(3).

improve it (16). And BLUHME's reason for the reversed order is simply no reason at all (17).

The explanation of the retransfer of Ed(2a)(2b) is again a matter, not of content, but of size. The E compilers reached the end of Ed(3) before the S compilers reached the end of their stint. They therefore helped them by reading Ed(2b). When they reached the end of that, the S compilers had still not finished, so they read Ed(2a) as well. And this time everyone finished together. That explains both the retransfer and the reversed order.

There was then a joint meeting of all compilers and *Deo Auctore* was drafted and submitted to Justinian for his approval. While they were waiting for his approval they read BK 10-13 and BK 124-133. And when he had approved it they started on Julian and Celsus and Marcellus.

After *Deo Auctore* on 15 December 530 the S compilers read 328 books (+ 34 books in the Appendix) (18), while the E compilers read 385 books (+34 books in the Appendix). They should have finished at the same time to go on to the second, editorial stage together. It follows that E worked faster than S (19). That seems to have been true before *Deo Auctore* as

16) *Tanta*, 5.

17) The fact that you cannot make up your mind what order to follow is not a reason for doing things back to front.

18) PUGSLEY, *Journal of Legal History*, 13 (1992) 209 at 218-228.

19) Complete precision is impossible, and in particular BK 13, Ulpian 6 *de censibus*, belongs after *Deo Auctore*, not before: see MANTOVANI, *Digesto e Masse Bluhmiane* (Milan, 1987), p. 90, "Retractatio". But the overall conclusion stands: E worked faster than S.

well ⁽²⁰⁾. E read 36 books in BK 124-133 while S read 32 books in 10-13 ⁽²¹⁾. And it was because E were reading faster than S and faster than expected that Ed(2b) and then Ed(2a) were transferred to them. Since E also read fewer books than S before *Deo Auctore*, it follows that S must have started before E, perhaps by as much as several weeks. That in any case seems likely when we look at the initial reading stints. At the beginning S read 103 books of Sabinianic commentary and E read 67 books of Ed(1), and then they roughly split the remainder of the edictal commentaries. That also suggests that S started before E.

The compilers finished reading the Papinianic Mass towards the end of 531, as is shown by the very detailed reference to Paul's monograph on the *SC Tertullianum* (BK 239) in CJ 6.58.14.1, 27 November 531 ⁽²²⁾. The compilers reading the other two Masses should have finished at the same time so that they could all go on together to the second, editorial stage. As a rough calculation, if the S compilers took about 9 months to read 362 books (328 + 34 in the Appendix) after *Deo Auctore*, they will have taken about 5 months to read 200 books before *Deo Auctore*; and if the E compilers took about 9 months to read 419 books (385 + 34 in the Appendix) after *Deo Auctore*, they will

20) See Table II.

21) Actually 26 books in BK 10-12. The conclusion is the same.

22) See PUGSLEY, *Syracuse Journal of International Law and Commerce*, vol. 20 (1994) 161 at 164-165; H. KRÜGER, *Die Herstellung der Digesten Justinians und der Gang der Excerptio* (Münster i. W., 1922), 162. The series of articles in the *BIDR* by DE FRANCISCI on the constitutions of 531 stopped in 1914 at 18 October 531, so that he never discussed this text.

have taken about 4 months to read 188 books before *Deo Auctore*. In that case the S Mass started in July and the E Mass in August 530: see Table II.

There is an immediate objection to this reconstruction of the compilers' progress. It is traditionally and as far as I can see universally held by those who consider the matter at all that the compilers started all three main Masses at the same time (23). Indeed that is considered to be a matter of simple common sense. "That the work on all three Masses should begin at the same time was an elementary rule for the best use of time", says WIEACKER (24), who recommends the use of the "common-sense" factor in strong and colourful language (25). But "common-sense" says all sorts of things. "Common-sense" says that if one Mass is ready to start and the others are not, it is better to start on that one than to wait until the others are ready, particularly if one of those Masses is much smaller than the first one. "Common-sense" says that if S read more books than E before 15 December 530, they probably started earlier. "Common-sense" says that if you are drafting a very large, systematic work like the Digest you should

23) Indeed H. KRÜGER suggests, though with considerable hesitation, that they started the Appendix at the same time as well (that is, for him, they started all four masses together on 16 December 530): *op. cit.*, pp. 175-176 and 177 I. According to him the compiler responsible for reading the Appendix had finished it by the end of August 531 (p. 176), and was then available to help with S and E; particularly S, where progress was very slow (pp. 182, 184).

24) *Festschrift Waldstein* (1993) 417 at 428.

25) *Loc. cit.* 418/9 and n.10. I am much less enthusiastic about the use of "common sense": see PUGSLEY, *Journal of Legal History*, 13 (1992) at 211.

read the major systematic works first, to build up your system, and the casuistic works later, to fit into that system, and therefore that you should read the works in the P Mass after you have finished the commentaries *ad Sabinum* and *ad edictum* (26).

The trouble with so much discussion of the compilation of the Digest is that there is too much "common-sense" and not enough hard fact (27). The question is not what the compilers should have done as a matter of common-sense, but what they did in fact do according to the evidence. In this case we have already set out the evidence (the instructions in *Deo Auctore*, the BK *ordo librorum*, the statistics), and we conclude that S started before E. There will be further evidence to corroborate that conclusion in due course (see below pp. 304-308).

The idea that all the Masses started at the same time seems to be connected with the idea that the Masses were established (the distribution of the works between the Masses and the order of the works within each Mass) at a preparatory stage before the work of reading and excerpting started. But that was certainly not

26) Contra HONORÉ, *Bracton Law Journal*, 25 (1993) 29 at 37: "Tribonian and Justinian knew that the casuistic works of Papinian, Paul, Scaevola and others would have to be read as part of the Digest project. That being so, there was no case for delaying the start, and hence the completion, of this part of the work". See now PUGSLEY, *Syracuse Journal*, 211.

27) Hence the popularity of arguments about the existence of one or more pre-Digests, which start from the "common sense" proposition (unverified and unverifiable) that the compilers could not have produced the Digest in three or four years if they started from scratch (GUARINO's second "postulate": *Studi Scherillo*, II 720 B).

necessary (28): it is quite easy to start reading and to distribute books between Masses as you go along. It was not natural: no-one who looks at the list of books in the *Index Florentinus* is likely to say: of course, that naturally divides into three groups. And it does not seem to have been what happened: though some works are grouped by author or content, there is no overall system: for example, there is a substantial group of *regulae* in S (BK 36-46) but the *regulae* of Modestinus and Licinius Rufinus are in E (BK 139 and 175) and the *regulae* of Gaius in P (BK 223). The only reason for the theory that the Masses were established before work started is that it is essential to that other theory, that the Appendix is composed of works that turned up late. That is an extraordinary case of the tail wagging the dog (29). And there are other, and better, explanations for the Appendix (30).

In any case there is no necessary connection between establishing the contents of the three Masses and starting to read them all at the same time. It is quite possible to start reading three Masses at the same time and to work out their contents as you go along. On the other hand, it is equally possible to establish their contents straight away and to plan for one of them to start at a later stage, particularly if that one is shorter than the others.

28) It might have been if there had been a time limit, but the instruction in *Deo Auctore*, 14, was simply to finish as fast as possible; or if Justinian had required it, but he had not (pace HONORÉ, *Tribonian*, 78).

29) An appropriate metaphor, comparing the Appendix and a dog's tail.

30) See PUGSLEY, *Syracuse Journal*, 211-212.

For excerpting to start on a particular work or group of works what is needed, and all that is needed, are manuscripts and manpower. If either is missing, you cannot start. As soon as both are present, you should start straight away. If therefore E started later than S, there may have been a good reason for it.

Why then did S start before E? Indeed why did S start at all? It is true that it was not in conflict with an instruction to follow the order of the edict, which was not issued until December. But most of the major classical works followed the edictal order. The decision to start by reading the commentaries *ad Sabinum* is therefore still surprising. And the question remains: why?

It is unlikely that the compilers should start on the commentaries *ad Sabinum* without clear instructions to do so. Indeed it is unlikely that they should work on the Digest for four or five months before *Deo Auctore* without clear instructions to do so (31). Where could such instructions be found? Where else than in the Constitution *ad senatum* of 22 July 530? We conclude, therefore, that that constitution instructed the compilers to follow the Sabinianic order.

And the idea was quite workable. The compilers had both the basic work, Sabinus' three books on the *ius civile*, to provide the rubrics (32), and the three great classical commentaries by Ulpian

31) CENDERELLI, *Digesto e predigesti* (Milan, 1983) 9, but with different conclusions.

32) It appeared in the Law of Citations in 426, though only in the second rank, with Julian, Scaevola and Marcellus. It was refound by the compilers and appears in the *Index Florentinus*. It cannot have been put there *honoris causa* if it was not actually available to the compilers. No one compiles

(³³), Paul and Pomponius, to provide the text. The manpower was there; the manuscripts were there: and the work could go ahead straight away.

And what about the commentaries *ad edictum*? The crucial text is CJ 6.28.4.3:

Et ex hac iniquitate vitium emersit, quale ex libris Ulpiani, quos ad edictum fecit praetoris, inventum a Triboniano viro gloriosissimo nostro quaestore ceterisque facundissimis compositoribus iuris enucleati ad nostras aures relatum est.

And out of that wickedness a legal defect emerged which was reported to us from the books of Ulpian, which he wrote on the praetor's edict, found by Tribonian, that most glorious man, our quaestor, and the other most brilliant compilers of the *ius enucleatum* (abridgement of the writings of the jurists) (³⁴).

This is an extraordinary text, which has received very little attention (³⁵). Of course the reference to the most glorious and

indexes in that way. It is true that there are no extracts from it in the Digest, but that is natural if it was used to provide rubrics rather than text.

33) In a second edition (see *Cordi*, 3) and not quite complete.

34) I have discussed this text briefly in the *Journal of Legal History*, 14 (1993) 94 at 99-100.

35) DE FRANCISCI, *BIDR*, 23 (1911) 186 at 214 and 226, reports the special reference to the compilers, but does not discuss its significance. H. KRÜGER *Herstellung*, does not mention it at all.

brilliant compilers does not affect the substantive law: but what is it doing there at all? It is natural and unsurprising to sing the compilers' praises at the beginning, when they were appointed (*Deo Auctore*, 3) and at the end, when they had successfully completed the Digest (*Tanta*, 9). It is more surprising to do so in the middle. In fact this is the only time when it happens. And the superlatives are very enthusiastic. The compilers must have done something very special to deserve them. What on earth had they done?

One possibility is that they had found a *vitium*, a defect in the law. We can imagine the scene in Justinian's palace:

Enter Tribonian, followed by the other compilers.

TRIBONIAN: Justinian, Justinian!

JUSTINIAN: Yes, what is it? What are you all getting so excited about?

TRIBONIAN: Justinian, guess what we have found.

JUSTINIAN: Well, what is it? Let me see.

TRIBONIAN: We have found a defect in the law in Ulpian's commentary on the edict.

JUSTINIAN: Have you really? Super! Wonderful! What brilliant men you are!

This does not sound very convincing. There were plenty of other defects in the law, calling for a large number of constitutions *ad commodum propositi operis pertinentes* (*Cordi*, 1), but on no other occasion did everyone get so excited. And

you do not need so many people to find a defect in the law. If a defect was found it was probably found by a single compiler reading Ulpian on his own ⁽³⁶⁾.

Let us try again:

Enter Tribonian, followed by the other compilers.

TRIBONIAN: Justinian, Justinian!

JUSTINIAN: Yes, what is it? What are you all getting so excited about?

TRIBONIAN: Justinian, guess what we have found.

JUSTINIAN: Well, what is it? Let me see.

TRIBONIAN: We have found a copy of Ulpian's commentary on the edict.

JUSTINIAN: Have you really? Super! Wonderful! What brilliant men you are!

This sounds more plausible. This is the only constitution in which there is an express reference to Ulpian's commentary on the edict. If the compilers had just found a manuscript, it would have been a very special occasion, which fully justified the superlative language. And you may need a group of people for a proper search, to find an important manuscript. Even if it is actually found by one person only, the others will have

36) And the Latin is wrong: it should not be *ex libris inventum*, but in *libris inventum*.

contributed by searching as a team, and the whole group can rightly claim the credit (37).

We are now slowly reconstructing the sequence of events. Most of the classical works had been produced by Tribonian himself before work started (38). Then the compilers were approved and admitted to the palace and started work on the commentaries *ad Sabinum*. At the same time they helped Tribonian to search for more manuscripts, and when they found Ulpian on the edict they all rushed to tell Justinian about it.

That means that Ulpian on the edict was not available to the compilers when they started. And we may note that the syllabus in the law faculties at the time included Gaius, Paul and Papinian, but there was no mention at all of Ulpian (39). No doubt there

37) The Latin is not quite right: *inventum* must be amended to *inventis*.

38) *Tanta*, 17. But not from his private library, as is so often said (e.g. HONORÉ, *Tribonian*, p. 146, n. 68), of which there is no mention in *Tanta* (see H. KRÜGER, *Herstellung*, p. 3), but from the palace archives with which he was familiar both as quaestor and as one of the compilers of the first Code. KRÜGER suggests the library of the Constantinople law faculty: but it is hard to believe that Tribonian found books there of whose existence even the professors themselves were unaware.

39) *Omnem*, 1. COLLINET, *Histoire de l'École de Droit de Beyrouth* (Paris, 1925) seems to me to be unpardonable. He says at p. 224: "*Omnem*, 1, tells us that before 534 legal studies lasted four years. The study of the works of the Roman jurists was based on the works of Gaius, Ulpian, Papinian and Paul". *Omnem* does not mention Ulpian at all, which would be quite extraordinary if he was in fact used. It is far more likely that Gaius *ad edictum provinciale* was used. In the east that would be more suitable than a commentary on the urban edict. And the four *libri singulares* read in the first year are then books 11, 12, 17 and 18 of that commentary.

were fragments of Ulpian in circulation in the east during this period, but there was no complete manuscript of his commentary *ad edictum* until the compilers discovered it. And that is the substantive reason why the Constitution *ad senatum* of 22 July 530 chose the Sabinianic order and why the compilers started to read the commentaries *ad Sabinum* first: at the time there was no choice.

As soon as the compilers discovered Ulpian's commentary *ad edictum* (and ten books of Gaius' commentary)⁽⁴⁰⁾ they could start a second Mass. They had both the basic work, Julian's edition of the edict, to provide the rubrics ⁽⁴¹⁾ and enough of the

40) *Index Florentinus*, XX. 3, "only ten books found".

41) The instructions in *Deo Auctore*, 5, are to follow the order of the *edictum perpetuum*, which makes sense if they had a copy of it, but not otherwise. The compilers could not be expected to reconstruct it from the commentaries on it as LENEL did hundreds of years later. And the order of the commentaries on the edict is not the same in Julian and Ulpian, on the one hand, and Paul and Gaius, on the other: see GUARINO, *Studi Albertario* (Milan, 1953), vol. I, 623 at 653-655. Which order were the compilers to follow? *Deo Auctore* provides the answer, but that presupposes that a copy of the edict itself was available. Justinian speaks of Julian as *legum et edicti perpetui subtilissimus conditor*, that most subtle draftsman of laws and of the perpetual edict. He had no authority for that proposition in the works of the classical jurists. At least he gives us none. I conclude that his information came from the copy in front of him. In Justinian's constitutions Julian first appears in CJ 4.5.10.1: *Salvium Iulianum summae auctoritatis hominem et praetorii edicti ordinatorem*, Salvius Julianus, a man of the highest authority and draftsman of the praetor's edict. That was published on 1 August 530. I conclude that a copy of his edict had been found shortly before then. GUARINO, *Atti del Congresso Internazionale di Diritto Romano, Verona, 1948* (Milan, 1951), vol. 2, 169 at 182, says: "There is no doubt that Justinian was influenced by the tradition going back to Eutropius as to the codification of the edict by Julian and Hadrian (n. 61). That is shown particularly by CJ 4.5.10.1 with its description of Julian as *summae auctoritatis hominem et praetorii edicti ordinatorem*". But those words are very different from the words used by Eutropius, though the

great classical commentaries to provide the text (42). The manpower was there; the manuscripts were now there: and the second Mass could now go ahead straight away.

As we have already seen, the compilers read the two Masses side by side. When S finished the commentaries *ad Sabinum*, E was not far from Ulpian 25 *ad edictum*. They therefore split the remaining books of the commentaries *ad edictum* fairly evenly between them, with a view to finishing together so that they could hold a joint meeting and plan for the future. But E worked faster than S, with the consequences that we have already seen and which are reflected in the anomalies in the BK order. When they did meet they decided to adopt the edictal, rather than the Sabinianic, order. *Deo Auctore* was drafted accordingly and submitted to Justinian for his approval. In due course it was returned, giving full powers to Tribonian to proceed on the new basis. The general provisions of the Constitution *ad senatum* were quietly abandoned and only the detailed reforms were left. So that *Deo Auctore* now marked the official start of the Digest project (43).

substance, quite naturally, is the same: it is unlikely that Justinian's description of Julian was derived from Eutropius.

42) The greatest commentary of them all by Pomponius in over 150 books was not found, but with Ulpian and Paul and Gaius *ad edictum provinciale* there was enough to go on with.

43) The history behind *Deo Auctore* may explain some of the oddities in the way in which it is drafted: cp. Anna Maria GIOMARO, *Ipotesi sulla*

That left the compilers with a problem: what about the constitutions *ad commodum propositi operis pertinentes* which had already been issued. They showed that the compilers had started reading the commentaries *ad Sabinum* and *ad edictum* long before the new official starting date and were an undesirable reminder of the fact that there had been an earlier plan and that it had been abandoned. The solution was simple: during the course of the next twelve months those constitutions were reissued with a new addressee and a new date.

Hence we find CJ 6.24.14 pr.:

Cum in libris Ulpiani, quos ad Massurium Sabinum scripsit, talis species relatum est, hanc apertius expedire nobis visum est.

datazione della Deo Auctore, Studi Urbinati, 81-83 (1982-85) 185. Her first hypothesis (p. 205) is that *Deo Auctore* is an amalgam of two texts. It seems to me that part of it may have been taken over from the Constitution *ad senatum*.

Further speculation about the contents of the Constitution *ad senatum* is possible. It may be that it gave a list of the original compilers, as *Haec quae necessario* had done for the first Code, and that there was then disagreement among them as to how best to organize the work. *Tanta*, pr. speaks of *humana imbecillitas*, as a result of which Justinian invoked the patronage of God (*Deo Auctore*) and put Tribonian in sole command (*Deo Auctore*, 3, is very repetitive and very emphatic) - not that Tribonian was superhuman, but that he was not an imbecile, unlike some of the other compilers originally appointed. That may explain why names are not given in *Deo Auctore*. The effect of emphasizing the sole responsibility of Tribonian, is also to emphasize the subordinate position of Theophilus and the other professors.

Since the following case is set out in the books of Ulpian, which he wrote on Massurius Sabinus, we decided to dispose of it clearly.

The date is 29 July 531 (44). The citation is given carefully and in full, as is appropriate when a work is cited for the first time. Later on an abbreviated reference, like *libri Sabiniani* (45), will be sufficient. It is, however, surprisingly late for a first reference to Ulpian *ad Sabinum*, dealing with book 5 (46), which on any basis must have been read long before. But if it really belongs to the end of July or 1 August 530, it would be the first, or one of the first, constitutions *ad commodum propositi operis pertinentes*, almost immediately after work had started. After *Deo Auctore* it was moved to 531.

See also CJ 6.28.4.3, which we have already seen:

Et ex hac iniquitate vitium emersit, quale ex libris Ulpiani, quos ad edictum fecit praetoris, inventum a Triboniano viro gloriosissimo nostro quaestore ceterisque facundissimis compositoribus iuris enucleati ad nostras aures relatum est.

And out of that wickedness a legal defect emerged which was reported to us from the books of Ulpian, which he

44) Changed by P. KRÜGER from the MS reading 30 July.

45) CJ 3.34.14 pr. (18 October 531); CJ 6.40.3.2 (1 November 531).

46) LENEL, *Paltingenesia*, Ulpian, no. 2460; DE FRANCISCI, *BIDR*, 23 (1911) 46-50; H. KRÜGER, *Herstellung*, 111; missing in the table in FALCHI, *Sulla codificazione del diritto romano nel V e VI secolo* (Rome, 1989) 115, where all the constitutions of 29 July 531 are missing.

wrote on the praetor's edict, found by Tribonian, that most glorious man, our quaestor, and the other most brilliant compilers of the *ius enucleatum* (abridgement of the writings of the jurists).

The date is 1 September 531. Again the citation is given carefully and in full, as is appropriate when a work is cited for the first time. It is, however, surprisingly late for a first reference to Ulpian *ad edictum*. And the excited reference to the discovery of the manuscript is more likely to belong to a period soon after the event (47). If it really belongs to 1 September 530, that all fits. It also explains the reference to the codification as *ius enucleatum*: the name, Digest, does not appear until *Deo Auctore*, 12, and even then only as an afterthought. After *Deo Auctore* this text, like CJ 6.24.14, was moved by the compilers to 531.

The overall picture is therefore as follows. When Justinian turned his attention to the writings of the classical jurists, the original plan for the proposed work was set out in the Constitution *ad senatum* of 22 July 530, including the instruction to follow the Sabinianic order, which was the only practical possibility at that date. After the discovery of Ulpian's commentary on the edict, and after they had read the commentaries *ad Sabinum* and *ad edictum*, the compilers decided to follow the

47) Hence I am inclined to connect the constitution with Ulpian 14 *ad edictum*, as does DE FRANCISCI, *BIDR* 23 (1911) 186 at 226-227, but not for the reason given by him (that it is necessary to fit in with his general system) but for the reason given in the text (people get excited about recent events). LENEL, *Palin.*, connects it with Ulpian 40 *ad edictum*; H. KRÜGER, *Herstellung*, 130, with either book 39 or book 40. That was read several weeks later, and by that time the excitement should have worn off.

edictal order instead. The revised plans were set out in *Deo Auctore* on 15 December and the work proceeded from there.

There remains one fundamental difficulty ⁽⁴⁸⁾. How did the changeover work in practice? The problem arises because of the traditional view of the compilers' working methods, as set out, for example, by SCHULZ in his *History of Roman Legal Science* ⁽⁴⁹⁾:

“ This is how the compilers went to work: (i) They first drafted a *schema*, settling the arrangement of the work as a whole and its division into books and titles....

(ii) The works from which excerpts were to be made were divided into four groups....

(iii) Next came the work of excerpting....The excerpts were certainly at once arranged under the various titles of the *schema*, and doubtless the work of adapting, shortening, and interpolating the texts was put in hand forthwith. Thus at the end of the process of excerpting there were four groups of excerpts arranged in the order of the books and titles of the *schema*”.

If that system is right, then there are indeed problems. Are we to suppose that the compilers first drafted a *schema* following the Sabinianic order and started excerpting and filing according to

48) Rightly raised by Professor Dario MANTOVANI when I read a version of this paper at Turin on 28 June 1994.

49) Oxford, 1946, pp. 319-321.

that *schema*; and that they then abandoned that *schema* and drafted a new one following the edictal order and began to excerpt and file according to that *schema*? Did they then take all the extracts from the Sabinianic *schema* and re-file them according to the edictal *schema*? Or did they start again from the beginning, reading and excerpting and filing according to the edictal *schema*? The very idea is mind-boggling.

The compilers' working methods require separate treatment and cannot conveniently be dealt with at the end of an article on the Constitution *ad senatum* of 22 July 530. But perhaps the traditional view should be re-examined. The compilers' work fell into two main stages. Stage 1 is set out in *Deo Auctore* 4: *Iubemus igitur vobis libros et legere et elimare ut ex his omnis materia colligatur*. We order you to read and condense the books so as to collect the whole substance from them. Stage 2 is set out in *Deo Auctore*, 5: *Cumque haec materia collecta fuerit, oportet eam extruere et in libros quinquaginta digerere*. When this substance has been collected, it should be set out and distributed into 50 books. That is, the distribution into books and titles took place at stage 2; it was a matter, not for the excerpting compiler, but for the editing compiler. That means that at the end of stage 1 there were simply four Masses of excerpts filed in the order in which they had been read. And in that case the compilers will have had no problems when they were reading the commentaries *ad Sabinum* and *ad edictum*.

As soon as *Deo Auctore* was issued on 15 December 530 the compilers started to read the Digests of Julian (S compilers) and Celsus and Marcellus (E compilers). Before 20 February 531 they had reached Julian book 35, Celsus book 18, and Marcellus book 13, and on that date Justinian issued a series of constitutions reforming points of law that had arisen up to that point.

The fundamental text is CJ 6.22.10.3. It is concerned with the law of wills and ends with the words "*secundum quod Iuventio Celso placuit*", according to what was approved by Juventius Celsus. Both LONGO⁽⁵⁰⁾ and H. KRÜGER⁽⁵¹⁾ assume that the constitution arose from the reading of Ulpian, book 1 *ad Sabinum*, which indeed cites Celsus, book 22, on a related point. Indeed LONGO says, "it is obvious". But that cannot be right. Ulpian never refers to Celsus as Juventius Celsus. In LENEL's *Palingenesia* there are 277 fragments of Celsus, of which 113 are quotations by Ulpian, often with several references to Celsus in each fragment. In 111 fragments out of 113 Celsus appears simply as Celsus; once as Celsus Juventius⁽⁵²⁾; once as Juventius⁽⁵³⁾; as Juventius Celsus, never. When Ulpian 1 *ad Sab.* cites Celsus 22 *dig.*, Celsus is simply Celsus, not Juventius Celsus⁽⁵⁴⁾. Celsus only appears in one other constitution during

50) *BIDR* 19 (1907) 147-149.

51) *Herstellung*, 91.

52) No. 107, D. 38.1.7.1.

53) No. 156, D. 7.8.12.1.

54) No. 192, D. 40.9.1.

this period (55). In that case there is a citation of Ulpian citing Celsus: but the constitution says so expressly, and it only uses a single name for Celsus. Furthermore, in all Ulpian's citations of Celsus, the expression *Celso placet* or *Celso placuit* never appears.

On the other hand Celsus himself used both his names, Juventius Celsus. They presumably appeared on the title page of his Digest; they certainly appear three times inside, in books 15, 20 and 37 (56). And it was precisely in book 15 that Celsus dealt with the law of wills, which was also the subject of the constitution that cites him. I conclude that this was not an indirect citation via Ulpian *ad Sabinum* but a direct citation of Celsus himself, and that therefore the compilers had reached Celsus book 15 before 20 February 531 (57).

55) CJ 4.5.10.1 (1 August 530).

56) LENEL, nos. 113, 178 and 252.

57) H. KRÜGER, *Herstellung*, deals with this issue of one or two names in a brief footnote: p. 195, n. 2. But he only considers the practice in the constitutions, and not the practice of Ulpian and Celsus themselves. And even on the constitutions he is hardly convincing: "Celsus is cited as Juventius Celsus. Are not the two names an indication that it is a direct citation? For the constitutions issued while the Digest was being compiled the answer is, no. It is true that Paul and Modestinus, on the only occasion on which they are cited, have both their names; but there is only one name, not only for Sabinus, but also regularly for Papinian and Ulpian. In the constitutions prior to 531 the number of names is just as arbitrary". Actually Sabinus has both names, Massurius Sabinus, in CJ 6.24.14 pr. (29 July 531); and Ulpian has both of his, Domitius Ulpianus, in CJ 6.49.7.1b (18 October 531). And the use of two names is not arbitrary: there is always a good reason for it: first reference (Sabinus); a different work (Ulpian); or a direct citation (Celsus).

It was obvious to LONGO that it was not a direct citation from Celsus, because the compilers could not have read so much so soon, because they only started reading the commentaries *ad Sabinum* and *ad edictum* after *Deo Auctore* on 15 December 530. In fact they started reading the previous summer after the Constitution *ad senatum*; they had started Celsus straight after *Deo Auctore*, and they reached book 15 easily before 20 February 531.

LONGO made the same mistake with CJ 6.40.2, which deals with the *lex Iulia miscella* and the *cautio Muciana* ⁽⁵⁸⁾. Julian dealt with the *cautio Muciana* in book 35 ⁽⁵⁹⁾, which corresponds to Celsus, book 18, and that may have given rise to the constitution. The proximity of CJ 6.22.10 and Celsus book 15, and CJ 6.40.2 and Julian book 35, is striking and suggests that the compilers had reached this area of their Digests. LONGO did not pursue the point, because he was convinced that the compilers could not have got so far so soon.

In this case there is a more concrete difficulty. The next constitution in the Code, CJ 6.40.3, is dated 1 November 531 and refers expressly to Ulpian *ad Sabinum* (*apud Ulpianum in libris Sabinianis invenimus*). The reference is to book 18 ⁽⁶⁰⁾ or perhaps book 8 ⁽⁶¹⁾, as is shown by D. 35.1.7. In either case if

58) *BIDR* 19 (1907) 155-157; cp. H. KRÜGER, *Herstellung*, 94-97.

59) LENEL, nos. 517, 518, D. 35.1.22; 106.

60) H. KRÜGER, 95.

61) LENEL, 2595 and n.1.

the compilers were still reading the commentaries *ad Sabinum* in November 531 they could not have been reading Julian in February 531. Now it would in any case be surprising if nearly a year after they started the compilers were still only a third of their way through the Sabinianic commentaries. More specifically we have seen how the reform constitutions issued in 530 between the Constitution *ad senatum* and *Deo Auctore* were suppressed, and then re-issued or their material reused during 531. That must be the explanation for this surprisingly late reference to Ulpian *ad Sabinum*. It in no way means that the compilers had not read Julian's Digest at the beginning of the year.

In fact all the constitutions issued on 20 February 531 deal with points of law that arose in titles I to XXVII of the praetor's edict, whose order the compilers had been instructed to follow. They therefore arose in the corresponding sections of the Digests, Julian 1-35, Celsus 1-18 and Marcellus 1-13.

CJ 6.28.3 is concerned with disinheriting the testator's own son. LONGO connects it with Ulpian 1 *ad Sab* ⁽⁶²⁾. It should be connected with Julian 29 *dig.* ⁽⁶³⁾ and Marcellus 11 *dig.* ⁽⁶⁴⁾. Celsus 15 *dig.* may also have discussed it, but there is no relevant extract left in the Digest.

CJ 6.23.29 is concerned with wills written by someone other than the testator: the testator must write the name of the heir or

62) *Loc. cit.*, 149.

63) Julian, nos. 417-419, in quotations from Ulpian and Paul 1 *ad Sab*.

64) Marcellus, no. 138.

heirs, or pronounce it so that it is clear to the witnesses. LONGO connects it with Ulpian 2 *ad Sab.* (65). It should be connected with Celsus 15 *dig.*, D. 28.1.27, which deals with the question whether the scribe can be a witness (66). It is incidentally the text in which Celsus appears expressly as Juventius Celsus, which explains the style of the citation in CJ 6.22.10.3. Julian and Marcellus may have discussed the same issue, but there is no relevant extract left in the Digest.

CJ 6.43.2 is the famous constitution on legacies and *fideicommissa*. LONGO connects it with Papinian, 16-20 *quaestionum*, not for any positive reason, but simply because it will not fit into his system anywhere else (67). Since Papinian, 16-20 *quaestionum* is parallel to Julian, 32-40 *digestorum*, it is just as possible that Julian provided the source of inspiration for the constitution, and we have seen that the compilers had got that far in reading his Digest. In any case LONGO's view goes back to the old idea that all three Masses started at the same time. We have already seen that that was not true for S and E. It was not true for P either. The compilers, quite sensibly, read the fundamental systematic works first and then started the casuistic works. They did not start the P Mass until after they had finished the three

65) *Loc. cit.*, 149-150; Ulp. 2435, D.28.1.21 pr.

66) Celsus' reply is memorable: "I do not understand what it is that you are asking me, or else your question is totally foolish: it is quite absurd to doubt that someone is legally present as a witness because he is the scribe who wrote out the will".

67) *Loc. cit.*, 157-158; H. KRÜGER, *Herstellung*, 94, is slightly sceptical.

great Digests. That is why it is only about half the length of the other two Masses (⁶⁸).

CJ 6.38.3 is connected by LONGO with Papinian, 17 *quaestionum* (⁶⁹). As H. KRÜGER says, it might equally well be connected with Julian, 33 or 35 *digestorum*: "when Julian's work was excerpted needs to be established first just as the time of excerpting Papinian's *quaestiones*" (⁷⁰). The constitution is at least consistent with the theory that the compilers had reached Julian 35 *digestorum* but had not yet started the works of Papinian.

The compilers went on to finish the Digests of Julian, Celsus and Marcellus, and a series of constitutions issued on 30 April 531 deals with further points of law in what they read. All these constitutions seem to arise out of Julian, 30-42 *dig.*, Celsus, 16-22 *dig.*, and Marcellus, 12-16 *dig.* (⁷¹).

68) On the P Mass see generally PUGSLEY, *Compiling* (2), *Journal of Legal History* 13 (1992) 209 at 214-217, *Compiling* (4), *Syracuse Journal*, 170-171. See also H. KRÜGER, *Herstellung*, 174-175: "My research does not even go so far as to show that the compilers started the P Mass at the same time as the S and E Masses"; but (p.177 I) "it is probable that it was no exception".

69) *Loc. cit.*, 158-159.

70) *Herstellung*, 94; but he toys with the idea (p.168, n.1) that Julian may have been read at the same time as the first books of the Sabinianic commentaries. That cannot be reconciled with the BK Order.

71) There is an overlap between the end of the section giving rise to the reforms of 20 February 531 (Julian, 1-35 *dig.*) and the beginning of the section giving rise to the reforms of 30 April 531 (Julian, 30-42 *dig.*).

In the series of articles by DE FRANCISCI ⁽⁷²⁾ it is striking how prominently Julian appears in connection with the constitutions of 30 April 531 and how little he appears in connection with the constitutions of 29 July 531 and later.

1. CJ 6.27.5 concerns the institution of a slave as heir *sine libertate*. The closest text in the Digest comes from Julian 30 *dig.* ⁽⁷³⁾. DE FRANCISCI therefore concludes that the compilers had just read Ulpian 4 *ad Sabinum* ⁽⁷⁴⁾. It is true that the beginning of Ulpian *ad Sab.* frequently cites or copies or follows closely without citing the corresponding passages of Julian 29 and 30 *dig.* ⁽⁷⁵⁾. It does not follow that when the nearest text comes from Julian, the compilers must necessarily just have read Ulpian. That is like LONGO's treatment of CJ 6.22.10.3 ⁽⁷⁶⁾. There the text quotes Celsus: therefore, according to LONGO, the compilers had just read Ulpian 1 *ad Sab.* Here the text is from Julian: therefore, according to DE FRANCISCI, the compilers had just read Ulpian 4 *ad Sab.* It is just as likely that the compilers had just read Celsus and Julian respectively. The coincidence makes it more likely. And both cases fit the timetable arising out of the instructions in *Deo Auctore*.

72) *BIDR* 22 (1910) 155 (30 April 531); 23 (1911) 39 (29 July 531); 23 (1911) 186 (1 September 531); 27 (1914) 5 (18 October 531). The series was never completed: DE FRANCISCI never reached 27 November 531.

73) D. 28.5.38.1.

74) *BIDR* 22 (1910) 156-166.

75) DE FRANCISCI, *loc. cit.*, 160 n. 2. The note takes up most of pages 160-162.

76) See above, pp. 316-318.

2. CJ 6.38.4 concerns provisions like *ille vel ille mihi heres esto*, or *illi aut illi do lego*. LENEL connects it with D. 31.16, Celsus, 16 *dig.*, *Si Titio aut Seio, utri heres vellet, legatum relictum est* (77). DE FRANCISCI, who does not like Celsus, rejects the connection in a footnote, but without giving any reasons (78).

3. CJ 6.35.11 concerns the *SC Silanianum*. There are no relevant fragments in Justinian's Digest from the Digests of Julian and Celsus, but there is a short section in Marcellus, 12 *dig.* (79).

4. CJ 6.37.24: DE FRANCISCI finds related texts in Julian, 39 *dig.*; Julian, 61 *dig.*; Papinian, 29 *quaest.*; Papinian, 6 *resp.* (80). He rejects Julian, as usual, because according to him the compilers were still reading Ulpian, 4 *ad Sab.*, and suggests Papinian, 19 or 20 *quaest.*, for which he can find no direct evidence. In the edictal order Papinian, 19-20 *quaest.*, corresponds to Julian, 39-40 *dig.* Since Julian has a related text that was probably the source of the constitution (81).

77) LENEL, Celsus, no. 130.

78) *Loc. cit.*, p.182, n.1.

79) LENEL, Marcellus, nos. 149-152. DE FRANCISCI, *loc. cit.*, 166-169, suggests Ulpian, 3 *ad Sab.*, but more because it fits with his overall system than for any firmer reason. H. KRÜGER, *Herstellung*, 102-103, suggests Gaius, 17 *ad ed. prov.*, and Ulpian, 50 *ad ed.*; but the classical Digests also followed the edictal order, so that Marcellus, 12 *dig.* is just as likely.

80) D. 30.94; 35.2.87.7; 35.2.11.5, 8; 28.6.41.3, 6; DE FRANCISCI, *loc. cit.*, 201.

81) H. KRÜGER, *Herstellung*, 103, calls DE FRANCISCI's conjecture an "unwarranted assumption". For him, the constitution is unplaceable.

5. CJ 6.42.31 is connected by P. KRÜGER with the previous constitution. DE FRANCISCI again connects it with Papinian, 19 *quaest.*, "and the fact that in book 19 of Papinian we no longer find any text concerning these controversies may be fresh evidence for placing the constitution" (82). There is however a related text in Julian, 40 *dig.* (83), and that is more likely to be the source of the constitution (84).

6. CJ 6.46.6: DE FRANCISCI's argument is familiar (85). We know from D. 40.7.20.1,3 (Paul, 16 *ad Plautium*) that Julian dealt with the questions decided by Justinian in connection with *statuliberi* (Julian, 42 *dig.*). Therefore Ulpian, who copied Julian extensively, will have dealt with the same questions in book 4 *ad Sabinum*, and that was the origin of the constitution. We have seen that argument before. It is just as likely that the constitution arose out of the work of Julian himself.

7. CJ 6.30.20. There are two relevant texts of Ulpian, both from book 4 *ad Sabinum*, which LENEL joins in one fragment, no. 2456. LONGO (86) and H. KRÜGER (87) both conclude that that fragment was the origin of the constitution. On the other

82) *Loc. cit.*, 197.

83) D. 36.1.28.6; DE FRANCISCI, *loc. cit.*, 195 and n. 1, on the influence of Julian in this area.

84) H. KRÜGER, *Herstellung*, 105-107, concludes that "the origin of the constitution is obscure".

85) *Loc. cit.*, 175-176.

86) *Loc. cit.*, 176-179.

87) *Herstellung*, 102.

hand, in this area too Ulpian relies heavily on Julian⁽⁸⁸⁾, so that the origin of the constitution could just as easily be Julian, 42 *dig.*

8. CJ 6.30.21: the decisive text, as DE FRANCISCI says, is D.40.12.25 (Gaius *ad ed. pr. urb. titulo de liberali causa*), which shows that this kind of problem was dealt with under the rubric *de liberali causa*. That leads us naturally to Julian, 42/43 *dig.*⁽⁸⁹⁾.

I conclude that the compilers read, and finished, the Digests of Julian, Celsus and Marcellus early in 531, and were well on course to finish the whole of the S and E Masses at the same time as the P Mass before the end of the year.

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POSTSCRIPT: I used part of the material in this article in my paper, *La compilazione del Digesto e la tesi LONGO/DE FRANCISCI*, at the conference of the *SIHDA* at Vienna on 22 September 1994. There is a relationship between the citation of the classical jurists in the constitutions of the year 531, and the progress of the compilers who were systematically reading their works during that year. Celsus was read just before he was cited in February; Paul was read just before he was cited in November. At the end of my paper there was an intervention by

88) See LENEL, Julian, no. 595.

89) DE FRANCISCI, *loc. cit.*, 192-193, suggests Ulpian 14 *ad ed.*, because the issue must have been dealt with earlier. Julian fits better.

Professor Tony HONORÉ. He agreed that the LONGO/DE FRANCISCI system was wrong; but he maintained that there was no necessary connection between reading the works of the classical jurists and citing them. I disagree. The compilers read the works of Papinian (*quaestiones, responsa* and *definitiones*) in a block at the beginning of the P Mass; later on they read Ulpian's work on *fideicommissa*; and finally right at the end of the Mass they read Paul's monograph on the *SC Tertullianum*. The constitutions of 531 cited the works of Papinian (seven times in four constitutions) in a block in the summer, on 29 July and 1 September; later on they cited Ulpian's work on *fideicommissa*, on 18 October; and finally right at the end of the year they cited Paul's monograph on the *SC Tertullianum*, on 27 November. They read the same works in the same order; they cited the same works in the same order. It would be a quite extraordinary coincidence if there was no connection between the two. It seems far more likely that they were read first and cited afterwards.

That is confirmed by the detail of the citation in each case: the long textual quotation from Papinian 8 *responsorum* in CJ 6.25.9.1; the use of two names in CJ 6.49.7.1b; the very detailed reference ("right at the beginning of his monograph") in CJ 6.58.14.1. These are not citations from memory. They are citations after recent reading. And that reading must have been for stage 1 of the compiling process. The compilers, and in particular Tribonian, who was compiler and quaestor at the same time, already had a very difficult task to read all the classical works in the time available. It is most unlikely that they had the

time, or the desire, to read works that they were not actually excerpting.

The same arguments apply to the citation of Juventius Celsus on 20 February 531 in CJ 6.22.10.3. It is most unlikely that he was cited first and read afterwards. It is far more likely that he had been read just before he was cited.

TABLE I. The commentaries *ad Sabinum* and *ad Edictum*

Pars Sabiniana		Pars Edictalis	
1-3 4-9	Ulp. <i>ad Sab.</i> Ulp. <i>ad ed.</i> 26-52 <i>in.</i> , etc.	Sab Ed(2)	Ulp. <i>ad ed.</i> 1-25 etc. Ulp. <i>ad ed.</i> 56-83
120-123 112-119	(Plan) Ulp. <i>ad ed.</i> 52 <i>fin.</i> , 53 etc. Ulp. <i>ad ed.</i> 54-55 etc.	Ed(2a) Ed(2b)	(Actual) Ulp. <i>ad ed.</i> 54-55 etc Ulp. <i>ad ed.</i> 52 <i>fin.</i> , 53 etc
D. 50.16.	159-181 182-197	Sab Ed(2)	D. 50.16. 1-38 39-74 75-76 77
D. 50.17.	2-40 41-57	Sab Ed(2)	D. 50.17. 102-139 140-162 163-164 165-167
D. 45.1.	6-47 48-51	Sab Ed(2)	D. 45.1. 67-76 77-87
			Ed(1) Ed(3) Ed(2b) Ed(2a) Ed(1) Ed(3) Ed(2b) Ed(2a) Ed(1) Ed(3) Ed(1) Ed(3)

TABLE II. Reading and Excerpting

		S	E	P	
530					
22 July	<i>C ad Senatum</i> CJ 5.4.24				292
	CJ 6.24.14pr.?				311-312
1 Sept	CJ 6.28.4.3 ?	Sab " 103	Ed(1) 67		305-8, 312-13
		Ed(2) 65	Ed(3) 71		297-298
		Ed(2a)(2b) →	Ed(2b)(2a) 14		298-299
		BK10-13 32	BK124-133 36		299-300
		200	188		
15 Dec	<i>Deo Auctore</i>	Julian <i>Dig.</i>	Celsus/Marcellus		316
531					
20 Feb	CJ 6.22.10.3	Julian 29	134. Celsus 15		316-321
		Julian 1-35	Celsus 1-18		321-325
30 April		Julian 30-42	Celsus 16-22		
29 July	CJ 6.25.9.1			181.Pap. 8R	
1 Sept	Appendix				
	CJ 6.49.7.1b	34	34	203.Ulp. 5fc.	
18 Oct				239.Paul <i>SCTer.</i>	300
1 Nov					299-300
27 Nov	CJ 6.58.14.1	328	385	290	

The figures in the right hand column refer to pages in this article.