

## DECISIO AS A TERMINUS TECHNICUS\*

After the (first) Codex Justinianus had been successfully completed and put into effect, from 16 April 529, the emperor turned his mind to reorganising the *jurisprudentia veterum*. It was only after one year that he installed a committee charged with that gigantic task, an *opus desperatum*. This committee was led by a man who had participated in the Codex committee as an ordinary member, but whom Justinian had just promoted to the rank of Secretary of Legislation, *quaestor sacri palatii*. Tribonian expected the committee to need at least ten years for the job. That, at least, was what he said after it had in fact been completed within the unbelievably short time of three years:

Omni igitur Romani iuris dispositione composita ... et in tribus annis consummata, quae ut primum separari coepit, neque in totum decennium compleri sperabatur.<sup>1</sup>

The main problem presented by the *ius* was not only one of finding a suitable manner of organising the immense mass it constituted, but also in particular one of determining the relation between classical jurisprudence and the imperial constitutions. In other words, how was the *ius*, which existed as an independent source of law alongside the *leges*, to be integrated with the imperial legislation? This was the rock on which in the previous century the ambitious codification committee installed by Theodosius II on 20 March 429 had run aground. The task of this committee had been to organize the constitutions and to arrange the jurisprudence according to the same system. The constitutions and the lawyers' corresponding fragments concerning the same subjects were then to be collected together. The final result was supposed to have been one vast law-book, a Codex Theodosianus.<sup>2</sup> This Theodosian committee had ground to a halt, partly because it was not qualified for the job of sorting out the jurisprudence, and partly because it had failed fully to consider the legal force of those fragments in relation to that of the constitutions. Tribonian, on the other hand, found a solution to the latter problem, which was as simple as it was brilliant. He had the emperor assign to the newly organized jurisprudence the legal force of a single constitution, dated 16 December 533, exactly three years after the official date of his commission:<sup>3</sup>

Leges autem nostras, quae in his codicibus, id est institutionum seu elementorum et digestorum

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1 Const. *Tanta* § 12.

2 The 429 A.D. commission is found in C.Theod. 1, 1, 5. Cf. A.J.B. Sirks, Observation sur le Code Theodosien, *SG* II (1985) 21 sqq. and J.H.A. Lokin, 'De wetgevingsplannen van keizer Theodosius II', *De Historie herzien*, Hilversum 1987, 97-111.

3 About the date being either 16 or 17 December 530, H.J. Scheltema 'Subsecivum XVI. L'autorité des Institutes, du Digeste et du Code Justinien', *RIDA* 3e S. 13 (1966) 344-348. Cf. Van der Wal-Lokin, *Delineatio* 123.

vel pandectarum posuimus, suum optinere robur ex tertio nostro felicissimo sancimus consulatu, praesentis duodecimae indictionis tertio calendas Ianuarias, in omne aevum valituras et una cum nostris constitutionibus pollentes et suum vigorem in iudiciis ostendentes in omnibus causis, sive quae postea emergerint sive in iudiciis adhuc pendent nec eas iudicialis vel amicalis forma compescuit, etc.<sup>4</sup>

This legal ingenuity eliminated the *ius* as a separate source of law and every citizen was impressed by the fact that all law, previous as well as subsequent, issued direct from the mouth of the emperor:

ut omnes qui relati fuerint in hunc codicem prudentissimi viri habeant auctoritatem tam, quasi et eorum studia ex principalibus constitutionibus profecta et a nostro divino fuerant ore profusa. omnia enim merito nostra facimus, quia ex nobis omnis eis impertietur auctoritas.<sup>5</sup>

The codification of the *ius* had several inevitable consequences. For instance, after its promulgation as one constitution in 533 A.D. the Digest occupied its place in the successive imperial constitutions and had therefore to be incorporated in the revised Codex of the year 534. This was duly done, although not by including the whole text, but by including the introductory constitutions, *Deo auctore* and *Tanta* in the seventeenth title of the first book under the heading *De veteri iure enucleando et auctoritate iuris prudentium qui in Digestis referuntur*. Second, the writings of the lawyers had to be updated, because their authenticity was supposed to date from 16 December 533. This complication was solved by rather mechanical changes in the text, the so-called interpolations. In the third place, all discrepancies had to be removed from the Digest, because it was to be promulgated as one constitution by Justinian, who obviously could not be allowed to contradict himself:

Contrarium autem aliquid in hoc codice positum nullum sibi locum vindicabit nec invenitur, si quis supitili animo diversitatis rationes excutiet: etc.<sup>6</sup>

Not only were two conflicting fragments considered antinomies, but also conflicting opinions discussed within one fragment. Many of these *altercationes* were remnants of the controversies between the old Sabinian and Proculian schools. Unless removed by an imperial decree they were still undecided. In such cases the *lex citandi* of the year 426 indicated which opinion had to be accepted as valid law, but its directives were hardly satisfactory. They obliged the judge simply to collect and count the votes. In court citations were permitted only from the works of Papinian, Paul, Ulpian, Modestinus and Gaius (who was posthumously given the authority that he had presumably not enjoyed in his lifetime). Opinions of other, earlier lawyers were valid only in so far as they were referred to by these five. It is not quite clear whether this rule applied to the complete works of the cited lawyers or merely to their opinion on the specific disputed point; if the restriction to the five jurists is not

4 Const. *Tanta* § 23.

5 Const. *Deo auctore* § 6.

6 Const. *Tanta* § 15.

to lose all sense, the latter alternative seems more probable. Manuscripts had to be collated in order to determine the text of these older authors. If various opinions were found about a legal problem, that held by majority was considered valid; if the division was equal, the great Papinian's opinion was decisive. If however Papinian had not discussed the matter in question, then the judge himself was allowed at last to use his own brains in choosing one of the alternatives.<sup>7</sup> Justinian was confronted with the necessity of eradicating all inconsistencies and discrepancies from the Digest in order to make it one constitution. He did so by means of *decisiones*.<sup>8</sup>

The term *decisio* is obviously used in a technical sense. It had never before been used in contexts on legislation. In the Institutes we find more explicit information concerning the nature of these *decisiones*, when the emperor speaks about his abolition of the status of *dediticius*. He says:<sup>9</sup>

et dediticios quidem per constitutionem expulimus, quam promulgavimus inter nostras decisiones, per quas suggerente nobis Triboniano viro excelso quaestore antiqui iuris altercationes placavimus.

In the first place, this passage makes it clear that a *decisio* is a specific type of *constitutio*, which is consequently always issued by the emperor. This is confirmed by three passages in the const. *Cordi*, which mention the *decisiones* alongside *aliae constitutiones*:

Postea vero, cum vetus ius considerandum recepimus, **tam quinquaginta decisiones fecimus quam alias ad commodum propositi operis pertinentes plurimas constitutiones promulgavimus**, quibus maximus antiquarum rerum articulus emendatus et coartatus est omneque ius antiquum supervacua prolixitate liberum atque enucleatum in nostris institutionibus et digestis reddidimus.

Sed cum novellae nostrae **tam decisiones quam constitutiones**, quae post nostri codicis confectionem latae sunt, extra corpus eiusdem codicis divagabantur...

Repetita itaque iussione nemini in posterum concedimus **vel ex decisionibus nostris vel ex aliis constitutionibus**, quas antea fecimus, vel ex prima Iustiniani codicis editione aliquid recitare ...<sup>10</sup>

Whether the fifty *decisiones* must be contrasted with the *constitutiones ad commodum propositi operis pertinentes*<sup>11</sup> or make up a special subsidiary category, as

7 C. Theod., I, 4, 3: Imp. Theod(osius) et Valentin(ianus) AA. Ad senatum urbis Rom(ae). Post alia. Papiniani, Pauli, Gai, Ulpiani atque Modestini scripta universa firmamus ita, ut Gaium quae Paulum, Ulpianum et ceteros comitetur auctoritas lectionesque ex omni eius corpore recitentur. Eorum quoque scientiam, quorum tractatus atque sententias praedicti omnes suis operibus miscuerunt, ratam esse censemus, ut Scaevolae, Sabini, Iuliani atque Marcelli omniumque, quos illi celebrarunt, si tamen eorum libri propter antiquitatis incertum codicum collatione firmentur. Ubi autem diversae sententiae proferuntur, potior numerus vincat auctorum, vel, si numerus aequalis sit, eius partis praecedat auctoritas, in qua excellentis ingenii vir Papinianus emineat, qui ut singulos vincit, ita cedit duobus (...). Ubi autem eorum pares sententiae recitantur, quorum par censetur auctoritas, quos sequi debeat, eligat moderatio iudicantis etc.

8 See lastly G.L. Falchi, 'Osservazioni sulle "L Decisiones" di Giustiniano', *Studi in onore di Arnaldo Biscardi* V (Milan 1984), 121-150.

9 Inst. 1, 5, 1.

10 Const. *Cordi* § 1, 2 en 5.

11 Cf. Pieler, *Rechtswissenschaft* 408, who refers to K.-H. Schindler, *Justinians Haltung zur Klassik*

is suggested by the word *aliae*, makes no difference for the technical meaning of *decisio*. It does, however, seem beyond doubt that the promulgation of decisions continued after the const. *Deo Auctore*, that is after 16 December 530.<sup>12</sup> Neither before nor after the proceedings of the Digest committee is the word *decisio* ever used to indicate a kind of constitution. This shows that it had indeed a technical sense and that it must be taken in that sense each time it is employed. Consequently there are also decisions among the constitutions of 30 April 531.<sup>13</sup> It is quite well possible that these later decisive instructions were incidentally given in the form of internal *mandata*.<sup>14</sup> The decisions were subsequently grouped together and promulgated as imperial constitutions on 1 August 530, 1 September 530, 1 October 530, 17 November 530 etc. etc.<sup>15</sup>

Another point shown by the passage from the Institutes is, that the *decisiones* are due to Tribonian's initiative and suggestion. This is said not only of the decision to abolish the concept of *dediticii* but of all *decisiones*, as is clear from the plural *per quas*.

It is more than probable that Tribonian made the decisions alone or with some members of the first Codex committee. If we may assume that the Digest committee started to work after installation, i.e. after 16 December 530 - the date of the const. *Deo auctore* - it follows that most of the decisions were already made when the committee began its activities. Thus it appears that the decisions were made in the period in which the first codex of April 529 was the sole work which was finished. Therefore the first Codex constituted the only criterion used in judging the still unfragmented works of the classical jurists. Perhaps Tribonian was already comparing the jurisprudential works with the Codex in 528/529 when he was a 'simple' *magister officiorum inter agentes* and a member of the Codex committee. We know he had a magnificent library and scholarly interests. All known decisions are part of the books 3 to 8, with the exception of one decision (C. 2, 18, 24) dealing with *negotiorum gestio* in book 2 of the Codex title 18, exactly where private law begins to be treated. For all decisions deal with private law and that is the reason why there are no decisions in book 1, in the beginning of book 2 and in the last 4 books of the Codex, in which church law, penal law, fiscal law and state law are to be found. Many subjects in these fields had developed after the 'classical' period and gave no reason for conflict. Further detailed research into the well-known decisions is much needed, particularly concerning their interconnections, their date of issue,

(Cologne-Graz 1966), 64 ff., Honoré, *Tribonian*, (London 1978), 142; extensively Falchi, o.c. 124, specially note 12.

12 Contra Schindler, *Justinians Haltung*, 336, who is of the opinion that the promulgation of decisions stopped as soon as the Digest-project had been formally announced in the const. *Deo Auctore*; Falchi o.c. 127.

13 C. 6, 30, 20, 2; 6, 30, 21, 1; 6, 27, 5, 1a.

14 Cf. Pieler, *Rechtswissenschaft* 408.

15 A systematic enumeration gives Falchi, o.c. 125 note 13.

their place in the Codex and their effect on the Digest.

From the passage quoted from the Institutes, we learn about the decisions in more detail. They serve to settle disputes of ancient law, *placare antiqui iuris altercationes*. Thus the decisions interfere with the *ius*. This makes it understandable that the emperor did not issue them as internal directives, but as a *constitutio*. Since the emperor is the only authority allowed to make fundamental changes in the ancient *ius*, one of the sources of law, it is possible for *decisiones* to ignore the rules of the *lex citandi*. As we have seen, this *lex* took the conflicting opinions of the lawyers for granted, whereas the Digest denied the existence of any discrepancies. The *decisiones* served precisely to pave the way that was to lead from pluriformity to uniformity. Each *decisio* removed one obstacle.

Naturally the *decisiones* as such are not mentioned in the Digest;<sup>16</sup> their results were assimilated in the Digest-fragments without it ever being pointed out that a decision had been made to settle a controversy. On the other hand, decisions found a place in the revised Codex of the year 534, which is somewhat illogical. For, in view of the fact that the decisions were meant to make possible the appearance of a consistent Digest, it is strange to discover them a year after its appearance in the second Codex. In this way the reader of the second Codex is informed of disputes which had existed before the Digest, but which had been solved. In other words, the decisions were irrelevant for the practising lawyer, although not, of course, for the legal historian. Probably Tribonian was led in this direction by his vanity, wishing to show off his ingenuity in cutting through various Gordian knots.<sup>17</sup> In the Institutes too, which were composed immediately after the completion of the Digest and already promulgated as a law in 533, several decisions are mentioned, but that is less surprising. The Institutes are a textbook for first year law students and it is easy to see that teaching a specific rule gains force if it is explained how and for what reasons it came into existence and how it solved a legal controversy. When several decisions had once been relegated to the Institutes for educational purposes, we may imagine that Tribonian wanted to show them in their original shape. The appearance of the revised Codex in 534 A.D. proved quite useful for fulfilling this wish.

The const. *Cordi* makes mention of fifty *decisiones*: *tam quinquaginta decisiones fecimus quam alias ad commodum propositi operis pertinentes plurimas constitutiones*

16 Of course the decisions are referred to in the const. *Tanta*/Δέδωκεν, § 1: *omnes ambiguitates decisae nullo seditioso relicto* / καὶ ἀπάσας τὰς ζητήσεις τέμοντες... *nomenque libris imposuimus digestorum seu pandectarum. quia omnes disputationes et decisiones in se habent legitimas ...* / ὅπερ βιβλίον digesta εἶτε πανδέκτην προσηγορεύσαμεν. ἐκ τε τοῦ τῶν νόμων ἔχειν διαρρέσεις τε καὶ διατυπώσεις ...

17 Scheltema, *SG I* (1984), 6 (below, note 21) suspected that Tribonian adopted the decisions in order to flatter Justinian; Pieler on the contrary (*SZ* 108 (1991), 594) believes 'daß die Absicht der Verherrlichung Justinians besser durch Aufrechterhaltung der Werkindividualität erreicht worden war.'

*promulgavimus*. Legal historians have for a long time assumed that these fifty decisions had been assembled in a separate collection. This idea seemed to be suggested by the so-called Turin gloss fr. 370 (ed. Alberti 1934): *sicut biblio L constitutionum invenies*. Wenger<sup>18</sup> persists in calling this passage *von starker Beweiskraft*. Scheltema on the contrary had already deprived it of its evidential value by his discovery that the Turin gloss is a Latin translation of Theophilus' Paraphrasis and that the text is better understood by retranslating it into Greek. We must first take into account the similarity of the Greek numbers for 50 (N) and 8 (H), and then the fact that *constitutiones* is a current equivalent of *Codex*. This leads to a different interpretation of the passage: 'as you will find in the eighth book of the Codex'. That is indeed where the reference can be found.<sup>19</sup> Scheltema's discovery is fatal to the theory of the separate collection (*liber*); the only remaining subject for speculation is the cryptical amount of fifty recorded in the const. *Cordi*. The most probable explanation is, that the number was suggested by the emperor's fiftieth birthday in 532.<sup>20</sup> The *decisiones* would serve very well as a birthday-present, for they are of pivotal importance for Justinian's revision. It is easy enough to imagine that Tribonian could not fight the temptation to include the *decisiones* again in the Institutes and the second Codex. We for our part must be grateful for this touch of vanity in his character, because it allows us to gain a glimpse behind the scenes.

In a paper written just before his death,<sup>21</sup> Scheltema discussed the technical aspect of the *decisiones*. He argued that the term *decisio* must be taken quite literally, stressing the etymological connection with *caedere*, cutting; a *decisio* is 'cutting' something. Occasionally the texts even use the synonym *resecare*.<sup>22</sup>

If we now look at the object of *decidere* or *resecare*, we find that it is always a conflict, a point of doubt or a controversy which is being decided. So *decidere* means something like cutting knots, solving problems. The Latin texts do not immediately make clear the technical sense, but the Greek sources offer some further help, especially the scholia on Theophilus' Paraphrasis of the Institutes. It is therefore useful to turn our attention to the Greek texts, which Scheltema was not able to search for help on this point.

- 18 *Die Quellen des römischen Rechts*, Vienna 1953, 573. P.E. Pieler too still assumes the existence of such a collection, in *Rechtsliteratur* 407 and 408, in particular note 50: 'Die gesonderte Promulgation der einzelnen *decisiones* erscheint heute freilich nicht mehr nachweisbar'. Cf. also T. Honoré, 'The fifty decisions', *Tribonian*, 142-146.
- 19 H.J. Scheltema, 'Subsecivum II. Die Turiner Institutionenglosse und die Quinquaginta Decisiones', *TRG* 30 (1962) 254-256 and *SG I* (1984) 6 note 12.
- 20 Or perhaps in 531: see among others W.J. Zwolve, 'Lucubratiunculum de Justiniani Augusti die natali', *SG I* (1984), 133-142.
- 21 'Subsecivum XVIII. Les Quinquaginta Decisiones', published posthumously in *SG I* (1984), 1-9. See P. Pieler, *SZ* 108 (1991), 594.
- 22 For instance C. 3, 33, 13 pr. *auctorum iurgium decidentes compendioso responso omnem huiusmodi dubitationes resecamus*; C. 5, 60, 3: *Indecoram observationem in examinanda marum pubertate resecantes iubemus.*; cf. Scheltema *SG I* (1984) 3, note 2.

Not all the Greek sources are helpful. In the Greek lexica for instance *decisio* is never explained in its technical sense; usually it is simply translated as διάταξις. So it is in the lexicon αὔσηθ, edited by Ludwig Burgmann, where *decisio* (δεκέσιω) is explained by διάταξις, διατίθεμαι. Unfortunately the explanation of the lemma δεκεσιον in the same lexicon has not been preserved.<sup>23</sup> In the lexicon ὥδετ, also edited by Burgmann, decision (δεκεσιόν) is translated διάταξις, ψήφος.<sup>24</sup>

In the Greek text of the Codex too the word *decisio* is never translated in a technical sense. Normally it is represented by the Greek term for constitution, διάταξις;<sup>25</sup> consequently the neutral translation θεσπίζομεν is used to render the Latin expression *decidentes sancimus*, ignoring the participle *decidentes* altogether.<sup>26</sup> In the κατὰ πόδας, however, we find *decidere* being translated by τέμνειν or κατατέμνειν. In the κατὰ πόδας of C. 3, 33, 12<sup>27</sup> we read for *ambiguitatem antiqui iuris decidentes sancimus*: τὴν ἀμφιβολίαν τοῦ παλαιοῦ νομίμου κατατέμνοντες θεσπίζομεν; in that of C. 7, 4, 14:<sup>28</sup> ἡμεῖς τὴν παλαιὰν φιλονεικίαν τέμνοντες θεσπίζομεν. A scholion on C. 6, 2, 20, 1 says:<sup>29</sup> Τέμνουσα γοῦν ἡ διάταξις τὰς τοιοῦτας ζητήσεις λέγει (...) Similarly Thalelaeus about C. 6, 2, 22, 1:<sup>30</sup> Ταύτας τοῖνυν τὰς ζητήσεις ἡ διάταξις τέμνουσα λέγει (...), and once also in the text of C. 6, 57, 6:<sup>31</sup> τὴν τοιαύτην τοῖνυν ἀμφισβήτησιν αὐτῶν τέμνοντες περαιτέρω αὐτὴν προελθεῖν οὐκ ἀνεχόμεθα, ἀλλὰ θεσπίζομεν (...). Again the object of τέμνειν turns out always to be a controversy: τὴν ἀμφιβολίαν, τὴν ἀμφισβήτησιν, τὴν ζήτησιν. So here too the meaning of the term is to cut a knot. It is actually used in the same sense in cons. *Tanta*/Δέδωκεν 1, 1: *omnes ambiguitates decisae* and ἀπάσας τὰς ζητήσεις τεμόντες respectively.

The Theophilus scholia give us an idea of how this *decidere* / τέμνειν worked out in practice. Theophilus duly renders *decisio* as διάταξις τοῦ ἡμετέρου βασιλέως τέμνουσα τὴν ἀμφισβήτησιν,<sup>32</sup> or as διάταξις τοῦ εὐσεβεστάτου ἡμῶν βασιλέως τέμνουσα τὴν ζήτησιν καὶ τὴν Μαρκέλλου δεχομένη γνώμην ('cutting the question and accepting Marcellus' opinion as valid').<sup>33</sup> Occasionally, however, he simply retains the Latin word *decisio* as a technical term in the text, where the manuscripts have preserved it in the form δεκισίων.<sup>34</sup> This has led to a few interesting scholia. These scholia do not comment on the Greek text by Theophilus, but on the Latin text of the original Institutes; afterwards they were transferred to

23 FM VIII (1990), 302, Δ 25 and Δ 50.

24 FM VI (1984), 42, Δ 25.

25 For instance BT 868, 4; BT 837, 15; BT 1333, 20; BT 1621, 23; BT 2240, 12.

26 For instance BT 889, 4; BT 1149, 3; BT 2085, 4.

27 BS 1004, 34-35.

28 BS 2961, 5-6.

29 BS 3267, 2.

30 BS 3269, 20.

31 BT 2085, 21.

32 ad I. 1, 10 pr.

33 ad I. 2, 5, 5.

34 E.g. ad I. 1, 5, 4; ad I. 3, 23, 1; ad I. 3, 28, 3.



the margins of the Paraphrasis manuscripts.<sup>35</sup> These scholia translate *decisio* as a 'cutting constitution', but without making explicit what exactly is being 'cut'.

Most scholia on *decisio* have been preserved in the cod. Par. 1366. Where Theophilus renders *decisio* in I. 4, 1, 16 by his usual phrase: διάταξις δὲ τοῦ ἡμετέρου γέγονε βασιλέως, a commentator supplies further information by saying:<sup>36</sup> διάταξις βασιλέως παρακελευομένη περὶ τῶν ἀπολομένων ἐκ τῶν μισθῶν ('a constitution of the emperor which issued directions about lost rent'). The word *decisio* in I. 3, 23, 1 is explained as follows:<sup>37</sup> τούτέστι ἡ διατέμνουσα διάταξις. Similarly a scholion on I. 1, 5, 4, which defines *decisiones* as: τούτέστι ταῖς διατάξεσι ταῖς ἀνατεμνούσαις. *decisio* γὰρ ἡ ἀνατομή. This last scholion is especially interesting for our purpose, because it actually contains a proper translation of the technical term *decisio*. The nearest parallel for this translation ἀνατομή is found in another Theophilus manuscript, the Laur. plut. 10.16. There a scholion explains: ταῖς διατάξεσι ταῖς ἀνατεμνούσαις ἡγουν ταῖς ἀναίρεσούσαις. In the Vat. pal. 19 fol. 17r the words ταῖς ἀναίρεσεσι have even been added in the main text. So *decisio* could be rendered as ἀναίρεσις, 'destruction'.

How is this 'cutting up' or 'destruction' to be imagined? What is 'cut up' or 'destroyed'? The scholiast is not explicit on this point, but nevertheless the meaning is clear. What in fact happens is, that the emperor *actively* interferes by taking away the force of law from an existing rule.<sup>38</sup> The normal way to take away force of law was passive, simply by not including it in an exclusively valid collection of legal rules. The emperor Justinian had for instance employed this procedure for omitting unwanted regulations when he made the Codex. Not including in his Codex a constitution which had been issued by a predecessor was enough to deprive that constitution of its validity. Apart from that, the validity of those which he had included depended on their relative chronology, for *lex posterior derogat legi priori*. That means, whenever several constitutions spoke of the same matter, the most recent one was decisive.<sup>39</sup>

35 Cf. Van der Wal - Lokin, *Delineatio*, 41.

36 Par. 1366 fol. 268v.

37 Par. 1366 fol. 246r.

38 Cf. Theoph. 1, 10, 2: τῆς δὲ ἀδνατίου ἀναίρεθείσης: when the *agnatio* was abolished; also the Greek (not Theophiline) inscription of Inst. 1, 7 *De lege fufia caninia sublata*: περὶ νομοῦ φουφίου ἀναίρεσεως.

39 Const. *Summa* § 3: Hunc igitur in aeternum valiturum iudicio tui culminis intimare prospeximus, ut sciant omnes tam litigatores quam disertissimi advocati nullatenus eis licere de cetero constitutiones ex veteribus tribus codicibus, quorum iam mentio facta est, vel ex iis, quae novellae constitutiones ad praesens tempus vocabantur, in cognitionalibus recitare certaminibus, sed solis eidem nostro codici insertis constitutionibus necesse esse uti, falsi crimini subdendis his, qui contra haec facere ausi fuerint, cum sufficiat earundem constitutionum nostri codicis recitatio, adiectis etiam veterum iuris interpretatorum laboribus ad omnes dirimendas lites, nullaque dubitatione emergenda vel eo, quod sine die et consule quaedam positae sunt, vel quod ad certas personas rescriptae sunt, cum omnes generalium constitutionum vim obtinere procul dubio est. etc.

Const. *Cordi*, § 5: Repetita itaque iussione nemini in posterum concedimus vel ex decisionibus



In the case of the Digest the problem was more complex and could only be solved by active measures taken by the emperor. The solution employed in composing the Codex was impossible here, because the *lex posterior*-rule was not valid for the old jurisprudence and could not be applied to the Digest either, as this was one large constitution tied to one single date. The absence of any chronology within the Digest implies the absence of contradictory rules, *antinomiae*, for how could an emperor contradict himself within one single law? In order to ensure a certain unity Tribonian and the Digest committee too used omission as the solution. It endeavoured not to include displeasing opinions as fragments in the Digest and this omission took away their legal validity, because, like the Codex, the Digest too was exclusive.<sup>40</sup> But what criterion could one use to decide which fragments were to be omitted? In principle the criteria were formulated in the still valid *lex citandi*, but that was not sufficient. Firstly, the *lex citandi* failed to provide solutions for some conflicts, for instance for those where there was no majority in favour of one opinion and which Papinian<sup>41</sup> had not discussed. In such cases it was up to the emperor to *decidere*. He did so not by designating one opinion as the winning one, but by cutting out the other as the loser. This operation is what is called *decidere*. In the second place a *decisio* was needed if the emperor wished to follow an opinion which would have been defeated according to the *lex citandi*.<sup>42</sup> But it is not only the *lex citandi* that was corrected by a *decisio*, nor did a *decisio* necessarily deal with an old controversy between the Sabinian and the Proculian school. A *decisio* was made by Tribonian and could be asked for by the Digest committee every time it encountered or thought it encountered a so-called *antinomia*. For the purpose of the *decisiones* was the elimination of every contradiction in the Digest, which had in fact the legal status of one big constitution. In the last place, and not insignificantly, a *decisio* was asked for whenever a lawyer's fragment which had been selected for

nostris vel ex aliis constitutionibus, quas antea fecimus, vel ex prima Iustiniani codicis editione aliquid recitare: sed quod in praesenti purgato et renovato codice nostro scriptum inveniatur, hoc tantummodo in omnibus rebus et iudiciis et obtineat et recitetur. cuius scripturam ad similitudinem nostrarum institutionum et digestorum sine ulla signorum dubietate conscribi iussimus, et omne, quod a nobis compositum est, hoc et in scriptura et in ipsa sanctione purum atque dilucidum clareat, licet ex hac causa in ampliorem numerum summa huius codicis redacta est.

- 40 Const. *Tanta* § 19: hasce itaque leges et adorate et observe omnibus antiquioribus quiescentibus: nemoque vestrum audeat vel comparare eas prioribus vel, si qui dissonans in utroque est, requirere, quia omne quod hic positum est hoc unicum et solum observari censemus, nec in iudicio nec in alio certamine, ubi leges necessariae sunt, ex aliis libris nisi ab iisdem institutionibus nostrisque digestis et constitutionibus a nobis compositis vel promulgatis aliquid vel recitare vel ostendere conetur, nisi temerator velit falsitatis crimini subiectus una cum iudice, qui eorum autentiam patiatur, poenis gravissimis laborare.
- 41 By the promulgation of the Digest Papinian lost the formal priority that he had been given by the *lex citandi*. As a compensation the third year students, called Papinianists, held a festive banquet in his honour. See const. *Omnem* 4.
- 42 For instance in the case described in Inst. 2, 14 pr., cf. Scheltema SG I, 5 note 10.

inclusion spoke of outdated juridical institutions, such as the difference between *res Mancipi* and *res nec Mancipi*, between *dominium ex iure Quiritium* and *in bonis habere*. There the 'cutting' was not a constitutive but a declaratory action, not eliminating an unpleasing opinion, but preventing the resurrection of outdated legal institutions.<sup>43</sup> These declaratory judgments do indeed count as decisions in the technical sense and do not belong to the *aliae constitutiones*.<sup>44</sup> This is shown by C. 7, 25, 1: *antiquae subtilitatis ludibrium per hanc decisionem expellentes*. The *decisio* served to register formally and confirm the factual death of these obsolete legal institutions. This ostracism was necessary because it constituted the legal foundation on which the committee based its interpolations. The *decisio* legitimized these interpolations; the committee was not allowed to interpolate beyond the boundaries indicated by it. So *decisio* and *interpolatio* are inseparable concepts, which confirms once again that interpolations are always confined by narrow, legally determined limits. If we keep in mind that Tribonian had already made most of the decisions when the const. *Deo Auctore* was promulgated, so that he knew of their contents when he wrote the constitution *Deo Auctore*, we can easily read the measures taken in § 8, 9 and 10 in connections with the decisions although they are not named as such: § 8 forbids the *antinomiae* § 9 the *similitudines* and § 10 the resurrection of outdated legal institutions.

It would be worth-while systematically to investigate the connections between decisions and interpolations, just as Nelson has compared the fragments of Gaius' Institutions as incorporated into the Digest with the original work.<sup>45</sup> The Justinian compilers have undeniably made stylistic changes, but according to Nelson these alterations are rare and intended only to simplify and clarify the text:

Die Ausdrucksweise der Justinianer entspricht demzufolge allen Aufforderungen der Sachlichkeit und der allgemeinen Verständlichkeit. Sie gehorcht den strengen Regeln der Schulgrammatik und sie stützt sich auf eine eindeutig und durchsichtig aufgebaute Syntax. Dieses Festhalten am klassischen Wortlaut und am klaren Satzbau ist mit einer solchen Konsequenz durchgeführt worden, dass der unvoreingenommene Leser tatsächlich konstatieren muss, dass die Sprache der Justinianischen Rechtslehrer mit der von Gaius, Paulus, Ulpian und anderen klassischen Autoren eine verblüffende Ähnlichkeit aufweist und dass es den kaiserlichen Redaktoren gelungen ist, in sprachlicher und stilistischer Hinsicht ein Intervall von mehr als drei Jahrhunderten zu überspringen.<sup>46</sup>

Es empfiehlt sich deshalb, nur in recht bescheidenem Masse von sprachlichen Indizien Gebrauch zu machen, wenn man in den Digestenfragmenten Interpolationen aufdecken will. Die Lateinkenntnisse der Mitglieder der Justinianischen Kommission waren eben derart

43 Cf. Jörs, RE IV 2, 2276 who refers to two decisions (C. 7, 5 and C. 7, 6) which 'keine Entscheidung einer Streitfrage enthalten, sondern eine Abschaffung veralteten Rechts'.

44 Cf. Schindler, *Justinians Haltung*, 336 note 1.

45 H.L.W. Nelson, *Überlieferung, Aufbau und Stil von Gai Institutiones*, Leiden 1981, 236-267.

46 Nelson, *Überlieferung* 210.

ausgezeichnet, dass sich in den von ihnen verfertigten Exzerpten nur ausnahmsweise ursprünglicher Wortlaut von interpolierter Schreibe unterscheiden lässt.<sup>47</sup>

There are also few interpolations of material kind. That at least is true of the fragments that Nelson has examined, but Nelson formulates as his assumption 'daß die Eingriffe, welche von den Justinianern an anderen für uns nicht mehr kontrollierbaren, Stellen vorgenommen wurden, einen ähnlich beschränkten Umfang gehabt haben.'<sup>48</sup> These material interpolations must have been founded on decisions. The existence of this interaction between decision and interpolation is a more modest and sounder basis of investigation than the unbridled 'interpolation hunting' which has only succeeded in discrediting the study of Roman law.

Pieler<sup>49</sup> urges the necessity of further research 'unter Einbeziehung der Kontroversenberichte der Digesten zusammen mit dem einschlägigen Codexstellen' and, as I said before, I quite agree with him. We have not got round to such research (yet). Our sole aim has been to employ the Greek sources in clarifying the technical sense of the term *decisio*: a *decisio* is an ἀνατομή or ἀναίρεσις, i.e. a 'cutting' constitution, one that takes away validity of law. The *decisio* presents the guidelines on the basis of which a particular rule of law must either completely be omitted from the Digest or be included in an interpolated, revised form.

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47 Nelson, *Überlieferung* 261.

48 Nelson, *Überlieferung*, 262.

49 SZ 108 (1991) 594.

