

THE FIRST CONSTITUTION OF THE *CODEX JUSTINIANUS*
Some remarks about the imperial legal sources in the *Codices Justiniani*

1. Introduction

It is a remarkable fact that the three introductory constitutions of the *Codex Justinianus* say not a word about the constitutions in the Greek language.¹ The precept of Justinian, i.e. that only the constitutions collected in the Code in their specific wording are endowed with legal force, means that it is the numerous Greek constitutions in the Code that possess force of law and not their not collected Latin equivalents. Does this mean that only the Greek text was allowed to be cited in court and not the Latin one? That seems to me unlikely. Several copies of every imperial constitution were made to be sent to the different magistrates, and the language in which they were sent would have been the language of the region for which they were intended. This is made clear by Nov. 66 (538). This Novel deals with the force of law acquired by every new constitution, which occurred two months after registration (*insinuatio actis*, ἐμφάνισις). Justinian refers to two synonymous constitutions (ἰσότυπα), one in Greek and one in Latin.² These constitutions,

1 The three introductory constitutions are known by their first words. The constitution *Haec* (*quae necessario*) is entitled *De novo codice componendo*, the rubric of the const. *Summa* reads *De iustiniano codice confirmando*, and the const. *Cordi* begins with *De emendatione codicis iustiniani et secunda eius editione*. For all this, see recently W. Kaiser, 'Die Zweisprachigkeit reichsweiter Novellen unter Justinian. Studien zu den Novellen Justinians (I)', *SZ* 129 (2012), 392-474 with literature; W. Kaiser/S. Chronopoulos, 'Unterschiede zwischen griechischen und lateinischen Ausfertigungen von Novellen am Beispiel des Gesetzes vom 15. Juni 535 über Darlehen an Bauern. Studien zu den Novellen Justinians (II)', *SZ* 129 (2012), 475-500; W. Kaiser, 'Zur äusseren Gestalt der Novellen Justinians', in: J.H.A. Lokin/B.H. Stolte, (eds.), *Introduzione al diritto bizantino. Da Giustiniano ai Basilici*, Pavia 2011, 159-173.

2 The emperor refers to Nov. 18 which is indeed 'dated' 1 March 536, as is written (in Latin) at the end of the Greek text (SK 138/16). The Latin version is lost. Nov. 66,1,2-3 (SK 342/3-19) reads: διότι γενομένων ἡμῖν ἰσοτύπων διατάξεων περὶ τοῦ μέτρου τῆς ἐνστάσεως τῶν παίδων, τῆς μὲν τῆ Ἑλλήνων φωνῆ γεγραμμένης διὰ τὸ τῷ πλήθει κατάλληλον, τῆς δὲ τῆ Ῥωμαίων ἥπερ ἐστὶ καὶ κυριωτάτη διὰ τὸ τῆς πολιτείας σχῆμα, ἡ μὲν καλάνδρας Μαρτίας ἔχει, γραφείσα μὲν τότε, οὐκ ἐμφανισθεῖσα δὲ τηνικαῦτα εὐθύς, ἡ δὲ τῆ Ῥωμαίων φωνῆ γεγραμμένη πρὸς Σολομόντα τὸν ἐνδοξότατον τῶν ἐν Ἄφροις ἱερῶν ἡγούμενον πραιτωρίων καλάνδρας Ἀπριλλίας προσγεγραμμένης ἔχει· διόπερ οὐδὲ ἡ τῆ Ἑλλάδι φωνῆ γραφείσα γέγονε παραχρῆμα καταφανής, ἕως καὶ ἡ τῆ Ῥωμαίων συντεθεῖσα γλώττη γέγονέ τε καὶ ἐξεπέμφθη, ἀμέλει δὲ καὶ ἡ πρὸς τοὺς ἐνταῦθα ἐνδοξοτάτους

destined for the capital Constantinople, were copied on different days, the Greek one on 1 March, the Latin one on 1 April. In Nov. 66, the emperor decreed that the decisive moment that a constitution acquired legal force was not two months after the copying, but after the registration. Because the Greek constitution had to wait for the Latin one to be registered, there was the danger of confusion. Therefore Justinian fixed the moment of registration for both constitutions as 1 May, so that legal force was acquired on 1 July. So much for the capital. In the same period the constitution was sent to the provinces, where legal force was acquired by them two months after registration in the relevant provincial capital.³ The same procedure was followed in the provincial towns after receiving the constitutions from the provincial governor. In short, legal force was acquired by a constitution at different moments. If the Novels had been collected into one official imperial Code, as was the intention of the emperor, only one of each of the synonymous Novels – for example Nov. 32 in Greek, Nov. 34 in Latin – would probably have been included.⁴

Whereas we know for sure of the existence of several copies of the same constitution in Greek and in Latin, according to the strict rule in the introductory constitutions the copy chosen by the codifying committee is the only authoritative text that can be cited in court. If any difference of interpretation should arise, the text of the inserted constitution was decisive, just as in 1811 the French text of the Code Napoléon settled any disputes and not the official Dutch text. If the Code did not contain a special version of a constitution in Greek and in Latin, as in case of the Digest confirmed by the Latin const. *Tanta* and the Greek const. *Δέδοκεν*, the text with legal force was the text included in the Code.⁵

ἐπάρχους τῶν ἱερῶν ἡμῶν πραιτωρίων γεγραμμένη (φαμέν δὴ τὴν Ἑλληνίδα) κατὰ τὸν Μάιον μῆνα ἐνεφανίσθη τε τῷ αὐτῶν δικαστηρίῳ καὶ ἐξεπέμφθη.

- 3 For extensive discussions of this in connection with the Theodosian Code, see O. Seeck, *Regesten der Kaiser und Päpste für die Jahre 311 bis 476 n. Chr.*, Stuttgart 1919, 8ff.
- 4 The Novv. 32 and 34 are addressed to the provincial governor of Haemimontus. For extensive discussions of this, see Kaiser/Chronopoulos, ‘Unterschiede’ (note 1 above), 475-500; Nov. 33 contains no more than a Latin fragment of the same law, addressed to the *praefectus praetorio per Illyricum*. In this fragment hardly anything is said about the rule involved, but announcement is made of the law being sent to the diocese of Thrace and to the provinces belonging to it (including Haemimontus), of a special copy being destined for the military, and of its general validity for all Illyrians. Of all these copies, only one provincial specimen has come down to us in Greek and one in Latin. Nov. 33 was issued on the same day (15 June 535) as Novv. 32 and 34.
- 5 Numerous copies of the const. *Tanta* and *Δέδοκεν* were sent. Cf. T. Wallinga, *Tanta/Δέδοκεν. Two introductory constitutions to Justinian’s Digest*, Groningen 1989, 90-95. In § 24 of both constitutions, mention is made of copies in Greek and in Latin being sent to all provincial magistrates. The *praefectus urbi* for Constantinople and the three *praefecti praetorio* for the empire were responsible for the distribution. Remarkably, the const. *Δέδοκεν* adds ‘our *magister*’. Undoubtedly the *magister officiorum* is meant, who was at the head of the imperial offices. The

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With regard to the Novels the situation is different. The proposed official edition of Justinian's Novels not having been realized, we are left only with some private collections. This distinction between the official edition of the Code and the private collections of the Novels has its dogmatic consequences. There is not one official text of the Novels that excludes all the other copies, all copies have equal validity. Although most of the Novels have come down to us in just one language, usually Greek, that does not change the fact that every non-abridged copy, either in Greek or in Latin, has the same legal validity. As the result of extensive research, Wolfgang Kaiser has prudently but convincingly made clear that Justinian's Novels of general importance were issued in both languages, Greek and Latin.⁶ If by any chance Latin copies of Greek Novels were now to turn up, these would have the same legal validity.

So on which sources are the Greek constitutions in the Code based? The answer is something of a mystery in spite of the two introductory constitutions being perfectly clear on this point. Three times in the const. *Haec*⁷ and three times in the const. *Summa*⁸ it is said that all constitutions had been collected from the three existing *Codices*, the *Gregorianus*, *Hermogenianus* and *Theodosianus* and from the post-Theodosian Novels, the constitutions issued by Justinian being given special mention.⁹ Not a word is said about other sources,¹⁰ which is quite remarkable as we know that the Greek constitutions must have been collected from other sources. There is no trace of them being part of the two private collections, for the language of the law was exclusively Latin when they were drawn up.¹¹ Apart from a few Greek sentences and some lone words, only one complete Greek constitution, preceded by a Latin equivalent, can be found in the Theodosian Code, and the post-Theodosian Novels are all in Latin.¹² From which sources are they then

Greek word for the *magister militum* is στρατηγός or στρατηλάτης. It is worth noting that only the Latin const. *Tanta* is preserved in the second Code. Did the const. *Δέδοκεν* lose its legal force in 534?

6 Cf. Kaiser, 'Zweisprachigkeit' (note 1 above), 392-474.

7 Const. *Haec* pr. and § 2.

8 Const. *Summa* § 1 and § 3.

9 Const. *Haec* pr, const. *Summa* § 1: (*constitutiones*) *a nostra etiam clementia posita*.

10 The const. *Cordi* pr. speaks more vaguely about the distribution of the constitutions *per diversa volumina*.

11 Cf. N. van der Wal, *Tweetaligheid en recht in het Romeinse keizerrijk*, (Inaugural lecture), Groningen 1976.

12 CTh. 9,45,4 (Latin) and CTh. 9,45,5 (Greek); some Greek sentences in CTh. 8,15,1 and CTh. 11,39,5. Cf. B.H. Stolte, 'The Use of Greek in the Theodosian Code', *SG VIII* (2009), 147-159; J.H.A. Lokin, 'Alcune note sul bilinguismo nella legislazione romana', (in print). For the *Codex Theodosianus*, see recently S. Crogiez-Pétrequin/P. Jaillette, (éds.), *Société, économie, administration dans le Code Théodosien*, Villeneuve d'Ascq (Lille) 2012; A.J.B. Sirks, *The Theodosian Code. A Study*, Friedrichsdorf 2007 (reviewed by D. Liebs in: *SZ* 127 (2010), 516-539); L. Atzeri, *Gesta*

drawn? This question mainly arises when reading the beginning of the Justinian Code, which contains a disproportionate number of Greek texts. Especially in the first thirteen titles of the first book, which deal with theological and canonical problems, many Greek regulations can be found that are not drawn from the sixteenth book of the Theodosian Code, which deals with the same problems. At first sight they thus seem to form a special unity.

2. Waelkens

The unusual character of the first thirteen titles of book one of the Justinian Code has tempted my colleague from Leuven, Laurent Waelkens, to develop a revolutionary hypothesis.¹³ He has tried to demonstrate that the first thirteen titles did not belong to the original text of the Code but were added to it at a later date. The original Code of 534, *Codex repetitae praelectionis*, would have started with a constitution, now numbered as C. 1,14,1. What now is called the fourteenth title would have been the first title of the original Code. The textual tradition of the Code would then have been as follows, according to Waelkens: in some sixth-century manuscripts of the Code, several legal bits and pieces dealing with canon law, which Waelkens labels nomocanons, were added to the text before the proper beginning of the Code. They dealt with theology, the Trinitarian doctrine, the legal position of bishops and monks, with heretics, apostates and Jews, in short with every matter concerning religion and church. For the most part they were written in Greek and consequently were lost over the course of time, as all Greek texts were. The reconstruction of these Greek texts took place in two phases. In the twelfth century, legal scholars, known as legists, collected the Latin texts dealing with these canonical matters, and in the sixteenth century the Greek texts were rediscovered and added to them. So what determined the order of the texts? The arrangement was determined by the *Collectio tripartita*, a sixth-century collection of legal texts, the first part of which consisted of imperial constitutions. Without forming part of the actual Code, these constitutions were apparently added to a sixth-century manuscript in front of the first text of the Code, which was C. 1,14,1. The first part of the *Collectio tripartita* consists of thirteen titles, and, according to Waelkens, the twelfth-century scholars would have

senatus Romani de Theodosiano publicando. Il Codice Teodosiano e la sua diffusione ufficiale in Occidente, Berlin 2008 (reviewed by W. Wolodkiewicz in: *SZ* 128 (2011), 518-524).

13 L. Waelkens, 'L'hérésie des premiers titres du Code de Justinien. Une hypothèse sur la rédaction tardive de C. 1,1-13', *TRG* 79 (2011), 253-296. An earlier version concerning C. 1,1,1 appeared in 2010: L. Waelkens, 'L'Édit de Thessalonique, droit romain ancien ou ius commune?', in: *Vetera Novis Augere. Studia i prace dedykowane Profesorowi Waclawowi Uruszczakowi*, II, Kraków 2010, 1075-1088 (read: 1099-1112).

reconstructed the canonical texts with the help of the constitutions and references, known as *paratitla*, of this *Collectio tripartita*. The theory developed by Waelkens is diametrically opposed to the universally accepted opinion which says that the sequence and substance of the first part of the *Collectio tripartita* is drawn from the original texts of the first thirteen titles of the Code, which from the start formed part of the Justinian codification. In short, according to Waelkens, it was not first the Code and once it was finished the *Collectio tripartita*, but first the *Collectio tripartita* and then, in phases, the beginning of the Code as we know it today.

It is indeed a startling hypothesis that Waelkens presents and supports with an abundance of notes and references. It stimulates the reader to close inspection and to a response. This response was given by my Groningen colleague Bernard Stolte.¹⁴ Carefully and convincingly he refuted and rejected Waelkens' hypothesis about the origin of the first thirteen titles. But a number of other questions still demand a closer look. Waelkens turns more things upside down than his hypothesis about the titles 1-13 of the first book of the Code. I will limit myself to responding to his statements about the imperial sources in connection with the first constitution of the Code, the famous const. *Cunctos populos*. With the help of Popper's falsification theory, Waelkens hoped to undermine the traditional significance of the constitution. It is not always easy to grasp his argumentation, exclusively drawn from Western sources,¹⁵ but it gives me the opportunity to say something about the imperial legal sources.

3. *Cunctos populos*

Without doubt C. 1,1,1 is one of the most famous texts in Roman law. It deals with the Edict of Thessaloniki dated 27 February 380, which imposed the Christian faith on all the peoples living under the sway of Emperor Theodosius I. Apart from a few words, the text is identical to the second constitution of the last book, first title of the Theodosian Code: CTh. 16,1,2. The text of C. 1,1,1 reads as follows:

Imppp. Gratianus, Valentinianus et Theodosius AAA. ad populum urbis Constantinopolitanae. Cunctos populos, quos clementiae nostrae regit temperamentum, in tali volumus religione versari, quam divinum Petrum apostolum tradidisse Romanis religio usque ad nunc ab ipso insinuata declarat quamque pontificem Damasum sequi claret et Petrum Alexandriae

14 B.H. Stolte, 'A heretical hypothesis: on the beginning of the *Codex Justinianus*', *TRG* 81 (2013), 109-128.

15 Not a single Byzantine legal source or any secondary literature about Byzantine law is quoted by Waelkens.

episcopum virum apostolicae sanctitatis, hoc est ut secundum apostolicam disciplinam evangelicamque doctrinam patris et filii et spiritus sancti unam deitatem sub pari maiestate et sub pia trinitate credamus. 1. Hanc legem sequentes Christianorum catholicorum nomen iubemus amplecti, reliquos vero dementes vesanosque iudicantes haeretici dogmatis infamiam sustinere, divina primum vindicta, post etiam motus nostri, quem ex caelesti arbitrio sumpserimus, ultione plectendos. *D. III k. Mart. Thessalonica Gratiano V et Theodosio AA cons.*

The Emperors Gratian, Valentinian, and Theodosius to the people of the City of Constantinople. We desire that all peoples subject to our benign temperance shall live under the same religion that the divine Peter, the Apostle gave to the Romans, as the religion until now introduced by himself declares, and that Pope Damasus, and Peter, Bishop of Alexandria, a man of apostolic sanctity, evidently follow; that is to say, in accordance with the rules of apostolic discipline and evangelical doctrine, we should believe that the Father, Son, and Holy Spirit constitute a single Deity, endowed with equal majesty, and united in the Holy Trinity. (1) We order all those who follow this law to assume the name of catholic Christians, and considering others as demented and insane. We order that they shall bear the infamy of heresy, and shall be struck at first by divine retribution and afterwards punished by the revenge of our impulse, which we have acquired from heavenly judgment. Dated at Thessalonica, on the third of the *Kalends* of March, during the consulate of Gratian, Consul for the fifth time, and Theodosius emperors.

The constitution is generally understood to be the introduction of the Christian faith as the official religion of the state. For this reason the text was moved from the last book of the Theodosian Code to the beginning of the first book of the Justinian Code. According to Waelkens, this move took place in the Middle Ages, while the significance of the text changed completely from the universally accepted one.¹⁶ So what was the original purpose and meaning of the text according to Waelkens? Issued as a decision (*decretum*), not as an edict (*edictum*), the text decides upon the question of whether the emperor – that is to say the imperial executive power personified by the emperor – was responsible for the execution, ‘*l’exequatur*’, of the verdicts given by **every** bishop in an ecclesiastical court, or only of those verdicts which were given by bishops adhering to the orthodox faith, i.e. to the Trinitarian doctrine, proclaiming the divine trinity including the acceptance of Christ as God. This is indeed a completely new interpretation of the text. Although the traditional meaning and Waelkens’ interpretation lie miles apart, it is necessary to follow

16 Waelkens, ‘L’hérésie’ (note 13 above), 269ff.

his path in order to understand and, if possible, refute his opinion. So let us examine the reasoning Waelkens followed to reach his conclusion.

Since the creation of the ecclesiastical courts, *audientia episcopalis*, in the days of Emperor Constantine, the imperial prefectures had been charged with the task of executing the episcopal judgments. From the beginning, Christians were bound to submit their differences to the court of the bishops, according to Waelkens, who bases his opinion on a third-century text called *Didaskalia apostolorum*.¹⁷ In these disputes the winner could ask for execution, *exequatur*, of the verdict, by the secular authorities.¹⁸ If they refused to execute, appeal to the emperor was possible. This combination of episcopal jurisdiction and secular execution had its advantages and disadvantages. The secular powers benefitted from supervising the episcopal courts, whereas on the other hand there was the risk of protecting the judgments of every sectarian bishop. How was one to know whether a bishop adhered to the orthodox faith? This question must have been discussed many times in the imperial chancelleries. It cannot be ruled out, according to Waelkens, that the *decretum* of 380 (*Cunctos populos*) solved exactly this problem. The main concern of Theodosius after the death of Gratianus was to strengthen the unity of the empire, especially the unity between the eastern and western bishops, the majority of whom supported the Trinitarian doctrine or, in other words, were orthodox. The text of *Cunctos populos* decided upon a case in which the principal question was whether the verdicts of every bishop had to be sanctioned and executed without exception. Theodosius answered in the negative and limited the execution obligation to the judgments of Trinitarian bishops and forbade the execution of verdicts by Monophysite bishops, either Arian or Nestorian. This was the substance of the constitution of 380 and as such it appeared in the sixteenth book of the Theodosian Code. Seen from this point of view, the translation of some parts of the text naturally must be changed. For example, the meaning of the first words *cunctos populos quos clementiae nostrae regit imperium* was **not** all peoples who submit to the majesty of the emperor, **but** the (two) peoples of East and West submitting to the jurisdiction of the emperor. Curiously, Waelkens uses the word *imperium* in his new interpretation in accordance with Gothofredus, whereas the received opinion, supported by the oldest and best manuscripts of the Theodosian and Justinian Codes, speaks of

17 Unfortunately, Waelkens, 'L'hérésie' (note 13 above), 270 does not quote the text (probably 2,46-55). The original Greek text of the *Didaskalia* is lost. There is an edition by R.H. Connolly, published in Oxford 1929, with an English translation; see www.earlychristianwritings.com/didascalia.html. Apparently, Waelkens thinks the word *Didaskalia* is a *neutrum plurale* for he writes: '*les didascalía*'. He also writes more than once '*les Epítome*'; cf., for example, Waelkens, 'L'Édit de Thessalonique' (note 13 above), 1112: 'Mais en fait, fallait-il tout attendre *des Epítome Juliani orientales*?'

18 For this, Waelkens refers to G. Vismara, *La giurisdizione civile dei vescovi (secoli I-IX)*, Milano 1995, 37-55.

temperamentum.¹⁹ The translation of the last sentence also changes considerably. The clause which matters most in this respect is: (...) *iubemus (...) reliquos (...) divina primum vindicta, post etiam motus nostri, quem ex caelesti arbitrio sumpserimus, ultione plectendos*. Without giving a literal translation of the words *divina vindicta*, Waelkens makes clear that it does not signify ‘divine retribution’ but contents himself with saying it is related to ‘imperial revenge’. And in the same way *arbitrium caeleste* does not mean ‘celestial judgment’ but refers to ‘episcopal arbitration’. Thus at least is how I understand his sentence (p. 271): ‘L’*arbitrium caeleste* signifie l’arbitrage des évêques’.

4. *Collectio tripartita*

But there is still a long way to go. We still need to explain how this text, in Waelkens’ interpretation, came to be placed at the beginning of the medieval edition of the Justinian Code. The reason can apparently be found in the *Collectio tripartita* which, as we have seen, Waelkens thinks were collected in the sixth century from the nomocanons.²⁰ What these nomocanons looked like, or what precisely they were, Waelkens does not say. As is generally known, the expression *nomocanon* occurs in Western literature and rarely in late Byzantine sources. In the West – not in Byzantium – the word *nomocanon* is used for the first part of the *Syntagma canonum*, which partly consisted of a systematic collection in fourteen titles. This collection of purely canonical texts dates from 580. Enantiophanes added texts of secular Justinian law dealing with ecclesiastical matters to this collection.²¹ At a later stage the term is also used for a collection of canonical and secular rules dealing with the same subject and put next to each other. No matter what Waelkens understands under the *term* nomocanons (in the plural), for him it is clear they were not part of the Code, which began with the present title 14 of book 1. These nomocanons dealt with thirteen problems about the relationship between the emperor and the bishops. An inscription was written in Latin at the head of each chapter, later adopted into the Code. Waelkens even goes as far as to suggest a Latin prototype underlying the *Collectio*

19 *Temperamentum* also occurs in Waelkens’ own quotation of C. 1,1,1 on p. 262; cf. Waelkens, ‘L’hérésie’ (note 13 above), 268/269, especially note 74; Waelkens, ‘L’Édit de Thessalonique’ (note 13 above), 1107. It is evident that *temperamentum* is the right version, it is the *lectio difficilior*. Changing *temperamentum* into *imperium* is a probable guess, but no one explaining *imperium* conjectures *temperamentum*.

20 The most recent edition is by N. van der Wal/B.H. Stolte, *Collectio Tripartita. Justinian on Religious and Ecclesiastical Affairs*, Groningen 1994. This edition was used by Waelkens.

21 For all this, see Van der Wal/Lokin, *Delineatio*, 60 and 66; B.H. Stolte, ‘Justice: Legal literature’, in: E. Jeffreys/J. Haldon/R. Cormack, *The Oxford Handbook of Byzantine Studies*, Oxford 2008, 691-698 (694).

tripartita. The nomocanons would have been numbered 1-13 and been added in front of the actual beginning of the Code at an early stage.²²

It so happens that every title in the *Collectio tripartita* contains references to parallel texts known as *paratitla*. They refer to related texts taken from the twelve books of the Code, and also from texts stemming from the thirteen numbered nomocanons, still according to Waelkens. The author of these *paratitla* must have had before him a ‘Code antique’ consisting of the thirteen titles of the nomocanons whatever they may have been, and the Code beginning with the present title 14, at that time title 1. The texts of the *paratitla* are not identical to the texts of the *Collectio tripartita*. The author of the *paratitla* obviously made use of another summary. The special thing about the *paratitla* is that they not only refer to related texts but also give the first words, usually in Latin, of each reference. For twelfth-century legal scholars, these first words would have been the keywords in their search for the complete constitution and thus for composing the collection. While doing so, they came across a *paratitlon* after the last fragment of title 5 dealing with heretics. This *paratitlon* reads: Βιβ. α’ ττ. α’ διατ. α’, ἥς ἡ ἀρχή CUNCTIS. Οἱ ἀίρετικοὶ πάντες ἄτιμοί εἰσιν.²³ Translation: ‘book 1, title 1, constitution 1, the beginning of which reads CUNCTIS. All heretics are infamous’. The twelfth-century legists took the word *cunctis* as a starting point for their search for a fitting constitution, and thus would have discovered CTh. 16,1,2, which starts with the word *Cunctos* and lays down the rule about the execution of episcopal judgments. However, because the word *cunctis* is followed by an explanation, all heretics are infamous, the scholars associated the rule of execution with religious affairs and so placed *Cunctos populos* at the beginning of the Code. In this way they gradually reconstructed the first thirteen titles of the first Code.²⁴ In the sixteenth century, the humanists completed the reconstruction by filling in the Greek passages.

I do not intend to discuss the origins of the *Collectio tripartita* here as Bernard Stolte has already done so most convincingly. I will limit myself to Waelkens’ opinion about C. 1,1,1. After all, moving the Theodosian text in the twelfth century to the beginning of what was then an extended Justinian Code (thirteen titles and the Code beginning with the present title 14, the final numbering having taken place in the sixteenth century),²⁵ does not resolve all difficulties. Although the rule of Theodosius was now placed at the beginning of the *Codex Justinianus*, its substance still had to change from a rule about executing Trinitarian episcopal judgments into a command imposing the

22 Waelkens, ‘L’hérésie’ (note 13 above), 278.

23 CollTrip. 1,5, parat. 1 (ed. Van der Wal/Stolte, *Collectio tripartita* (note 20 above), 78/20-21).

24 Waelkens, ‘L’hérésie’ (note 13 above), 282-296 tries to reconstruct every passage; if his hypothesis does not hold water, this labour is superfluous.

25 Waelkens, ‘L’hérésie’ (note 13 above), 279.

orthodox (Trinitarian) faith on all the subjects of the empire. Waelkens tries to prove this change using reverse logic. He does not start with the development from Theodosius to Justinian but with the current Justinian text, and attacks the accepted meaning with different arguments. In this way he tries to pare down the constitution from an edict proclaiming the Christian faith as the state religion, to an ‘original’ decision about the secular execution of Trinitarian episcopal judgments. I will examine each of his arguments in turn.

5. Theodosius I

The fact that Theodosius was not yet a Christian when he issued the edict on 27 February 380 is Waelkens’ first objection to the accepted meaning of the constitution. Why should the emperor prescribe a religion to which he himself did not adhere?²⁶ This objection can easily be refuted. The elevation of one religion above the others could well have served the political goal of preserving and cementing the unity of the empire. Emperor Constantine, although not baptized, summoned the bishops to Nicaea for a council in order to restore the unity of the empire and declared all the council’s decisions the law of the state. Waelkens himself suggests that the public penance of Theodosius ten years later was prompted by a possible ‘apaisement politique’.²⁷ But is it true that Theodosius was not a Christian in February 380? Waelkens’ statement leaves plenty of room for discussion. We know of two primary sources concerning the event: Socrates (Socr. *H.E.* 5,6,2-5) and Sozomenos (Soz. *H.E.* 7,4,3-6). According to the first, Theodosius fell seriously ill in 380, summoned Acholios, bishop of Tessaloniki, made sure he belonged to the orthodox adherents of the Nicæan creed, and ‘with great joy’ was baptized by him. According to the second source, Theodosius issued the edict just after his baptism. Doubts have been raised about this last statement because from the report Socrates gives us, it appears that the illness of Theodosius occurred in November 380 whereas the edict was issued on 27 February. But whether it was in February or November, ‘Niemand zweifelt daran, dass Theodosius tatsächlich 380 die Taufe empfang’.²⁸ It is more than just a mere hypothesis,

26 Waelkens, ‘L’hérésie’ (note 13 above), 263.

27 Waelkens, ‘L’hérésie’ (note 13 above), 263.

28 H. Leppin, *Theodosius der Große. Auf dem Weg zum christlichen Imperium*, Darmstadt 2003, 69. Waelkens, ‘L’hérésie’ (note 13 above), 263 refers to two older works, a biography by A. Lippold, *Theodosius der Grosse und seine Zeit*, München 1980², and A. Demandt, *Die Spätantike. Römische Geschichte von Diocletian bis Justinian, 284-565 n. Chr.* [Handbuch der Altertumswissenschaft, III, 6] München 1989, 124-137. For a precise survey of the reign of Theodosius, cf. G. Rauschen, *Jahrbücher der christlichen Kirche unter dem Kaiser Theodosius dem Grossen*, Freiburg im Breisgau 1897.

which is what Waelkens wants us to believe.²⁹ Theodosius' Christian inclinations ten years later are also considered suspect: 'au moment où il ordonna le massacre de plus de dix mille personnes au cirque de Constantinople'. As far as I know, there has never been such a massacre in Constantinople. There was a revolt in Antioch in 337 and in Alexandria in 389, when the populace destroyed the temple of Serapis. Waelkens probably means the massacre in 390 of more than 7000 people in Thessaloniki. However, this was not a response to 'une émeute pendant laquelle des fonctionnaires impériaux furent seulement bousculés',³⁰ but an excessive act of revenge by Gothic soldiers avenging the murder of their Gothic commander, the *magister militum* Butherik.³¹

6. One Trinitarian faith

Waelkens thinks it unusual and strange that an imperial edict would prescribe a certain religion and prefer it above all others – his second objection –, especially 'dans un régime soutenu par des légions arianistes, nestoriennes, sarmates, celtes ou simplement désintéressées par la religion'.³² In his inimitable way he connects this forceful imposition of the Trinitarian faith with the rule taken from the criminal Code, where it says that no one can be punished for a crime that has never been committed but only thought of: *cogitationis poenam nemo patitur*,³³ as if an openly confessed heresy has the same weight in the eyes of the governing powers as a premeditated crime. Whatever the case may be, in his opinion an edict compelling subjects to submit to a certain religion does not fit in a legal text, 'est mal libellée dans un text juridique'.³⁴ At first Waelkens considered the sentence *quam divinum Petrum apostolum tradidisse Romanis religio usque ad nunc ab ipso insinuata declarat* corrupt and grammatically impossible,³⁵ but on second thoughts he became convinced of its grammatical correctness. Nevertheless, the sentence is difficult to 'fit in' the imperial legal sources: '(...): un édit imposant une confession religieuse s'inscrit

29 Waelkens, 'L'hérésie' (note 13 above), 273: '(...) il est nettement plus hypothétique de croire à la catholicité de Théodose le Grand (...)'.
 30 Waelkens, 'L'hérésie' (note 13 above), 263.

31 Butherik was murdered by adherents of a popular charioteer, imprisoned by him because of homosexual advances to one of Butherik's servants.

32 Waelkens, 'L'Édit de Thessalonique' (note 13 above), 1104; Waelkens, 'L'hérésie' (note 13 above), 265.

33 D. 48,19,18.

34 Waelkens, 'L'hérésie' (note 13 above), 266.

35 Waelkens, 'L'Édit de Thessalonique' (note 13 above), 1105: '(...) il est impossible de situer grammaticalement la phrase *quam divinum (...)*'; cf. however Waelkens, 'L'hérésie' (note 13 above), 266: 'Elle est grammaticalement correcte, mais elle est mal libellée dans un texte juridique'.

difficilement dans les sources du droit impérial'.³⁶ A little further on he thinks it goes a little too far to conclude that Theodosius imposed his theological opinions on his multicultural empire: '(...) il nous semble un peu court (un peu expéditif) de conclure qu'il (Theodosius) aurait imposé par constitution des vues théologiques à son empire multiculturel'.³⁷ Waelkens' conclusion is in my view untenable given the great number of constitutions dealing directly with doctrinal questions. If we only look at the years 380-381, we can see a constitution similar to *Cunctos populos* on 10 January 381.³⁸ This constitution also forbids heretics to reject the traditional Nicaean creed, or to gather and meet in churches.³⁹ In order to make clear what is understood by the Nicaean creed, the doctrine is extensively explained in plain words.⁴⁰ The constitution continues by considering everyone a criminal who rejects this doctrine, and forbids such persons to enter a church. The full emphasis of the constitution lies on the prohibition to gather and in the command to hand over all the church buildings to the orthodox bishops, *qui Nicaenam fidem tenent*. After issuing this constitution, Theodosius sent his general Sapor into the country in order to chase all Arian bishops out of their churches.⁴¹ It is significant that this constitution comes second in the Justinian Code. In a constitution dated 19 July 381 the same order is given. Heretics are forbidden to build churches in the towns or in the country.⁴² It was issued a week after the closing of the oecumenical council on 9 July. According to E. Stein, the constitution was meant 'à liquider complètement l'arianisme'.⁴³ That was certainly the goal of the constitution of 30 July 381, eleven days after the previous one.⁴⁴ Again Theodosius ordered all existing churches to be handed over to the Nicaean bishops, and again he formulated the different articles of the Trinitarian faith:

36 Waelkens, 'L'hérésie' (note 13 above), 264.

37 Waelkens, 'L'Édit de Thessalonique' (note 13 above), 1104; Waelkens, 'L'hérésie' (note 13 above), 265.

38 CTh. 16,5,6 = C. 1,1,2.

39 The constitution mentions in particular the Fotinians, Arians and Eumonians excommunicated by the council of Constantinople. In the *Codex Justinianus* they are left out.

40 CTh. 16,5,6,1 = C. 1,1,2,1: (...), *qui omnipotentem deum et Christum filium dei uno nomine confitetur, deum de deo, lumen ex lumine, qui spiritum sanctum, quem ex summo rerum parente speramus et accipimus, negando non violat, apud quem intemeratae fidei sensu viget incorruptae trinitatis indivisa substantia, quae Graeci adsertione verbi (Graeco verbo) οὐσία recte credentibus dicitur*.

41 Theodoretus (Thdt. *H.E.* 5,2) attributes the mission of Sapor to Gratianus; for this, see Rauschen, *Jahrbücher* (note 28 above), 89 note 2.

42 CTh. 16,5,8. Again the heretics are singled out by name: Arians, Eunomians and adherents of the doctrines of Aetius. In the meantime, on 2 and 6 May 381, legal measures were issued prohibiting apostates and Manichaeans from making bequests: CTh. 16,7,1 and CTh. 16,5,7.

43 E. Stein, *Histoire du Bas-Empire*, I, Paris 1968, 199.

44 CTh. 16,1,3.

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We command that all churches shall immediately be surrendered to those bishops who confess that the Father, the Son, and the Holy Spirit are of one majesty and virtue, of the same glory, and of one splendor; to those bishops who produce no dissonance by unholy distinction, but who affirm the concept of the Trinity by the assertion of three Persons and the unity of the Divinity; (...).⁴⁵

After this explanation, the constitution enumerated the names of all the bishops to whom the church buildings had to be surrendered.

It is evident, at least to me, that these Trinitarian constitutions about church buildings and places of worship are part of the same strategy to extinguish Arianism and all heresy. They are connected with *Cunctos populos*. Not without reason, the constitution of 30 July is put in the sixteenth book of the Theodosian Code, just after *Cunctos populos*. Seen in this light, the const. *Cunctos populos* acquires added significance, at least in the *Codex Theodosianus*. In the Theodosian Code the constitution was not meant to prescribe Christianity as the only permitted religion, but a measure favouring Trinitarian bishops by letting them confiscate church buildings.⁴⁶ The omission of a little clause in the text of C. 1,1,1 is very significant. The last sentence of the constitution in the Theodosian Code reads as follows:

We command that those persons who follow this rule shall embrace the name of Catholic Christians. The rest, however, whom We adjudge demented and insane, shall sustain the infamy of heretical dogmas, **their meeting places shall not receive the name of churches,**⁴⁷ and they shall be smitten first by divine vengeance and secondly by the retribution of Our own initiative, which We shall assume in accordance with the divine judgment.

The revenge of which the text speaks was realized by the constitutions of 19 and 30 July 381. The editors of the Justinian Code deliberately omitted this crucial clause, so that full emphasis was put on the orthodox Catholic faith. By doing so they brought about a change of meaning, or at least a change of emphasis. The constitutions of 19 and 30 July were products of their time and therefore had no place in the Justinian Code. They were left out

45 CTh. 16,1,3: Idem AAA. ad Auxonium proc(onsulem) Asiae. *Episcopis tradi omnes ecclesias mox iubemus, qui unius maiestatis adque virtutis patrem et filium et spiritum sanctum confitentur eiusdem gloriae, claritatis unius, nihil dissonum profana divisione facientes, sed trinitatis ordinem personarum adsertione et divinitatis unitate (...)*. Transl.: Pharr.

46 In this sense Leppin, *Theodosius der Große* (note 28 above), 72: 'Vielleicht war das ein Hauptzweck der Bestimmung'.

47 CTh. 16,1,2,1: (...) *nec conciliabula eorum ecclesiarum nomen accipere (...)*. Transl.: Pharr.

so that the full beam could shine upon the first passage of *Cunctos populos* about the orthodox faith. The same relationship between the Trinitarian Nicaean creed and the damnation of every heresy was repeated in the constitution of 10 January 381, which as a result was included in C. 1,1,2 of the *Codex Justinianus*.⁴⁸

7. Edictum/Decretum

The third objection of Waelkens is directed against the legal form of an edict in which the const. *Cunctos populos* is couched. Clarifying his statement, Waelkens expands on the sources of imperial law, on which he is developing ideas of his own. Of the four kinds of imperial regulation falling under the common name of constitution – *decreta*, *rescripta*, *edicta*, *mandata*⁴⁹ – Waelkens finds the edicts most difficult to understand. According to him, from the fourth century on it is impossible to recognize the edictal character of a constitution. Most constitutions are either *decreta* or *rescripta*, both of which are judicial decisions, one based on a specific case, the other on a written prejudicial question. These two legal measures were the common legal forms in which the laws of the empire were made. The edicts, according to Waelkens, were reserved for regulating the organization of the administration. One can be sure, Waelkens says, that the specific administrative reforms of Hadrian and Diocletian were issued by means of edicts.⁵⁰ For example, it is more than probable that the appointments of the different praetorian prefects were made by means of edicts.⁵¹ But using edicts to impose norms and values on the whole population is a step too far and cannot be taken. Thus, Waelkens' idea is diametrically opposed to the accepted opinion, just as his view on the origins of the first thirteen titles of the first book of the Justinian Code is. Edicts were issued for specific administrative purposes, while *decreta* and *rescripta*, being judicial decisions, contain general measures.⁵² The ideas of

48 CTh. 16,5,6; C. 1,1,2.

49 The qualification of the *mandata* as a formal legal source is doubtful. Neither Gaius (1,4) nor Ulpian (D. 1,4,1) mention the *mandata* when enumerating the imperial legal sources. See about this, *inter alia*, J.-P. Coriat, *Le prince législateur. La technique législative des Sévères et les méthodes de création du droit impérial à la fin du principat*, Rome 1997, 74ff. Waelkens seems to consider the *mandata principis* solely as contracts of private law, ending with the death of one of the parties. For this, see P. Krüger, *Geschichte der Quellen und Litteratur der römischen Rechts*, München 1912², 113.

50 Waelkens, 'L'hérésie' (note 13 above), 265.

51 Waelkens, 'L'hérésie' (note 13 above), 265: 'On pourrait se demander si la nomination des préfets du prétoire n'était pas faite par édit, puisque les préfets assuraient les interrègnes.'. The meaning of this sentence is a mystery to me.

52 Even the word *lex* means nothing more than *legal judgment*, according to Waelkens' experience with the Code. Waelkens, 'L'hérésie' (note 13 above), 265 note 54: 'Notre expérience avec le Code nous

Waelkens on this point give me the opportunity to go into the sources of imperial law in the Justinian Code – of which the const. *Cunctos populos* may or may not be the beginning – in more detail.

8. Excursion

8.1. *The constitutions Haec and Summa*

Emperor Justinian was clear from the start in 528 about the aim of his project, the composition of a new Code. In the first sentence of the const. *Haec*, he tells us the Code should stop the prolixity of lawsuits by reducing the great number of constitutions.⁵³ This is repeated at the end of the same constitution. A year later he formulated precisely the same objective again in the const. *Summa*, which confirmed the finished Code.⁵⁴ The Code was meant for the legal practice. By creating a single code of law with fixed and simple rules, the emperor hoped the judges would make faster and clearer decisions now that nothing but the constitutions of the Code could be cited in court.⁵⁵ The new Code pursued, in short, a practical goal.

Just as practical were the limitations Justinian put upon himself. His new code of law was not intended to be an all-embracing codification, uniting in one law book the two valid legal sources of the later Roman empire – the constitutions, *leges*, and the classical jurisprudence, *jurisprudentia veterum* or *ius* – and serving as the guiding principle in life, *magisterium vitae*. That was the ideal of Emperor Theodosius II a hundred years before, and as we know this plan failed. The Theodosian editing committee was eventually forced to give up the purification of the *jurisprudentia veterum* and to limit itself to collecting imperial legislation since the reign of Constantine (306).⁵⁶ For the same reason, the Justinian committee in 528 left the classical jurisprudence alone. On the other hand, it did not continue where the Theodosian Code had left off (438), but included in its contents all constitutions, including those from before Constantine. These early constitutions had been

incite à croire que dans cette partie du *Corpus iuris* il (sc. le mot *lex*) indique toujours une sentence judiciaire.’

53 Const. *Haec* pr.: (...) *prolixitatem litium amputare, multitudine quidem constitutionum (...) reseccanda.*

54 Const. *Summa* § 1: reducing the mass of constitutions, *multitudinem constitutionum (...) ad breviterem reducendo*, and by doing so banishing completely their obscurity which threatens the proper judicial definitions, *caliginem earum rectis iudicum definitionibus insidiantem penitus extirpare.*

55 Const. *Haec* § 3: (...) *ut ex eo tantummodo nostro felici nomine nuncupando codice recitatio constitutionum in omnibus ad citiores litium decisiones fiat iudiciis.*

56 The oldest constitution in the Theodosian Code dates from 311.

gathered together in two private volumes, probably named after their compilers, the *Codices Gregorianus* and *Hermogenianus*. Although the texts of these constitutions were no doubt abridged, they were certainly not changed substantially. Private persons did not have the authority to change imperial texts.⁵⁷ The oldest constitution in the Justinian Code dates back to Hadrian's reign (117-138). It is undated, *sine die et consulibus*.⁵⁸

In order to achieve his aim, the emperor selected a committee of ten lawyers under the presidency of the former *quaestor sacri palatii* John. This John is not the same person as the notorious John of Cappadocia, as so many scholars – *inter alia* J.E. Spruit in his introduction to the Dutch translation of the Justinian Code – want us to believe.⁵⁹ He is probably the John who is mentioned as still being alive in Nov. 35 (23 May 535).⁶⁰ He held his quaestorial office before 522/523 under Emperor Justin I.⁶¹ The task of the committee was precisely defined, *sub certis finibus*.⁶² It appears that reducing the number of constitutions must be understood in a double sense. Not only were constitutions left out in their entirety, for example because they had fallen into disuse, changes were permitted to the selected constitutions. These corrections were threefold: certain words could be omitted, added or changed, *detractis vel additis vel permutatis certis verbis*.⁶³ The first stage was to remove superfluous passages, for example the lengthy introductions (*prooimia, praefationes*) which were irrelevant to the legal rule.⁶⁴ Honorary titles of the emperors were also deleted, with the accidental exception of C. 1,27,1 where they are listed in full together with the invocation of the Trinity.⁶⁵ Also omitted were the extensive

57 For all this, see E. Volterra, 'Il problema del testo delle costituzioni imperiali', in: *La critica del testo. Atti del II Congresso Internazionale della Società Italiana di Storia del diritto (Venezia, 1967)*, Firenze 1971, 821-1097; N. van der Wal, 'Die Textfassung der spätromischen Kaiser Gesetze in den Codices', *BIDR* 83 (1980), 1-27, especially 8 note 16.

58 C. 6,23,1, *sine die et consulibus*.

59 J.E. Spruit in J.E. Spruit/J.M.J. Chorus/L. de Ligt, [eds.], *Corpus iuris civilis. Tekst en Vertaling*. VII: *Codex Justinianus I – III*, Amsterdam 2005, XXVII: 'De commissie stond onder leiding van Johannes de Cappadociër.'

60 SK 242/10.

61 Cf. J.R. Martindale, *The Prosopography of the Later Roman Empire*. Vol. II: A.D. 395-527, Cambridge 1980, s.v. Ioannes 68.

62 Const. *Summa* § 1.

63 Const. *Summa* § 3.

64 Const. *Haec* § 2: (...) *supervacuis, quantum ad legum soliditatem pertinet, praefationibus (...)*; const. *Summa* § 1: (...) *tollendis quidem (...) praefationibus nullum suffragium sanctioni conferentibus (...)*.

65 C. 1,27,1: *In nomine domini nostri Ihesu Christi imperator Caesar Flavius Iustinianus Alamannicus Gothicus Francicus Germanicus Anticus Alanicus Vandalicus Africanus pius felix inclitus victor ac triumphator semper Augustus Archelao praefecto praetorio Africae*. The constitution was issued in the year 534, has no date and a curious beginning of the subscription: *Emissa lex*. Moreover, it contains abbreviations despite the prohibition on the use of *sigla*. The numbers are not written in characters. The const. *Tanta* in C. 1,17,2 limits the honorary titles to *Imp. Caesar Flavius Iustinianus*

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salutations at the beginning and at the end of an imperial letter.⁶⁶ Likewise, publishing orders had become superfluous now that the Code was being published in its entirety, and so they were left out,⁶⁷ as were constitutions that had become obsolete by the issuing of a later one with the same substance.⁶⁸

To make things easier, the emperor stipulated that dispersed regulations about the same subject must be gathered together and put into one constitution.⁶⁹ It is evident that in the process words had to be added or changed in order to connect one sentence to another. It was then also possible for different passages to have different dates as they came from different constitutions. Consequently, parts of some constitutions were given the date of the new one to which they were being transferred. The date of a constitution was important because of the axiom: *lex posterior derogat legi priori*. The position which such a compound constitution held in a title determined its legal force. The same applied to constitutions without date.

The composition in this way of well-defined and succinctly formulated rules, arranged under proper headings, meant that the committee was permitted to leave out or add or even change certain words, *certa verba*, but only when efficiency, *commoditas*, required it.⁷⁰ Sometimes, the old-fashioned style or an over-flowery clause was adapted to a new and more sober mode of expression. For example, in the already mentioned

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- A. Honorary titles also appear in C. 1,1,8,7. This fragment is an extract from a letter from the emperor to the patriarch. Cf. C. 8,10,12 with the titles of Zeno which the editors of the Code have omitted.
- 66 The remnants of a salutation – *salutem dicit* or *salutem* – have been preserved in several constitutions: C. 1,3,1; C. 1,21,2; C. 3,28,26; C. 6,60,1; C. 7,62,13; C. 7,62,24; C. 9,1,21; C. 9,2,17; C. 9,46,10; C. 10,72,12; C. 10,72,14; C. 11,6,3; C. 11,33,2; C. 12,28,1; C. 12,33,1. Sometimes one can read the greeting (*H*)ave; cf. C. 10,72,7 *have Hypati carissime nobis*; C. 9,2,11 *have Crispine carissime nobis*; C. 7,62,9 *have Heraclida carissime nobis*. A complete subscription of an *oratio ad senatum* occurs in Nov. Val. 1,3 and Nov. Maj. 1: *Optamus vos felicissimos et florentissimos (nostrique amantissimos) per multos annos bene valere, sanctissimi ordinis patres conscripti*. On the salutations at the end of the Justinian Novels, see Kaiser, ‘Zur äusseren Gestalt’ (note 1 above), 166–168.
- 67 If a constitution was couched in the form of a letter to a magistrate, he received the order to distribute it *edictis solemnī more propositis*. The proper imperial edicts were issued with the publishing formula *Proponatur Constantinopoli(tanis) (civibus nostris)*; cf. Novv. 13, 141 and 69. Cf. also C. 10,61,1: *Pars edicti imperatoris Antonini A. propositi Romae V id. Iul. duobus Aspris cons.*
- 68 Const. *Summa* § 1: (...) *tollendis (...) contrariis constitutionibus, quae posteriore promulgatione vacuatae sunt, (...)*.
- 69 Const. *Haec* § 2: (...) *colligentes vero in unam sanctionem, quae in variis constitutionibus dispersa sunt, (...)*.
- 70 Const. *Haec* § 2: (...) *adicientes quidem et detrahentes, immo et mutantes verba earum, ubi hoc rei commoditas exigebat, (...)*; const. *Summa* § 3: (...) *earundem constitutionum detractis vel additis vel permutatis certis verbis, (...)*.

constitution CTh. 16,5,6, the words *Graeci adsertione verbi* were changed into *Graeco verbo* in C. 1,1,2.⁷¹

Nowhere is permission given to the committee to change the legal substance of a rule. This is made clear in the passage in which the emperor allows the revision of similar or contradictory constitutions **except** when they contain some legal distinction, *iuris aliqua divisio*, as the const. *Haec* says.⁷² The const. *Summa* is even more explicit, saying that constitutions of similar tenor may be revised **except** when it is known that they seemingly give the same rule but in fact make some legal distinction, and by distinguishing some old rule bring about something new.⁷³ The message is clear. No private person or a magistrate had the authority to change the substance of the law without the specific permission of the emperor. Complete freedom to interpret the substance of the law according to taste would run counter to the high opinion of the imperial majesty Justinian cherished and propagated. Only the emperor had the power to substantially change the imperial law of his predecessors, and that is precisely what Justinian did. Only he could create and abolish laws. Once the purification was complete, only he could ordain that the rejected constitutions lost their force of law. Citing these abolished constitutions in court constituted the crime of forgery. A great number of constitutions disappeared as a result of this imperial command. By the same command, the selected constitutions which survived in a changed form could only be cited in their new wording. It was not the members of the committee who actually revised the text, but the emperor who gave them special permission to revise⁷⁴ was the one who determined the text and made it sacrosanct. In the const. *Summa*, Justinian not only confirmed the Code but made it exclusive, that is to say declared it to be the only source of imperial law. The emphasis lies on **imperial** law. Alongside this sole source of imperial law, the other legal source, the *jurisprudentia veterum*, remained valid. In the const. *Summa*, the emperor states on two occasions that the citation of the works and efforts, *labores*, of the ancient jurists, called by him *veteres iuris interpretores*, was permitted, but only in so far as they were not in violation of the constitutions of the new Code. Relatively often a constitution was quoted in the writings of the lawyers, and usually in the old wording. *Expressis verbis* it is

71 Some other examples: CTh. 11,36,20: *his qui indigent*, C. 7,65,6: *pauperibus*. CTh. 16,10,15: *erutae*; C. 1,11,3: *abreptae*. CTh. 16,5,40: *revertentes*; C. 1,5,4: *evitantes*. CTh. 2,17,1: *cum vicesimi anni clausae aetas adulescentiae patefacere sibi ianuam coeperit ad firmissimae iuventutis ingressum*; C. 2,44,2: *cum vicesimi anni metas impleverint*; etc. More examples can be found in Krüger, *Geschichte* (note 49 above), 390, and Van der Wal, 'Textfassung' (note 57 above), 22-23.

72 Const. *Haec* § 2: (...) *resecatis (...) similibus et contrariis, praeterquam si iuris aliqua divisione adiuventur, (...)*.

73 Const. *Summa* § 1: (...) *tollendis (...) similibus etiam praeter eas, quae eadem paene sanciendo divisionem iuris aliquam facere noscuntur, ex qua dividendo vetera novum aliquid nasci videtur, (...)*.

74 Const. *Summa* § 3: (...) *quod (...) excellentissimis viris specialiter permisimus, (...)*.

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said that a constitution had to be cited in its new formulation, and that the interpretation of the classical lawyers was valid in so far as it did not conflict with the newly formulated law.⁷⁵ Imperial law was evidently to be preferred to opinions, commentaries, and the interpretations of private persons, however great their authority.

8.2. *Leges ut generales observentur: C. 1,14,3*

One old and difficult problem still needed to be solved, that is, the extent of the validity of the imperial rules. How far did the legal force of every single constitution reach? The emperors Theodosius II and Valentinian III wrestled with this problem when making their Code. Were all kinds of imperial measures, collectively known as *constitutiones*, to be included or only those having general force of law, that is, those that were issued as *edicta*? Already in an *oratio ad senatum* in 426, the co-emperors tried to draw up a comprehensive regulation about the two valid legal sources in their time (*leges* and *ius*). In an extensive constitution, which has come down to us in parts, they gave instructions about the two sources.⁷⁶ The part about the *iurisprudentia veterum* is known as the *lex citandi* and can be found in every textbook on Roman law. The part concerning imperial law is less known, but I am convinced it was meant to be all-embracing as that about the *ius*. It can be found in two constitutions: C. 1,14,2 and C. 1,14,3.⁷⁷

The two constitutions of 426 distinguish between ‘with limited’ (C. 1,14,2) and ‘with general’ validity (C. 1,14,3). Of the two, C. 1,14,3 is the most important. It gives the rules for the *leges generales* and lists the characteristics of a *lex generalis* in, I must confess, a rather confusing way. All the more reason, therefore, to take a closer look at the text.

75 Const. *Summa* § 3 in fine.

76 CTh. 1,4,3; C. 1,14,2; 1,14,3; 1,19,7; 1,22,5; 6,55,11.

77 It is remarkable that the message of C. 1,14,2 and 3 is divided over two successive parts, although they deal with the same subject, are issued by the same emperors (Theodosius and Valentinian), on the same day (6 November), in the same place (Ravenna), and are both addressed to the senate. Why did the editors choose two parts? Probably because they were two separate fragments in the constitution of 426, but even then the reason remains obscure. The const. *Cordi* talks of bringing together related matters under suitable titles and connecting them with previous constitutions dealing with the same subject. Const. *Cordi* § 2: (...) *ad perfectarum constitutionum soliditatem competentibus supponere titulis et prioribus constitutionibus eas adgregare*. The same phenomenon occurs in C. 3,28,35, 36 and 37. Because they have the same date, the *lex posterior* rule does not apply; cf P. Kussmaul, *Pragmaticum und Lex. Formen spätrömischer Gesetzgebung 408-457*, Göttingen 1981, 27-29.

Leges ut generales ab omnibus aequabiliter in posterum observentur, quae vel missa ad venerabilem coetum oratione conduntur vel inserto edicti vocabulo nuncupantur, sive eas nobis spontaneus motus ingesserit sive precatio vel relatio vel lis mota legis occasionem postulaverit. Nam satis est edicti eas nuncupatione censeri vel per omnes populos iudicum programme divulgari vel expressius contineri, quod principes censuerunt ea, quae in certis negotiis statuta sunt similium quoque causarum fata componere. 1. Sed et si generalis lex vocata est vel ad omnes iussa est pertinere, vim obtineat edicti; interlocutionibus, quas in uno negotio iudicantes protulimus vel postea proferemus, non in commune praeiudicantibus, nec his, quae specialiter quibusdam concessa sunt civitatibus vel provinciis vel corporibus, ad generalitatis observantiam pertinentibus.⁷⁸

Laws shall hereafter be observed by all persons as general ones, that have been sent by us in writing to your venerable assembly, or have been marked with the word *edict*, whether a spontaneous impulse has brought those laws about or they have been occasioned by a request or a report or some pending lawsuit. For it is sufficient for them to be marked by the term *edict*, or be divulged to all peoples by the publication program of the magistrates; or that they expressly contain the ordinance of the emperors that whatever had been determined in certain cases also determined the fate of similar cases. 1. If, however, the law is styled a general one, or is ordered to apply to all persons, it shall obtain the force of an edict; and interlocutory decrees, which we, acting as judges, have rendered in a certain case, or may render hereafter, shall not prejudice in general. Anything which has been granted specially to certain cities, provinces, or corporate bodies, shall not be of general application.

In the first part two kinds of measures are mentioned, i.e. *leges ut generales observentur*. The first are the laws addressed to the senate in the form of a proposition, *oratio*. Originally these orations were delivered orally, but they were soon sent in letters and became senatorial decrees, *senates consulta*, through their automatic acceptance. These letters started with a set way of addressing the senate: *consulibus praetoribus tribunis plebis senatui suo salutem dicit (dicunt)*. This salutation can still be found in the inscriptions of some constitutions.⁷⁹ Usually the greeting is reduced to no more than *ad senatum*, sometimes *ad senatum urbis Romae*,⁸⁰ once to *senatui urbis Constantino-*

78 C. 1,14,3. Cf. B. 2,6,8 = C. 1,14,3 (BT 76/7-13): Γενική νομιζέσθω διάταξις, περὶ ἧς ὀρατίωνα πρὸς τὴν σύγκλητον ἐποιήσατο βασιλεύς, ἢ μνήμην ἔχουσα ἐδίκτου ἢ προτεθείσα πανταχοῦ μετὰ τὰ διατεταγμένα παρὰ τῶν ἀρχόντων ἢ ἐν διαγνώσει ἐξενεχθείσα καὶ ἰδικῶς κελευσθείσα καὶ ἐπὶ τῶν ὁμοίων κρατεῖν ἢ παρὰ τοῦ βασιλέως γενικὴ κληθείσα ἢ ἰδικῶς κελευσθείσα παρὰ πᾶσι κρατεῖν· ἰδικὴ δὲ ἢ ἐν διαγνώσει διαλαληθείσα βασιλικῇ ἢ πόλει ἢ ἐπαρχίᾳ ἢ σωματείῳ παρασχεθείσα.

79 Cf. C. 6,60,1 (Constantinus); C. 9,1,21; C. 9,2,17; C. 9,46,10 (Honorius et Theodosius).

80 C. 6,55,11; C. 6,56,5; C. 6,60,3; in C. 12,3,1 only *ad senatum urbis*....

*politanae et urbis Romae*⁸¹ and once to *ad senatum et populum*.⁸² The last combination is remarkable. As we shall see, the words *ad populum* are characteristic of an edict. The compilers have probably combined a *senatus consultum* with an edict dealing with the same subject.⁸³ The orations were not published but instantly stored away in the archives, from where they could be produced if someone asked for them.⁸⁴ Because the orations acquired their legal force, strictly speaking, from the senate, being senatorial decrees, they do not figure as an imperial legal source in the Institutes of Gaius and Ulpian.⁸⁵ In other words, they do not fall under the general collective *constitutiones*, of which three kinds are mentioned. Justinian (Inst. 1,2,6) also speaks of three: *Quodcumque igitur imperator*⁸⁶ *per epistulam*⁸⁷ *constituit vel cognoscens decrevit vel edicto praecepit, legem esse constat: haec sunt, quae constitutiones appellantur*. The orations are not counted as constitutions; nor are the *mandata*.⁸⁸ Marcianus makes this clear by saying that forbidden associations can be dissolved by mandates, constitutions and senatorial decrees.⁸⁹

Returning to the first sentence of C. 1,14,3, the second category of rules that are observed as general laws is mentioned after the orations. They consist of measures to which the word *edictum* is attached, like putting a stamp upon a document, *inserto edicti vocabulo*, ἐδίκτου μνήμη.⁹⁰ There were four reasons to insert the word *edictum*, as we read

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- 81 C. 6,51,1; the const. *Cordi* is directed to the *senatui urbis Constantinopolitanae*. This is followed by the *S* of *salutem*. Nov. 81 is addressed τῇ ἱερᾷ συγκλήτῳ τῆς βασιλίδος πόλεως (SK 397/11-12).
- 82 C. 4,40,3 *iuncto* C. 11,23,2 = CTh. 14,15,3. The Theodosian text is directed only to the Senate. Unusual: const. *Tanta* in C. 1,17,2 is addressed *ad senatum et omnes populos*.
- 83 Many examples from the *Codex Theodosianus* in Seeck, *Regesten* (note 3 above), 7ff.
- 84 Cf. Van der Wal, ‘Textfassung’ (note 57 above), 17.
- 85 Gaius 1,5: *Constitutio principis est, quod imperator decreto vel edicto vel epistula constituit; (...)*. More extensively Ulpian in D. 1,4,1,1: *Quodcumque igitur imperator per epistulam et subscriptionem statuit vel cognoscens decrevit vel de plano interlocutus est vel edicto praecepit, legem esse constat*.
- 86 Regarding the legal authority of the emperor, cf. D. 1,4,1. Cf. for the principate J.M. Kelly, *Princeps iudex. Eine Untersuchung zur Entwicklung und zu den Grundlagen der kaiserlichen Gerichtsbarkeit*, Weimar 1957; for the period of the Severi, cf. Coriat, *Le prince législateur* (note 49 above). For Diocletian (controversially), A.M. Honoré, *Emperors and Lawyers*, Oxford 1994².
- 87 At an early stage the words *epistula* and *rescriptum* interchange. This is made clear *inter alia* in D. 48,18,1pr. which deals with torture. Emperor Augustus decreed that one had to be careful when applying torture while interrogating someone. The text continues: ‘The same is ordained in an *epistula* of the emperor Hadrian to Sennius Sabinus. The words of this *rescriptum* read as follows’, etc.
- 88 Regarding the particular status of the *mandata*: Coriat, *Le prince législateur* (note 49 above), 74ff; cf. also J.H.A. Lokin, ‘Mandata principis’, *Ars aequi* 2013, 957-964.
- 89 D. 47,22,3pr.: *Collegia si qua fuerint illicita, mandatis et constitutionibus et senatus consultis dissolvuntur: (...)*.
- 90 The scholia of the *Basilica* only mention these two categories of *leges generales*. Cf. sch. 1 ad B. 2,6,8 = C. 1,14,3 (BS 30/19-21): ‘Ἐκεῖνας τὰς διατάξεις ἡμῶν παρὰ πάντων ἀνθρώπων ὡς γενικὰς

in the text. The emperor could use it spontaneously, *spontaneus motus*, or the word could be inserted owing to a petition, *precatio*, or a report, *relatio*, or a pending lawsuit, *lis mota*. This clause highlights the different imperial measures: edicts (*spontaneus motus*), rescripts (*precatio*), letters directed to the magistrates (*relatio*), and decisions (*lis mota*). They all can be provided with the mark *edictum*, even the last three. Naturally they do not become edicts in the formal sense of the word, but they acquire the legal force of edicts, that is, of general laws. It can thus happen that *epistulae* can be stamped as *edicta* without technically being so.⁹¹ They remain in the category of *epistulae* but become *leges edictales* with the general force of law. This double sense of the word *edictum* has caused a lot of confusion. When, for example, Krüger says ‘dass die an die obersten Reichsämter gerichteten Erlässe sich selbst als edictales leges oder edicta bezeichnen’, he wrongly concludes that they are formally edicts.⁹² In fact, they are *leges generales* provided with the word *edictum* and therefore observed as general laws, *ut leges generales observentur*.

The second sentence of C. 1,14,3 repeats that marking a measure with the word *edictum*, *edicti nuncupatione*, is sufficient to give it general force of law. However, two new categories are added that also characterize a law as a *lex generalis*. If a measure is propagated to all people through publication by the magistrates, *iudicium programme divulgari*, or if it expressly contains a clause making the rule applicable in analogous cases, *similium quoque causarum fata componere*, then we know we are also dealing with a *lex generalis*. Similarly, the emperor says at the end of Nov. 162 (539) that the given measure must be applied in similar cases and promises to make a formal general law, κοινὸς νόμος, about these problems.

Nov. 162 epil. (SK 749/12-14): <Ἐπίλογος.> Τὰ τοίνυν τῷδε τῷ θείῳ πραγματικῷ τύπῳ περιεχόμενα ἢ σὴ ἐνδοξότης ἐπὶ τῶν ὁμοίων θεμάτων παραφυλάττειν σπευσάτω. Καὶ γὰρ δὴ καὶ κοινὸν περὶ τούτου γράψομεν νόμον ταῦτά τε καὶ ἕτερα ἅπαντα προσδιατυπῶντες, ἅπαν ἀναγκαίως νομοθεσίας εἶναι πιστεύομεν.

φυλάττεσθαι θεσπιζόμεν, αἵτινες πρὸς τὴν ἱερὰν σύγκλητον ὀρατίωνος γενομένης κατεπέμφθησαν καὶ ὅσα ἐδίκτου μνήμην ἐν αὐτοῖς ἔχουσιν.

91 For example, Nov. Val. 8,2 is an *epistula* directed to the *praefectus urbi* Auxentius in which one reads: *supra memoratam legem praesentis edicti*; in Nov. Val. 25,1: *praesentis edicti*; in Nov. Val. 17,1,4: *praesentis edictalis legis*; *edictali lege* in Nov. Val. 2,2,1; 6,1,1; 10,1,3; 14,1,2; 19,1,1; 23,1,2; 28,1,1; *edictalem legem* in Nov. Val. 7,1,5; 35,1,20. Cf. Krüger, *Geschichte* (note 49 above), 301 note 8.

92 Krüger, *Geschichte* (note 49 above), 301: ‘Die Wahl der Form ist also, soweit sich erkennen lässt, nach Belieben getroffen’. Cf. Th. Mommsen, *Prolegomena in Theodosianum*, CLIII-CLIV, N. van der Wal, ‘*Edictum* und *lex edictalis*. Form und Inhalt der Kaiser Gesetze im spätrömischen Reich’, *RIDA* 28 (1981), 277-313 (279); Id., ‘*Opuscula varii argumenti*. I. Die spätrömischen Gesetzesformen nochmals betrachtet’ *SG VI* (1999), 143-146.

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The text reveals that the clause applying the law to similar cases does not make the law an edict in a formal sense. The clause says no more than that the Novel is a *lex generalis*. In CTh. 11,28,9 (414), addressed to the *praefectus praetorio* Anthemius, the emperors Honorius and Theodosius have not inserted a clause of applicability in analogous cases; rather, after the subscription they say they have issued an *edictum ad populum* about the same matter.

Two new categories of general laws are mentioned in paragraph 1 of our text C. 1,14,3. A law also acquires the general force of an edict, *vim edicti obtineat*, if the emperor⁹³ calls a measure *generalis*⁹⁴ or if it contains a statement that the rule is meant for everyone, *ad omnes iussa est pertinere*. Note well, the general law does not become a formal edict but acquires the legal force of an edict, *vim edicti obtineat*. If it is not provided with the word *edictum*, the *generalitas* is only recognizable from the addressee. A measure directed at everyone, *omnes*, or destined for all, has the force of an edict.

C. 1,14,3 ends by summing up some exceptions. Intermediate judgments do not apply to other cases, nor do privileges given to specific towns or provinces or corporations.⁹⁵ The same exceptions can be found in C. 1,14,2:

The questions which we have decided owing to reports and suggestions of judges, or after consultation with a council of the most distinguished nobles of our palace or the concessions we have made to any corporate bodies, or to envoys or a province, a city, or a city council, are not general laws, but only apply to those matters and persons on whose account they have been promulgated, and shall not be revoked by anyone.⁹⁶

8.3. *Codex Theodosianus*

The question arises why the year 426 guidelines in C. 1,14,2 and 3, which distinguish so clearly between general and special laws, are missing from the Theodosian Code and only

93 C. 1,14,3,1: *Sed et si generalis lex vocata est (...)*. The Basilica text adds: *παρὰ τοῦ βασιλέως* ‘by the emperor’; B. 2,6,8 = C. 1,14,3 (BT 76/11-12).

94 For example C. 1,2,13 (= Nov. Marc. 5,2), C. 10,32,54, and C. 10,71,3: *generali lege sancimus*; C. 3,5,1: *generali lege decernimus*; C. 3,43,1,1: *hac generali lege*.

95 C. 1,14,3,1, in fine: (...); *interlocutionibus, quas in uno negotio iudicantes protulimus vel postea proferemus, non in commune praeiudicantibus, nec his, quae specialiter quibusdam concessa sunt civitatibus vel provinciis vel corporibus, ad generalitatis obsevantiam pertinentibus*.

96 C. 1,14,2: *Quae ex relationibus vel suggestionibus iudicantium per consultationem in commune florentissimorum sacri nostri palatii procerum auditorium introducto negotio statuimus vel quibuslibet corporibus aut legatis aut provinciae vel civitati vel curiae donavimus, nec generalia iura sint, sed leges fiant his dumtaxat negotiis atque personis, pro quibus fuerint promulgata, nec ab aliquo retractentur: (...)*.

reappear a century later in the Justinian Code. We know that in 429 Emperor Theodosius II instructed the first codifying committee to collect only the constitutions with general force of law (CTh. 1,1,5): *edictorum viribus aut sacra generalitate subnixas*. This instruction made the regulation of 426 superfluous. Why then do they reappear in the Justinian Code? Perhaps Theodosius revoked his decision to collect only the general laws. That would explain the permission he gave six and a half years later, in CTh. 1,1,6 (435), to select other constitutions as well as the general edicts, those meant for special provinces or places, *in certis provinciis seu locis*. The question is, of course, whether the legal force of these local and provincial provisions remained limited or extended to general validity due to their selection. The first possibility would mean a return to the guidelines of 426, keeping specific privileges intact. But if so, why is this 426 constitution not found in the Theodosian Code? The second possibility would, as we have seen, fit the objective of the 429 constitution, which was read in the senate and has come down to us as part of the *Gesta senatus* of 438.⁹⁷ Therefore the second possibility seems to me the most evident and at the same time the most practical.

It is quite clear that an imperial edict was never directed to one person, and had certainly not the form in which an appointment was made. This was not the case in Justinian's time, nor in the times of Theodosius, nor in the ages before.

8.4. *Codex Justinianus*

Grown wise through the experiences of the Theodosian committees, Justinian provided in the const. *Haec* and *Summa* a clear solution for the problem by giving general force of law to every constitution whatsoever. All non-selected rules lost their *legis vigor*. This, however, did not mean that the three ancient legal categories – *edicta*, *epistulae* and *decreta* – disappeared from the texts. They still were explained to the students in the classroom, as appears from the Justinian Institutes. And this explanation makes sense because the three kinds of laws were still distinguishable in the Code. More than anyone else, Theophilus uses his Paraphrase to instruct law-abiding students about the three legal forms. Because he was a member of the codifying committee for the *Codex vetus*, we will follow his explanation.

⁹⁷ On the *Gesta Senatus*: Atzeri, *Gesta senatus Romani de Theodosiano publicando* (note 12 above); cf. also A.J.B. Sirks, 'Observations on the Theodosian Code. V: What did the Senate of Rome confirm on Dec. 25th. 438? What did the commission of 429 do?' *AARC XVI* (2003) (Napoli 2007), 131-151.

8.5. *Edicta*

The first kind of legal measure known under the collective name *constitutiones* are laws named *edicta*, derived from the verb *edicere*. Theophilus:

καὶ τί ἐστὶν EDICTON; πᾶν ὅπερ ἐξ οἰκείας φύσεως κινηθεὶς ὀρίσει βασιλεὺς πρὸς τὴν τῶν ὑπηκόων εὐταξίαν καὶ λυσιτέλειαν. λέγεται δὲ EDICTON παρὰ τὸ EDICERE, ὃ ἐστὶ προλέγειν καὶ προαναστέλλειν τὰ ἔσθ' ὅτε τοῖς ὑπηκόοις συμβησόμενα λυπηρά. πολλὰ γὰρ καθ' ἑαυτὸν ἐλογίσαστο βασιλεὺς ἄτοπον εἶναι τὸ παρὰ τῶν ὑποτελῶν αὐτοῦ γινόμενον. (...) τὰ δὲ παρὰ τοῦ βασιλέως νομοθετούμενα ἰσοδυναμεῖν τῷ LEX τῶν ὁμολογημένων ἐστίν.⁹⁸

And what is an *edictum*? Every ordinance that an Emperor of his own motion establishes with a view to the orderly conduct and the practical convenience of his subjects. It is called *edictum* from *edicere*, which means to proclaim and to forestall evils that are from time to time likely to fall upon his subjects. For an Emperor often concludes in his own mind that practices obtaining among his subjects are unreasonable. (...) Now, the laws made by the Emperor, it is acknowledged, have equal force with a *lex* (statute).

The imperial edicts are meant for the whole population, as Theophilus goes on to say, including the senate and the plebs, for the people, ὁ δῆμος, elected him and formally ratified his election by an imperial statute, *lex regia*, νόμου REGIU, which was passed on the subject of his imperium and which conferred absolute power upon the emperor.⁹⁹

Theophilus explains further that an edict originally begins with *Imperator* (followed by the full name and honorary titles) *dicit*. And indeed, twice in the Code we read *Imp. Diocletianus et Maximianus AA. et CC. dicunt*.¹⁰⁰ In most cases an edict is recognizable from the addressee, the people; an edict is directed *ad populum* and in this form it appears in the Code again and again.¹⁰¹ Once we come across *edictum ad populum*, which repeats

98 Theoph. 1,2,6/27-38, edd. J.H.A. Lokin/R. Meijering/B.H. Stolte/N. van der Wal, *Theophili antecessoris Paraphrasis Institutionum*. With a translation by A.F. Murison, Groningen 2010, 14-16.

99 Theoph. 1,2,6/48-50; cf. Inst. 1,2,6; D. 1,4,1pr.

100 C. 3,3,2 *iuncto* C. 3,11,1; cf. C. 7,71,6: *Apud acta imp. Theodosius A. dixit: (...)*; Nov 167 (SK 754/16). See also a papyrus from the time of Justinian in: M. Amelotti/L. Migliardi Zingale, (edd.), *Le costituzioni Giustiniane nei papiri e nelle epigrafi*, [Legum Iustinianus imperatoris vocabularium. Subsidia, I], Milano 1985², 101.

101 *Passim*. Once in Greek: C. 1,4,14: Αὐτοκράτωρ Λέων αὐτῷ δήμῳ. Sometimes *ad omnes populos* as in the const. *Tanta*. C. 1,1,4 is addressed to *Palladio pp.*, but *universis populis* is also attested; cf. Krüger, app. crit. ad loc. (nota 7: universis populis *Auth.*, πρόθεμα τοῖς πόλιταις ἡμῶν

the same thing twice.¹⁰² Sometimes the edict limits itself to the population of the capital, for example *ad populum urbis Constantinopolitanae*,¹⁰³ once *populo Carthaginiensi*.¹⁰⁴ Nov. 14 was issued as an edict and directed at the inhabitants of Constantinople and published there, whereas at the same time a copy was sent to the *magister officiorum* with the order to make it known to all people outside the capital through his own edicts, διὰ προσταγμάτων οικείων.¹⁰⁵ Often the word *populus* is left out although the inhabitants are named: *ad (universos) provinciales, provincialibus (suis)*,¹⁰⁶ and sometimes specified *ad Afros, ad Lusitanos, ad Bythinos, Sitifensibus*.¹⁰⁷ Likewise, we know we are dealing with an edict if the emperor addresses soldiers, clerics, Jews, etc. in a general way.¹⁰⁸

Κωνσταντινουπολίταις *Chalc.* (cf. *plenioris inscriptionis versio apud Mansi 7, 721*). Cf. finally Mommsen, *Prolegomena in Theodosianum*, CLIII-CLIX.

- 102 C. 7,51,4; in the homonymous Nov. Marc. 1,1,7 the words *ad populum* are rightly left out. In the *Codex Theodosianus* the combination *edictum ad populum* occurs more often: CTh. 4,4,5; CTh. 11,28,9; CTh. 16,1,2; Nov. Val. 14,1. In C. 9,36,2 only *edictum*. Cf. C. 10,61,1: *Pars edicti imperatoris Antonini A. propositi Romae V id Iul. duobus Aspris cons.*
- 103 C. 1,1,1; the identical text in CTh. 16,1,2 adds *edictum (ad populum urbis Constantinopolitanae)*; CTh. 4,4,5: *edictum ad populum urbis Constantinopolitanae et ad omnes provinciales*; C. 4,29,25 and C. 5,13,1: *ad populum urbis Constantinopolitanae et universos provinciales*; Nov. 13, Nov. 14, and Nov. 69: Κωνσταντινουπολίταις, Nov. 132 and 141, "Ἰδικτον Κωνσταντινουπολίταις. Only the Authenticum of Nov. 77 has *Constantinopolitanis*. Of course, the inscriptions of the Novels are a later addition and do not belong to the original text.
- 104 C. 1,11,5.
- 105 Nov. 14 i.f. (SK 108/33-109/3): Ἐγράφη τὸ ἰσότυπον τῷ ἐνδοξοτάτῳ μαγίστρῳ μετὰ τῆς παραλλαγῆς ταύτης: Ὅπως ἂν ἅπανι ταῦτα γένοιτο φανερὰ τοῖς τῆν ἡμετέραν ἔχουσι πολιτείαν, ἢ τοῖνυν σὴ ὑπεροχῇ τόνδε ἡμῶν δεξαμένη τὸν νόμον ἐν ἀπάσῃ τῇ ὑπὲρ τὴν διὰ προσταγμάτων οικείων τοῦτον ἅπανι φανερόν καταστησάτω: ὡς ἂν μὴ μόνον ἐπὶ ταύτης τῆς εὐδαίμονος πόλεως, ἀλλὰ καὶ ἐν τοῖς ἔξω φυλάττειτο τόποις, τῷ δεσπότῃ τῶν ὅλων θεῷ ἀντ' ἄλλης τινὸς εὐωδίας προσαγόμενος.
- 106 C. 1,21,3; C. 1,40,3; C. 3,13,4; C. 3,18,2; C. 3,27,1; C. 4,43,2; C. 7,62,19; C. 8,16,7; C. 8,36,2; C. 10,1,6; C. 10,11,5; also C. 12,37,11: *provincialibus provinciae proconsularis*, and once C. 9,27,4: *edictum ad provinciales*. Remarkably C. 12,60,1 = CTh. 8,8,6: *ad provinciales et proconsules*. Generally the provincials were addressed by means of an edict, magistrates by letter. Cf. Seeck, *Regesten* (note 3 above), 6-7.
- 107 C. 10,21,1; C. 1,23,4; C. 10,32,25; C. 11,8,1; C. 10,32,27; the word *edictum* is added twice: C. 11,66,1: *edictum ad Heliopolitanos* and C. 12,57,1: *edicto suo ad Afros*.
- 108 C. 1,8,9: *ad Iudaeos*; C. 1,3,1: *clericis*; C. 12,35,2: *militibus cohortis primae*; C. 1,31,1 and C. 12,22,3: *ad agentes in rebus*; C. 10,13,1: *rationalibus Hispaniarum*; C. 11,6,3: *naviculariis Afris*; C. 11,6,5: *naviculariis per Africam*; C. 12,28,1: *palatinis bene meritis*; C. 1,4,33: τοῖς πανταχοῦ γῆς θεοφιλεστάτοις ἐπισκόποις. Once the addressee is a person with the addition *et gentes*: C. 1,29,5: *Zetae viro illustri magistro militum per Armeniam et Pontum Polemoniacum et gentes*.

8.6. *Epistulae*

The second kind is the letter, *epistula*. It is the most common¹⁰⁹ and the most complicated form of imperial legislation. Theophilus again:

Theoph. 1,2,6/7-14: καὶ τί ἐστὶν ἐπιστολή; ἀντιγραφὴ βασιλέως πρὸς ἄρχοντος ἀναφορὰν περὶ τινος ἀμφιβόλου πράγματος γινομένη. οἷον συνέβη κατὰ τινα ἐπαρχίαν τελευτήσαντός τινος δύο περὶ τῆς ἐκείνου κληρονομίας ἀμφισβητεῖν, ἀδελφὸν καὶ θεῖον. τούτων ἑκάτερος ἤξιον μόνος τὸν κλῆρον λαμβάνειν, ὁ μὲν ὡς ἀδελφός, ὁ δὲ ὡς θεῖος. νόμου μὴ κειμένου ταύτην τέμνοντος τὴν ἀμφιβολίαν ἀναφορὰ γέγονε πρὸς βασιλέα παρὰ τοῦ τῆς ἐπαρχίας ἄρχοντος. ἀναγνοὺς τὸ ἀνενεχθὲν ὁ βασιλεὺς ἀντέγραψε τὸν ἀδελφὸν τοῦ τελευτήσαντος προτιμηθῆναι.

Murison: And what is an *epistula* (letter)? It is a written reply (rescript) of the Emperor in answer to a reference from a magistrate on some doubtful matter. For instance, it happened in some province that, on the death of a man, two persons disputed his inheritance, a brother and a paternal uncle. Each of them claimed to be the sole person entitled to take the inheritance, the one as brother, the other as paternal uncle. There being no law to decide this doubtful point, the Governor of the province referred it to the Emperor. And the Emperor, having considered the case referred, wrote in reply that the brother was preferred.

A distinction has to be made as far as the imperial letter is concerned. Either the letter is the written response to a petition, *precatio*, by a private person who is named by his proper name, *Hermeti*, *Callisto*, *Trophimae*, etc., or by his professional status, *militi*, *veterano*, *liberto*, *evocato*,¹¹⁰ often with the addition *et aliis*,¹¹¹ *et ceteris*.¹¹² This kind of letter is properly called a *rescriptum*. Or the letter is a reaction in response to a report,

109 Nearly 900 rescripts from Septimius and Alexander Severus have come down to us, more than 2500 from Diocletian.

110 C. 1,18,1: *Maximo militi*; C. 4,55,3: *Novio liberto*; C. 7,35,1: *Venuleio veterano*; C. 10,55,2: *Caro veterano*; C. 7,35,2: *Aurelio archiatro*; C. 2,4,7: *Licinio Timotheo evocato*; C. 4,32,1: *Aurelio evocato*; C. 4,52,1: *Apollodoro evocato*; C. 4,54,5: *Aurelio Longino evocato*; C. 8,1,1, C. 8,10,3, C. 8,52,1: *Apro evocato*; C. 2,4,5, C. 8,16,4: *evocato*; C. 6,47,2: *libertis Cassiani*; C. 12,35,2: *militibus cohortis primae*.

111 C. 2,17,1: *Legitimo et aliis*; C. 2,18,10: *Secundo et aliis*; C. 2,28,1: *Sabinae et aliis*; C. 2,36,2: *Antiocho et aliis*; C. 2,43,1: *Romano et aliis*; C. 3,13,1: *Severo et aliis*; C. 3,28,4: *Sotericho et aliis*; C. 3,41,2: *Quintiliano et aliis*; C. 3,44,6: *Primitivo et aliis*, etc. etc. Cf. 3,33,5: ... *evocato et aliis*.

112 C. 4,34,9: *Aurelio Menophilo et ceteris*; C. 9,16,1: *Aurelio Herculiano et aliis militibus*; C. 12,35,5: *Valentino et aliis militibus*; C. 10,50,1: *Severino et ceteris scholasticis Arabiis*; C. 11,14,2: *Exsuperantio Iulio et ceteris decurialibus*.

relatio, a suggestion, *suggestio*, or a consultation, *consultatio*, by a high magistrate, often the *praefectus praetorio (per Orientem)*.¹¹³ This administrative letter is supposed to be sent in its proper form, *edictis propositis*, διὰ τῶν συνειθισμένων ἰδίκτων¹¹⁴ to the provincial governors, who in their turn send it to the cities.¹¹⁵ Several letters in the Code are addressed to the combined magistrates or bishops¹¹⁶ but in fact the letter was sent to every single magistrate and governor with a special message,¹¹⁷ including the usual publication order. In this way the letter acquired the legal force of an edict, *edicti vim obtineat*, without formally being one.

It is not always clear whether the initiative for an *epistula* came from the magistrate or from the emperor himself, who was in this way assured of the distribution of the letter by his publishing order. Even if the initiative came from a private person, the letter could be directed to a magistrate if the substance of the petition was found to be of public importance.¹¹⁸ Since Constantine, a distinction was made between private petitions that are answered directly to the petitioner by a subscription at the end of the letter¹¹⁹ (called a direct rescript in modern literature), and private requests that are followed by a letter directed to the magistracy with a copy sent to the petitioner (indirect rescript). This distinction corresponds with the two categories of rescripts in C. 1,23,7 (477):

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- 113 C. 1,14,2: *Quae ex relationibus vel suggestionibus iudicantium per consultationem in commune florentissimorum sacri nostri palatii procerum auditorium (...)*. Cf. C. 7,61 and C. 7,62, especially C. 7,62,34.
- 114 Cf. Nov. 129 epil. (SK 650/4-9). According to a note in one of the manuscripts handing down the version of the Novel in Julian's *Epitome Novellarum* (const. 116), the emperor himself published the Novel in Constantinople and ordered further distribution to the *praefectus praetorio Orientis* Addaeus. Cf. W. Kaiser, *Die Epitome Iuliani. Beiträge zum römischen Recht im frühen Mittelalter und zum byzantinischen Rechtsunterricht*, Frankfurt/M. 2004, 244-245. In Nov. 22 the emperor forbade all magistrates who had received a copy, ἰσότυπον, to publish the law – οὐ μὴν προθήσεις δημοσίᾳ τήνδε ἡμῶν τὴν θεῖαν διάταξιν (SK 187/14-15) – because he had ordered the publication and distribution to the *praefectus praetorio per Orientem* John.
- 115 The word *edictum* in the formula *edictis propositis* does not refer to an imperial edict but to the publishing order for a magistrate. The most complete formula can be found in Nov. Val. 23,9: *Inlustris et praecelsa magnificentia tua legem, quam pietatis et religionis amore concepimus, provinciis provinciarumque rectoribus celeriter innotescere propositis iubebit edictis, (...)*.
- 116 C. 1,46,1: *comitibus et magistratis utriusque militiae*; C. 11,61,3: *comitibus et magistris militum*; C. 10,18,1: *ad proconsules, vicarios, omnesque rectores*; C. 12,49,4: *omnibus rectoribus provinciarum*; C. 1,4,33: τοῖς πανταχοῦ γῆς θεοφύλακτοῖς ἐπισκόποις.
- 117 Seeck, *Regesten* (note 3 above), 6. In Nov. Maj. 3 the addressees, *universis rectoribus provinciarum*, are spoken to in the singular.
- 118 Cf. D. Feissel, 'Pétitions aux empereurs et formes du rescrit dans les sources documentaires du IV^e au VI^e siècle', in: D. Feissel/J. Gascou, [eds.], *La pétition à Byzance*, [Centre de recherche d'histoire et civilisation de Byzance. Monographies, 14], Paris 2004, 33-52 (35-36). In Annexe 1 of his article, Feissel has attached a list of petitions.
- 119 Cf. C. 7,43,1: (...), *propter subscriptionem patris mei, (...)*.

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We order that all rescripts whether they have been sent to the petitioners or to some magistrate, that are called either an annotation or a pragmatic sanction, shall be produced only under the condition that the requests conform to the truth (...).¹²⁰

A pure and complete petition from the villagers of Skaptopara addressed to the emperor Gordian III (238-244) is transmitted through the inscription Αὐτοκράτορι Καίσαρι Μάρκῳ Ἀντωνίῳ Γορδιανῶ εὐσεβεῖ εὐτυχεῖ Σεβαστῶ δέησις παρὰ κομητῶν Σκαπτοπαρηνῶν τῶν καὶ Γρησειτῶν (...).¹²¹ In the Justinian Institutes, a fine example can be found in Inst. 2,12pr. Soldiers who are *alieni iuris* are allowed to draw up a will concerning their *peculium castrense*. That is made clear *ex constitutionibus principum*. The text mentions the emperors Augustus, Nerva and Trajan but does not indicate in which legal form they have given this privilege. The right to draw up these testaments is extended to veterans by a subscribed rescript (an annotation) by the emperor Hadrian:

This was allowed at first only to soldiers on active service, by the authority of the late emperors Augustus and Nerva and of the illustrious Trajan, afterwards it was extended by a subscription of the emperor Hadrian to veterans, that is, soldiers who have received their discharge.¹²²

Many of these rescripts must have been incorporated in the *Codices Gregorianus* and *Hermogenianus*. It is estimated that more than 2500 date from the reign of Diocletian.¹²³ As we have seen in C. 1,14,2, a rescript had limited force of law; only the addressee could profit by it.¹²⁴ But we know that many rescripts were nevertheless used as precedents. Emperor Macrinus (217-218) forbade the custom of appealing to ancient rescripts.¹²⁵

120 C. 1,23,7: *Universa rescripta, sive in personam precantium sive ad quemlibet iudicem manaverint, quae vel adnotatio vel quaevis pragmatica sanctio nominetur, sub ea condicione proferrī praecipimus, si preces veritate nituntur, (...).*

121 Cf. T. Hauken, 'Structure and themes in petitions to Roman emperors', in: Feissel/Gascou, *La pétition à Byzance* (note 118 above), 11-22 (19).

122 Inst. 2,12pr.: (...). *Quod quidem initio tantum militantibus datum est tam ex auctoritate divi Augusti quam Nervae nec non optimi imperatoris Traiani, postea vero subscriptione divi Hadriani etiam dimissis militia, id est veteranis, concessum est. (...).* Emperor Gordian reconfirmed this privilege at the request of Gallus miles: C. 12,36,4pr.

123 For a list of epigraphical sources, see Annexe I at the end of Feissel, 'Pétitions' (note 118 above), 45-49.

124 C. 1,14,2: (...), *sed leges fiant his dumtaxat negotiis atque personis, pro quibus fuerint promulgata, (...).* Sometimes only a part of a rescript is preserved, usually without an addressee; cf. C. 8,14,3: *Pars ex rescripto imp. Alexandri A.*; C. 8,40,13: *Pars ex epistula Gordiani A.*; C. 9,41,4: *Pars ex rescripto imp. Antonini A.*; C. 10,5,1: *Pars epistulae imp. Alexandri A. ad rationales.*

125 Hist. Aug., *Vita Macrini* 13,1.

Many rescripts are quoted in the Digest supporting the legal opinion of a classical lawyer. This practice is obvious, as the rescripts did not judge the facts of a case but the law involved, just as the Supreme Court of the Netherlands and the European Court in Luxemburg do in their ‘prejudicial’ decisions. They presuppose the facts are correct, and working on this assumption deliver their opinions of the law.¹²⁶

Indirect rescripts originating from private requests which turned into public letters addressed to a magistrate occur more and more often in the fifth century. They are labelled *sanctio pragmatica*, πραγματικὸς τύπος, and could be the reason why annotations (letters directly addressed to private persons) are seldom found in the Theodosian Code. References to these original private petitions occur more frequently in the *prooimia* of the Justinian Novels. Examples include Nov. 155 (request from Martha), Nov. 158 (request from Thecla), Nov. 136 (request from the bankers of Constantinople), Nov. 64 (complaints about the gardeners of Constantinople), etc.¹²⁷

8.7. *Decreta*

Again Theophilus gives us the definition:

Theoph. 1,2,6/15-26: καὶ τί ἐστὶν DECRETON; ἀπόφασις βασιλέως μεταξὺ δύο μερῶν παρ’ αὐτῷ δικαζομένων ἐκφερομένη. οἷον ἐπὶ τοῦ αὐτοῦ θέματος· δύο τινὲς ἐφιλονεῖκουσιν περὶ κληρονομίας τελευτήσαντος τινος, ἀδελφός φημι καὶ θεῖος τοῦ κατοικομένου, περὶ τοῦ τίνα δεῖ εἰς τὴν κλησὶν προτιμηθῆναι τοῦ κλήρου. ὁ βασιλεὺς ἀμφοτέρων ἀκροασάμενος ἀπεφίνατο τὸν ἀδελφὸν προτιμηθῆναι. καὶ τοῦτο νόμος ἐστὶ βασιλικός, λέγεται δὲ DECRETON παρὰ τὸ DECERNERE, ὃ ἐστὶ θεωρησῆσαι. σκοπήσας γὰρ τῇ ἰδίᾳ διανοίᾳ τὸ νομιζόμενον αὐτῷ δίκαιον ἀποφαίνεται. λέγεται δὲ ὁμονύμως DECRETON καὶ ἡ τοῦ ἄρχοντος ἀπόφασις, ἀλλὰ τούτῳ διενηνόχασιν, ὅτι τὸ μὲν τοῦ βασιλέως DECRETON καὶ αὐτὴν καὶ ἄλλην τοιοῦτότροπον ὀτεδήποτε ἀναφρομένην ὑπόθεσιν ἐκτέμνει, τὸ δὲ τοῦ ἄρχοντος αὐτὴν, ἔσθ’ ὅτε δὲ οὐδὲ αὐτὴν, εἴγε ἐκκλητος παρακολουθήσει.

Murison: And what is a *decretum*? A decision of the Emperor pronounced between two parties in litigation before him. Take, for example, the case just cited: two persons, a brother and a paternal uncle of a man that had died, went to law about the inheritance of the deceased, the point being which of them was entitled to be preferred for entry on the

126 Cf. C. 1,23,7: (...) *sub ea condicione (...), si preces veritate nituntur, (...)*.

127 A list of all these pragmatic sanctions can be found in Annexe II in Feissel, ‘Pétitions’ (note 118 above), 50-52. For a fine example, see C. Zuckerman, ‘Les deux Dioscore d’Aphrodité ou les limites de la pétition’, in: Feissel/Gascou, *La pétition à Byzance* (note 118 above), 75-92.

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inheritance. The Emperor, having heard both parties, decided that the brother was to be preferred. This, too, is an imperial law, and it is called *decretum* from *decernere*, which means ‘to consider’; for the Emperor considers in his own mind and then declares what appears to him to be just. The decision of a magistrate also is called by the same name *decretum*, but there is this difference between them: the decree of the Emperor decides not only the particular case but also other similar cases at any time arising, while the decree of the magistrate decides the particular case alone, and sometimes not even that, when it goes to appeal.

Long before the reign of Justinian, the imperial *decreta* were used as precedents, according to Theophilus. And indeed, from the exchange of letters between Marcus Aurelius and his teacher Marcus Cornelius Fronto we learn that the verdict of a private judge was confined to the litigants, unlike an imperial verdict:

In those affairs and cases which are settled in private courts no danger arises since their decisions hold good only within the limits of the cases, but the precedents which you, O Emperor, establish by your decrees will hold good publicly and for all time. So much greater is your power and authority than is assigned to the Fates. They determine what shall befall us as individuals: you by your decisions in individual cases make precedents binding upon all.¹²⁸

This, of course, is an impressive example of rhetoric. In practice it will have been difficult to use even imperial judgments in similar cases because they were not published for the general public. In principle the verdict was destined for the litigants only. In this respect a *decretum* by Septimius Severus about persons above 70 years of age and fathers of more than five children being released from fulfilling state offices is interesting. Severus gave a judicial decision in this case when he was governor of the province of Asia, but later as emperor he drew up a constitution extending the rule to the other provinces.¹²⁹ In this way an imperial *decretum* was turned into a general constitution. A few months after the

128 Fro. Aur. 1,6,2: *In iis rebus et causis quae a privatis iudicibus iudicantur, nullum inest periculum, quia sententiae eorum intra causarum demum terminos valent; tuis autem decretis, imperator, exempla publice valitura in perpetuum sanciantur. Tanto maior tibi vis et potestas quam fati adtributa est: fata quid singulis nostrum eveniat; tu, ubi in singulos decernis, ibi universa exemplo adstringis.* Cf. W.J. Zwalfve/C.J.H. Jansen, *Publiciteit van Jurisprudentie. Beschouwingen bij 100 jaar Nederlandse jurisprudentie (1913-2013)*, Deventer 2013, 3 and 4.

129 D. 50,5,8pr.: (...): *quod optimus maximusque princeps noster Severus Augustus decrevit ac postea in ceteris provinciis servandum esse consituit.*

issuing of the *Codex vetus* in 529, Justinian confirmed the general validity of imperial judgments in a separate constitution. C. 1,14,12pr.:

When His Imperial Majesty examines a case for the purpose of deciding it, and renders an opinion in the presence of the parties in interest, let all the judges in Our Empire know that this law will apply, not only to the case with reference to which it was promulgated, but also to all that are similar.¹³⁰

Of the *decreta* which are collected in the Code,¹³¹ there is one that the compilers apparently forgot to adapt to the constitutional form, viz. C. 9,51,1:

When the Emperor had made his appearance, after being saluted by Oclatinus Adventus, and Opellius Macrinus, illustrious praetorian prefects, and by his friends and heads of the offices and men of both orders, Julianus Licinianus, who had been sentenced to deportation to an island, was presented to him by Aelius Ulpianus, at that time an imperial envoy, and Antoninus Augustus said to him: 'I restore you to your province, and added, 'Moreover, that you may know what it means to be restored, I hereby reinstate you in your rights, your rank, and all your other privileges'.¹³²

130 C.1,14,12pr.: *Si imperialis maiestas causam cognitionaliter examinaverit et partibus cominus constitutis sententiam dixerit, omnes omnino iudices, qui sub nostro imperio sunt, sciant hoc esse legem non solum illi causae, pro qua producta est, sed omnibus similibus.* The constitution dates from 30 October 529, only a few months after the publication of the *Codex vetus*. Apparently the const. *Summa* was not clear enough in this matter.

131 *Decreta* in de Code include: C. 7,62,1: *Sententia divi Severi data in persona Marci Prisci idibus Ian. Pompeiano et Avito cons. Severus A. dixit: (...)*. Curiously, Severus speaks as if he is still alive whereas from the inscription it is clear that he had died. C. 9,1,17: *Pars sententiae eorundem AA. et CC. datae V id. Ian. Diocletiano VII et Maximiano VI AA. cons. C. 9,41,3: Imp. Antoninus A. cum cognitionaliter audisset, dixit: (...)*. Probably part of a decision: C. 10,48,2: *Pars actorum Diocletiani et Maximiani AA. id. Febr. ... Inductis Firmino et Apollinario et ceteris principalibus Antiochensium adstantibus Sabinus dixit: ... Diocletianus: Certis dignitatibus (...)*; it is not clear whether this is part of a judgement or part of an edict. C. 1,3,7: *Pars actorum habitorum in sacro consistorio apud imperatores Gratianum Valentinianum et Theodosium (...)*. *Imp. Theodosius A. dixit: (...)*. *Item dixit: (...)*. C. 9,47,12: *Imp. Diocletianus et Maximianus AA. in consistorio dixerunt: Decurionum filii non debent bestiis subici. Cumque a populo exclamatum est, iterum dixerunt: Vanae voces populi non sunt audiendae: (...)*.

132 C. 9,51,1: *Imp. Antoninus A. cum salutatus ab Oclatinio Advento et Opellio Macrino praefectis praetorio clarissimis viris, item amicis et principalibus officiorum et utriusque ordinis viris et processisset, oblatus est ei Iulianus Licinianus ab Aelio Ulpiano tunc legato in insulam deportatus, Antoninus Augustus dixit: Restituo te in integrum provinciae tuae. Et adiecit: Ut autem scias, quid sit in integrum: honoribus et ordini tuo et omnibus ceteris.* It is clear the text has not found its constitutional form. The reference to Ulpian is interesting.

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As we have said above, Emperor Justinian put an end to all subtleties and gave all kinds of constitutions the same legal force. Even the decision mentioned above and destined especially for Licinianus thus acquired a general meaning, for example in the Basilica where it reads:

B. 60,68,5 = C. 9,51,1: Ἐὰν βασιλεὺς ἀποκαθιστῶν τινα εἶπεν ‘εἰς ἀκέραιόν σε ἀποκαθίστημι’, δοκεῖ λέγειν, ὅτι καὶ τὴν τιμὴν ἣν ἔπραττε πρότερον δίδωσιν αὐτῷ.¹³³

So did all non-collected constitutions disappear and vanish from the legal world? No, a few survived with limited legal force, as mentioned in C. 1,14,2, *in fine*. They are, however, easily recognizable for they were **not** inserted in the Code: (...), *quae minime in eodem nostro codice receptae sunt*, (...).¹³⁴ The const. *Summa* speaks about these privileges and calls them *pragmaticae sanctiones*, that is, they were issued as (indirect) rescripts.¹³⁵

Moreover, the pragmatic sanctions that are **not** included in our Code, and which might have been granted to cities, corporate bodies, bureaus, offices, or private individuals, shall remain in every respect valid, if they concede any privilege as a special favor; but where they have been promulgated for the settlement of some legal point we direct that they shall only hold when not opposed to the provisions of our Code. But in any matter which comes before your tribunal, or in any other civil or military proceeding, or in one which has reference to public expenses deposited in army headquarters, or in such as have any relation to the public welfare, we decree that they shall remain valid as far as public convenience may require this to be done.¹³⁶

133 BT 3126/19-21.

134 Const. *Summa* § 4.

135 On the (indirect) rescripts, cf. § 8.6 above.

136 Const. *Summa* § 4: *Si quae vero pragmaticae sanctiones, quae minime in eodem nostro codice receptae sunt, civitatibus forte vel corporibus vel scholis vel scriniis vel officiis vel alicui personae impertitae sunt, eas, si quidem aliquod privilegium speciali beneficio indulgent, omni modo ratas manere, sin vero pro certis capitulis factae sunt, tunc tenere, cum nulli nostri codicis adversantur constitutioni, praecipimus. sed et si qua regesta in tui culminis iudicio vel in aliis iudicis civilibus vel militaribus vel apud principia numerorum pro publicis expensis vel quibuscumque titulis ad publicum pertinentibus posita sunt, ea etiam, prout communis rei commoditas exigit, firma esse censemus.*

These rescripts existed separately from the Code and were not subject to the exclusivity mentioned in paragraph 3 of the const. *Summa*. Legal force was acquired by special provision, *firma esse censemus*.¹³⁷

8.8. *Codex repetitae praelectionis*

The const. *Cordi* does not mention the category of special constitutions circulating outside the Code. It is, however, not very likely that they lost their validity. The const. *Cordi* was created for a different reason. The purpose of the new edition of the Code was twofold. In the first place it was connected to the completion of the Digest. The labours involved in composing this *opus desperatum* were accompanied by numerous imperial instructions aimed at ordering the vast mass of texts and purifying them of contradictions and similarities. These instructions were couched in the form of constitutions which were distinguished into two types: *decisiones et aliae constitutiones*. The *decisiones* were meant to settle altercations between the classical lawyers by literally ‘cutting off’, *decidere*, one or more displeasing opinions until only one remained.¹³⁸ It is significant that the first known *decisio* dates from before the const. *Deo auctore* in which the concept of the Digest was announced.¹³⁹ Apparently Justinian (or Tribonian) began with the purification of the *jurisprudentia veterum* immediately after the completion of the *Codex vetus*. We do not know how many of these *decisiones* there were. We know of a collection of fifty ‘decisions’, but why they were created remains unclear.¹⁴⁰ Perhaps they were a present for the emperor’s fiftieth birthday in 532? Whatever the case may be, it is certain that alongside the *decisiones*, other constitutions also existed, not intended to end the discussions between the lawyers, but to ease the exertions of making the proposed work, (...) *ad commodum propositi operis* (...). They were very numerous, as we can read,

137 The Digest (1,4,1,2) and the Institutes (1,2,6) speak about personal constitutions, *constitutiones personales*. Some constitutions are personal, Theophilus writes, and cannot be taken as precedents, this not having been the emperor’s intention (Theoph. 1,2,6/51-53). Examples include personal service, excessive punishment, the pardoning of a wrongdoer, etc. The Institutes continue by repeating that all other constitutions, being general, without doubt have force of law. This last sentence is omitted in the Digest (1,4,1,2), either because Ulpian did not write it, or because the compilers did not reproduce it.

138 Cf. J.H.A. Lokin, ‘Decisio as a Terminus Technicus’, *SG V* (1992), 21-31 (repr. in: Id., *Analecta Groningana ad ius graeco-romanum pertinentia*, (ed. Th.E. van Bochove), Groningen 2010, 163-173).

139 The const. *Deo auctore* dates from 15/16 December 530 and is titled *De conceptione digestorum*. The first *decisio* is to be found in C. 3,33,12, dated 1 August 530.

140 Cf. e.g. C. Russo Ruggeri, *Studi sulle Quinquaginta decisiones*, Milano 1999; M. Varvaro, ‘Contributo allo studio delle Quinquaginta decisiones’, *AUPA XLVI* (2000), 359-539.

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plurimae.¹⁴¹ Many of these technical instructions became obsolete when the work was done. The reduction of this mass of now useless constitutions was the second purpose of the new edition. This clearly appears from the text of the const. *Cordi* (§ 1-2), in which the working method of the committee is prescribed. Its first task consisted of sifting and sorting out the instructions in support of the codifying process, that is, of the *decisiones et aliae plurimae constitutiones ad commodum propositi operis*. They not only existed outside the Code, they were also so numerous and issued over such a short time that they constantly became outdated and were replaced by new instructions due to new facts emerging in the process, and of more thorough discussions, (...) *ex emersis postea factis (...) meliore consilio (...)*. Thus, before adapting the *Codex vetus* substantially, the five members of the committee first had to sort out all **our** (Justinian's) constitutions, (...) *easdem constitutiones nostras decerpere (...)*,¹⁴² then divide these 'picked' constitutions into chapters, arrange them under the proper titles in the Code, and finally link them to previous constitutions. The result of this procedure was the abolition and disappearance of a vast number of technical constitutions created in the years 529-533. Only a small but significant part survived.

After having fulfilled this important first task, the committee went on to revise the *Codex vetus* substantially, as appears from const. *Cordi* § 3. The members were allowed to abolish, add and change texts, not on their own authority, but by permission of the emperor, (...) *nostra auctoritate fretos, (...)*. If some measures had become obsolete or superfluous because of newly issued rules, (...) *ex posterioribus sanctionibus nostris (...)*, they could be removed from the Code, whereas incomplete laws could be completed. That all this was done by the express permission of the emperor is repeated in § 4 of the const. *Cordi*, which also repeats the exclusivity of the new Code.¹⁴³ In § 5, the emperor again and again, *repetita itaque iussione (...)*, emphasizes the prohibition on citing in court from the *decisiones* or from the other constitutions or from the first edition of the Code. The careful defining of the task of the committee, and its strictly prescribed working method, clearly

141 Const. *Cordi* § 1: *Postea vero, cum vetus ius considerandum recepinus, tam quinquaginta decisiones fecimus quam alias ad commodum propositi operis pertinentes plurimas constitutiones promulgavimus, (...)*.

142 Const. *Cordi* § 2.

143 Const. *Cordi* § 4: *His igitur omnibus ex nostra confectis sententia, cum memoratus Iustinianus codex a praedictis gloriosissimis et facundissimis viris purgatus et candidus factus omnibus ex nostra iussione et circumductis et additis et repletis nec non transformatis nobis oblatus est, iussimus in secundo eum ex integro conscribi non ex priore compositione, sed ex repetita praelectione, et eum nostri numinis auctoritate nitentem in omnibus iudiciis solum, quantum ad divales constitutiones pertinet, frequentari (...), nulla alia extra corpus eiusdem codicis constitutione legenda, (...)*.

reveals the status of the new Code. It was a correction of the old one and not an autonomous work.¹⁴⁴

9. The inscription of C. 1,1,1

After this lengthy excursion, it is time to return to the objections made by Waelkens against the substance and form of the const. *Cunctos populos*. According to him, the constitution was originally a judicial decision about the execution of episcopal judgments. Were the secular authorities (the emperor) obliged to ensure the execution of all episcopal verdicts or could they limit themselves to the verdicts of the Trinitarian bishops? Waelkens tells us that in the case of C. 1,1,1 the judge decided in favour of the Trinitarian bishops. But from this point of view he thinks it strange and confusing that the decision is addressed to the people of Constantinople, *ad populum urbis Constantinopolitanae*. The inscription, as we know it, must therefore be wrong. It is ‘un fait unique dans les constitutions romaines’¹⁴⁵ and therefore he makes a bold conjecture. Waelkens presupposes the word *populus* to be wrongly interpreted from the abbreviation *pu.* in the original manuscripts and translates the characters *pu.* into *praefectus urbis*. In this conjecture, the constitution was addressed to one single magistrate, *ad praefectum urbis Constantinopolitanae*. The result would then correspond more with the character of a decision.

Waelkens’ conjecture seems to me highly improbable. Neither in the Theodosian Code nor in that of Justinian have I ever come across the adjective *Constantinopolitanae* in connection with the words *praefectus urbis* or *pu.* When the *praefectus urbis* is the addressee in an inscription, an indication of one of the two capitals never follows. Apparently it was always obvious which capital was meant.¹⁴⁶ On the other hand, the

144 Const. *Cordi* § 5: *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: sed quod in praesenti purgato et renovato codice nostro scriptum invenitur, hoc tantummodo in omnibus rebus et iudiciis et obtineat et recitetur.* Already Krüger, *Geschichte* (note 49 above), 387: ‘Die zweite Kommission hat das Werk ihrer Vorgänger unberührt gelassen.’

145 Waelkens, ‘L’hérésie’ (note 13 above), 265: ‘La confusion provient probablement du fait que la constitution *Cunctos populos* fût adressée au peuple de Constantinople, un fait unique dans les constitutions romaines.’ For the conjecture, cf. Waelkens, ‘L’hérésie’, 265-266.

146 Only twice is the city of Rome mentioned in connection with the *praefectus urbis* (*pu.*). In both cases it is the same person who is addressed, viz. Albinus. Both constitutions were issued in the same year (389) but have a different date: C. 6,1,8 and C. 11,43,3. In the *Codex Theodosianus* Albinus is mentioned more frequently, always with the addition *pu. Romae*, probably in order to avoid confusion with highly connected relatives or magistrates of the same name: C.Th. 16,5,18; 11,30,49; 9,16,11; 12,16,1; 14,4,5; 15,2,5; 15,1,27. Cf. A.H.M. Jones/J.R. Martindale/J. Morris, *The Prosopography of the Later Roman Empire*. Vol. I: A.D. 260-395, Cambridge 1971, s.v. Albinus.

words *populus urbis Constantinopolitanae* occur more than once in the inscription. By no means are they ‘un fait unique dans les constitutions romaines’. One example is the inscription of CTh. 4,4,5: *Edictum ad populum urbis Constant(ino)p(olitanae) et ad omnes provinciales*. A very similar inscription (without the superfluous word *edictum*) can be found in C. 4,29,25 (531): *Idem (Justinianus) A. ad populum urbis Constantinopolitanae et universos provinciales*. A year earlier, the same inscription appears in C. 5,13,1:¹⁴⁷ *Imp. Iustinianus A. ad populum urbis Constantinopolitanae et universos provinciales*. Nov. 132 is directed at the inhabitants of Constantinople (SK 665/2-3), whereas C. 1,11,5 is addressed to the population of Carthage: *Imp. Honorius et Theodosius AA. populo Carthaginiensi*. Numerous constitutions are simply directed *ad populum* and nowhere is the word *populus* abbreviated to *pu*.

10. Summary and conclusion

The purpose of this contribution is twofold. It hopes to show the reader that the hypothesis of my colleague Waelkens about the form and substance of C. 1,1,1 is untenable. In connection with this refutation, the present contribution also hopes to shed some light on the legal sources that were used in the composition of the two *Codices Justiniani*. Special attention is paid to the problem of legal measures having either general or limited *legis vigor*. Before the *Codex vetus* there were, strictly speaking, two kinds of general measures: the *orationes ad senatum* and the *edicta*. The orations were not supposed to be constitutions because their legal force was derived from the senate. Formally they were *senatus consulta*, but in actual fact it was the emperor who determined their substance. The *edicta* also had general legal force from the beginning. They were recognizable by the inscription *ad populum* (never shortened to *pu*.), and as such they can be found frequently in the Code. A formal edict contained the spoken word of the emperor: *imperator ... dicit*. An edict never had the form of a letter, *epistula*. However, a letter could be given force of law by inserting the word *edictum* into it, *inserto edicti vocabulo, edicti nuncupatione*.¹⁴⁸ Sometimes the emperors reserved the publication of a law in the capital to themselves and gave orders to the magistrates, usually the praetorian prefects (*per Orientem, per Illyricum*)¹⁴⁹ to publish it through their own prefectorial edicts, *edictis propositis*. The word *edictum* may have more than one meaning; however, it is never used for an appointment or a personal matter as Waelkens wants us to believe.

147 Perhaps C. 4,29,25 and C. 5,13,1 are parts of the same constitution and the date is corrupt in the manuscripts.

148 C. 1,14,3pr.

149 A praetorian prefecture was created in Africa in 533 and in Italy in 537.

By being selected for the Code, the *rescripta* and *decreta* acquired general force of law.

When drawing up the Code, the committee had the permission of the emperor to delete, add and change certain words.¹⁵⁰ The full set of honorary titles of the emperors was left out and shortened to *Imp.* (*Imp.*, *Imp.*), always followed by the full name and ending with the character *A.* (*AA.*, *AAA.*).¹⁵¹ The salutations for the senate were reduced to *ad senatum*, or *senatui*. The words *dicit* or *dicunt* in the edicts were cancelled and either replaced by the simple indication *edictum* or more often by the words *ad populum*, or *populo*. In the const. *Cunctos populos* as inserted in the Theodosian Code (CTh. 16,1,2), the inscription reads: **edictum** *ad populum urb(is) Constantinop(olitanae)*, but in C. 1,1,1 the word *edictum* is left out as being superfluous. In the letters the function of the magistrates is abridged as well. Most letters were directed to *pp.* which is the abbreviation for the *praefectus praetorio per Orientem*. If another prefecture was meant, it was always written out in full. After the *pp.*, it was the *pu.* (*praefectus urbi*) who was mentioned most often. Never is a capital added to his title. If a petition was made by a private person, his (first) name was written out in full; sometimes his profession was added: *Eusebio militi*, sometimes followed by *et aliis*, or *et ceteris*. The few *decreta* begin with for instance *sententia divi Severi*, or *pars sententiae*. Sometimes it appears from the text that the rule was derived from a judicial decision: *cum cognitaliter audisset (...)*. The subscriptions were also reduced to a minimum. No salutations, blessings, or best wishes for health and prosperity survived the purge. The publishing orders to the magistrates became superfluous after the confirmation of the Code and were left out in their turn. One character remained: *D.* (*datum*), *PP.* (*propositum*) or *S.* (*subscriptum*).

The addition of certain words was allowed in order to make proper sentences, on condition that they had no bearing on the legal substance of the law, (...) *ad vim sanctionis non pertinentibus (...)*.¹⁵² The change was permitted unless the text was supported by some legal distinction, (...), *praeterquam si iuris aliqua divisione adiuventur, (...)*.¹⁵³ Nowhere is permission given to change the substance of the law. That was and remained the prerogative of the emperor. In the course of the years 529-533, countless permissions were given, always in the form of a constitution, whether a *decisio* or an *alia constitutio*. As this vast mass of 'kodifikationsbegleitende' constitutions resulted in a confused mass, a second edition of the Code was necessary in order to get rid of these obsolete constitutions all at

150 Const. *Summa* § 3: (...) *detractis vel additis vel permutatis certis verbis, (...)*.

151 Caesars were created during the tetrarchy of Diocletian (and his colleagues), abbreviated to *CC*. No mention is made of the first names of the Caesars: *Imp. Diocletianus et Maximianus AA. et CC*. Cf. however C. 6,9,7 in which one reads *Pars epistulae Constantii et Maximiani AA. et Severi et Maximini nobilissimorum CC*.

152 CTh. 1,1,6.

153 Const. *Haec* § 2; in the same sense, const. *Summa* § 3.

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one time, by purifying this *indigesta moles* and selecting just a few, (...) *constitutiones nostras decerpere* (...).¹⁵⁴

The final result was satisfactory for the legal practitioners. The Code brought clarity and simplification. All the selected texts could be cited in court as general laws; only a few privileges and instructions with limited force continued to exist outside the Code.¹⁵⁵

The *Codex Justinianus* begins with the const. *Cunctos populos*. The attempts Waelkens makes to turn an edict into a judicial decision directed to the *praefectus urbis*, and his opinion concerning the original constitution as being a way to limit the secular execution to judgments of Trinitarian bishops, should not be taken seriously. To save his hypothesis Waelkens had to interpret the text in a completely different sense:

Les mots *cunctos populos* ne renvoient pas à “tous les peuples réunis sous l’égide de l’empereur”, comme l’ont compris les Glossateurs, mais simplement à la réunion des deux peuples d’Occident et d’Orient. “*Quos clementiae nostrae regit imperium*” renvoie à la juridiction impériale et non pas à un gouvernement illuminé. La “*vindicta divina*” mentionnée à la fin du texte et que les traducteurs interprètent comme une vengeance divine, renvoie à l’autorité souveraine de l’empereur. L’ “*arbitrium caeleste*” signifie l’arbitrage des évêques.¹⁵⁶

The results of his efforts remind me of the novel *Nicholas Nickleby* by Charles Dickens, in which a ‘most original thinker’ appears, Mr Curdle, ‘who had proved that by altering the received mode of punctuation any one of Shakespeare’s plays could be made quite different, and the sense completely changed’.

In this article I have limited myself solely to Waelkens’ opinion about the const. *Cunctos populos* and have not gone into his attempts to have the original Code begin with C. 1,14,1. More than enough has been said about this hypothesis by my long-standing colleague Bernard Stolte.

For two reasons it seems to me more than probable that the const. *Cunctos populos* was created in 380 for a purpose different from the one it eventually acquired in the Justinian Codes of 529/534. The first one is the place that was given to it in the Theodosian Code. If the constitution was meant from the start to make the Christian faith the religion of the state, it would not have been the second constitution in CTh. 16,1. The second reason is the omission of the original clause *nec conciliabula eorum ecclesiarum*

154 Const. *Cordi* § 2.

155 Const. *Summa* § 4.

156 Waelkens, ‘L’*hérésie*’ (note 13 above), 271.

nomen accipere in the Justinian Code. This clause is the key to a good understanding of the original text. The rule dovetails with a range of measures taken by Theodosius, all meant to deprive the heretical (non-Trinitarian) bishops of their church buildings and places of worship. Part of the constitutions is a clear and succinct exposition of the Trinitarian doctrine. By leaving out the special clause about the churches, the text in the Justinian Code caused a subtle but important change in significance, laying full emphasis on the exposition of the orthodox faith. As a result of this subtlety, the constitution was thought fit to figure as the beginning of the Christian *Codex*, of which the first words are: *In nomine domini nostri Ihesu Christi*. The constitution prescribed the orthodox, Trinitarian faith to all peoples, *cunctis populis*, and as such it has been understood through the centuries in the traditions of East and West.

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