FOR THE MOUTH OF THE EMPEROR HATH SPOKEN IT*

Some notes on C. 1,14,12 and the prohibition of commentaries in const. *Tanta*

1.

In the year 527, Justinian ascended the imperial throne of Byzantium. Before his reign, there existed two sources of law: the *leges*, constitutions promulgated by Justinian's imperial predecessors, and the *ius*, the writings of important lawyers and legal scholars (*iurisprudentes*) from the past, such as Gaius, Modestinus, Papinian, Paul, and Ulpian. It goes without saying that all these writings contained many conflicting opinions and interpretations. Justinian changed all that. He had a committee led by Tribonian collect and excerpt the writings of the *iurisprudentes*.[1] The ensuing result was eventually laid down in the *Digest*.

In const. *Deo auctore*, which was issued on 15 December 530 while commissioning the work on the *Digest*, Justinian explicitly stated that all the excerpts from the writings of the *iurisprudentes* that were going to be adopted into the *Digest*, would have equal authority as if those excerpts had originated from imperial constitutions, and had been pronounced by his own imperial mouth. Thus, Justinian made the words of the *iurisprudentes* his very own:

> (…): ut omnes qui relati fuerint in hunc codicem prudentissimi viri habeant auctoritatem tam, quasi et eorum studia ex principalibus constitutionibus profecta et a nostro divino fuerant ore profusa. omnia enim merito nostra facimus, quia ex nobis omnis eis impertietur auctoritas.[2]

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* Adapted quotation from Isaiah 40:5. The present article is ultimately based on my study 'Justinianus Latinograecus. Language and Law during the Reign of Justinian', § 3, § 6.2, § 7.1, and § 7.2 (forthcoming in the volume *Latin in Byzantium. Contexts and Forms of Usage in Late Antiquity and Beyond*, to be edited by Alessandro Garcea, Michela Rosellini, and Luigi Silvano).

1 On Tribonian and his committee, cf. const. *Deo auctore*, § 3; const. *Tanta* / *Δέδωκεν*, § 9; cf. also e.g. T. Honoré, 'The Background to Justinian's Codification', *Tulane Law Review* 48 (1973-1974), 859-893 (869-893); T. Honoré, *Tribonian*, London 1978; T. Honoré, *Justinian's Digest: Character and Compilation*, Oxford 2010, *passim*.

2 Const. *Deo auctore*, § 6.

We come across the same notion in const. *Tanta* / *Δέδωκεν*, which was issued on 16 December 533 and which marked the completion of the text of the *Digest*. In the relevant passage, we read that if in the writings of the old *iurisprudentes* there had appeared to be anything superfluous, imperfect, or less suitable, it had been extended or reduced in size, and been ranged under the most correct rule. Moreover, we learn that in the many cases of repetition or contradiction, each time the best possible alternative had been selected and given its place in the *Digest*, in preference over the other possibilities. To this Justinian added that everything had been provided with the same force of law, so that whatever had been written in the *Digest* would appear to be his own work, and compiled by his own will: thus, Justinian again appropriated the words of the old *iurisprudentes*, as he had already done in const. *Deo auctore*. This time, however, the emperor went beyond this: in order to protect his *Digest* text, he added an official ban on the collation of the texts of the *iurisprudentes* and that of the *Digest*, a prohibition to compare what the old *iurisprudentes* had written, and what he himself had introduced, reasoning that many important changes had been made for practical reasons:

> (…): hoc tantummodo a nobis effecto, ut, si quid in legibus eorum vel supervacuum vel imperfectum aut minus idoneum visum est, vel adiectionem vel deminutionem necessariam accipiat et rectissimis tradatur regulis. Et in multis similibus vel contrariis quod rectius habere apparebat, hoc pro aliis omnibus positum est unaque omnibus auctoritate indulta, ut quidquid ibi scriptum est, hoc nostrum appareat et ex nostra voluntate compositum: nemine audente comparare ea quae antiquitas habebat et quae nostra auctoritas introduxit, quia multa et maxima sunt, quae propter utilitatem rerum transformata sunt. (…). / (…), ἀμείψαντες μὲν εἴ τι περ ἔχειν ἡμῖν οὐκ ὀρθῶς ἐδόκει, μέρη δὲ τὰ μὲν ἀφελόντες τὰ δὲ προσθέντες, ἐκ πολλῶν τε τὸ κάλλιον ἑλόμενοι καὶ τὴν ἴσην ἅπασιν παρασχόντες τῆς ἐξουσίας ἰσχύν. ὥστε πᾶν ὅπερ ἐνγέγραπται τῷ βιβλίῳ, τοῦτο ἡμετέρᾳ γενέσθαι γνώμῃ, μηδένα τε θαρρεῖν παρατιθέναι τὰ γενόμενα νῦν τοῖς ἔμπροσθεν, ἐπειδὴ πολλὰ καὶ οὐδὲ ἀριθμηθῆναι ῥᾴδια μετατεθείκαμεν εἰς τὸ κρεῖττον, (…).[3]

Justinian did not stop here, for he also provided the *Digest* with exclusivity. In const. *Tanta* / *Δέδωκεν*, § 19, addressed to the senate of Constantinople and all people living in the Byzantine empire – *patres conscripti et omnes orbis terrarum homines* / φαμὲν δὲ ὑμᾶς τε ὦ μεγάλη βουλὴ καὶ ὁ λοιπὸς ἅπας τῆς ἡμετέρας πολιτείας ἄνθρωπος – we read that Justinian ordered the addressees to revere and uphold the laws, while laying the older ones to rest. The emperor allowed no one to compare the *Digest* with the earlier provisions, or to investigate if there was any discrepancy between them: only the rulings incorporated into the

3 Const. *Tanta* / *Δέδωκεν*, § 10.

Digest were to be observed. In the courts of law, and in other disputes where laws were applicable, Justinian strictly forbade quotations from other books than the *Institutes*, the *Digest* and the *Code*: offenders, and judges who allowed quotations from other sources were to be found guilty of the crime of forgery and should be punished accordingly:

> (…). Hasce itaque leges et adorate et observate omnibus antiquioribus quiescentibus: nemoque vestrum audeat vel comparare eas prioribus vel, si quid dissonans in utroque est, requirere, quia omne quod hic positum est hoc unicum et solum observari censemus. Nec in iudicio nec in alio certamine, ubi leges necessariae sunt, ex aliis libris, nisi ab iisdem institutionibus nostrisque digestis et constitutionibus a nobis compositis vel promulgatis aliquid vel recitare vel ostendere conetur, nisi temerator velit falsitatis crimini subiectus una cum iudice, qui eorum audientiam patiatur, poenis gravissimis laborare. / (…), χρῆσθε δὲ τοῖς ἡμετέροις νόμοις, τῶν τοῖς πάλαι βιβλίοις ἐνγεγραμμένων προσέχοντες οὐδενί, οὐδὲ ἀντεξετάζοντες αὐτὰ πρὸς τὰ νῦν κείμενα, διὰ τὸ κἂν εἰ δοκοίη τινά πως ἀλλήλοις μὴ συμφθέγγεσθαι, ἀλλ᾽ οὖν τὸ μὲν πρότερον ἡμῖν ὡς ἀλυσιτελὲς ἀπαρέσαι, τὸ νῦν δὲ τοῦτο δόξαι κρατεῖν. καὶ γὰρ ἀπαγορεύομεν ἐκείνοις τὸ λοιπὸν χρῆσθαι, ταῦτα δὲ δὴ καὶ μόνα πολιτεύεσθαί τε καὶ κρατεῖν συγχωροῦμέν τε καὶ θεσπίζομεν· ὡς ὅ γε ἐπιχειρῶν ἐκ τῶν ἔμπροσθεν βιβλίων, ἀλλ᾽ οὐκ ἐκ τούτων δὴ τῶν δύο βιβλίων μόνων καὶ τῶν διατάξεων τῶν παρ᾽ ἡμῶν συντιθεμένων ἢ γενομένων, χρῆσθαί τισιν νόμοις ἢ τούτους ἐν δικαστηρίοις ἀναγινώσκειν ἤ, εἴ γε δικάζοι, τούτων ὑπ᾽ αὐτῷ δεικνυμένων ἀνέχεσθαι, παραποιήσεως ἔνοχος ἔσται καὶ δημοσίων ἀδικημάτων κριθεὶς τὰ τῆς ποινῆς, εἰ καὶ μὴ λέγοιμεν, ἀλλ᾽ αὐτόθεν πρόδηλον ὡς ὑποστήσεται.[4]

In this passage, four elements can be discerned. First, we come across the order to observe the *Digest*, and to lay to rest all rulings preceding it. Second, the passage contains a reiterated prohibition of the collation of texts, viz. those of the *Digest* and of the sources underlying it. Third, there is the exclusivity clause proper: the explicit pronouncement that the *Digest* is exclusively valid, resulting in the formal abrogation of the writings of the *iurisprudentes* not incorporated into that compilation. Fourth, the passage contains a repeated exclusivity clause, this time extending to Justinian's codification in its entirety. In legal proceedings, it is expressly forbidden to quote from other sources than the *Institutes*, the *Digest* and the *Code*. Transgressors of the prohibition and the judge allowing the transgression are guilty of the *crimen falsitatis* and are subject to its penalty.

Finally, Justinian promulgated the *Digest* as one enormous imperial constitution: as of 30 December 533, the emperor granted the *Digest* – together with the *Institutes* – full force of law. In the words of *Tanta* / *Δέδωκεν*:

4 Const. *Tanta* / *Δέδωκεν*, § 19.

> Leges autem nostras, quae in his codicibus, id est institutionum seu elementorum et digestorum vel pandectarum posuimus, suum obtinere robur ex tertio nostro felicissimo sancimus consulatu, praesentis duodecimae indictionis tertio calendas Ianuarias, in omne aevum valituras (…). / Ταῦτα δὲ δὴ τὰ βιβλία, τά τε τῶν Instituton τά τε τῶν Digeston φαμέν, ἐκ τοῦ πέρατος τῆς τρίτης εὐτυχοῦς ἡμῶν ὑπατείας κρατεῖν θεσπίζομεν, τοῦτ᾽ ἔστιν ἀπὸ τῆς πρὸ τριῶν καλανδῶν Ἰανουαρίων τῆς παρούσης δωδεκάτης ἐπινεμήσεως, εἰς τὸν λοιπὸν ἅπαντα κρατοῦντα χρόνον (…).[5]

As a result of all this, the writings of the ancient *iurisprudentes* – the *ius* – effectively ceased to exist as a source of law in its own right. Henceforth, only one source of law remained: the imperial constitution, the *leges*. And the emperor Justinian himself was the very pinnacle of this entire new legal structure.[6] For, in the final clause of the prohibition of commentaries in const. *Tanta* / *Δέδωκεν*, he explicitly declared that the emperor was the only one invested with the authority to create and interpret laws:

> (…). Si quid vero, ut supra dictum est, ambiguum fuerit visum, hoc ad imperiale culmen per iudices referatur et ex auctoritate Augusta manifestetur, cui soli concessum est leges et condere et interpretari. / (…). εἰ γάρ τι φανείη τυχὸν ἀμφισβητούμενον ἢ τοῖς τῶν δικῶν ἀγωνισταῖς ἢ τοῖς τοῦ κρίνειν προκαθημένοις, τοῦτο βασιλεὺς ἑρμηνεύσει καλῶς, ὅπερ αὐτῷ μόνῳ παρὰ τῶν νόμων ἐφεῖται. (…).[7]

2.

The theme of the relationship between emperor and law had already occupied Justinian some years before.[8] The immediate cause for this involvement appears to have been the fact that Tribonian and the committee who drafted the first edition of the Justinian *Code* had encountered some doubt as to whether a judgement of the emperor ought to be regarded as

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5 Const. *Tanta* / *Δέδωκεν*, § 23.

6 On Justinian as the sole source of law, cf. J.H.A. Lokin, 'The End of an Epoch. Epilegomena to a Century of Interpolation Criticism', in: R. Feenstra / A.S. Hartkamp / J.E. Spruit / P.J. Sijpesteijn / L.C. Winkel, (eds.), *Collatio iuris romani. Études dédiées à Hans Ankum à l'occasion de son 65e anniversaire*, Tome I, (Studia Amstelodamensia ad epigraphicam, ius antiquum et papyrologicam pertinentia, Vol. XXXV, A), Amsterdam 1995, 261-273 (263-265) (repr. in: J.H.A. Lokin, *Analecta Groningana ad ius graeco-romanum pertinentia*, (edited by Th.E. van Bochove), Groningen 2010, 17-30 (19-21)).

7 Const. *Tanta* / *Δέδωκεν*, § 21.

8 Cf. C. Humfress, 'Law and Legal Practice in the Age of Justinian', in: M. Maas, (ed.), *The Cambridge Companion to the Age of Justinian*, Cambridge 2005, 161-184 (168-169).

law. Justinian dealt with this issue in no uncertain terms. For, in a constitution promulgated on 30 October 529 and addressed to the praetorian prefect Demosthenes, Justinian clearly stated that if the emperor had examined a case in court and had pronounced judgement in the presence of the litigants, all judges in the empire had to know that this sentence was legally valid, not only with regard to the case at hand, but for all similar cases as well. Justinian argued: what is more important and august than imperial majesty? Who dares to be so proud as to despise the opinion of the emperor, when even the creators of the ancient law have explicitly and clearly declared that constitutions, which have proceeded from an imperial decree, have force of law? But because we have also come across doubt in the ancient laws whether, if the opinion of the emperor has interpreted a law, this imperial interpretation ought to have force of law, we have both ridiculed this vain over-exactness and decided that it should be corrected. Therefore, Justinian ruled that every interpretation of a law given by the emperor in answer to petitions, or in legal proceedings, or in any other way, ought to be looked upon as confirmed and unquestionable. For, he reasoned, if at the present day the emperor is the only one allowed to create laws, then their interpretation ought also to be reserved for the imperial dignity alone. Justinian continued: Why do nobles take refuge with us when doubt arises in lawsuits and they consider themselves to be unfit or inadequate to decide the case, and why do our ears hear stories about ambiguities on the part of judges, (ambiguities) which happen to arise from laws, if the pure interpretation does not originate from us? Or who else will appear to be capable of solving legal riddles and clarifying them to all, if it not be he to whom alone is granted the right to be the creator of laws? Therefore, after these ridiculous doubts have been disposed of, it is the emperor alone who shall rightly be regarded as both the creator and the interpretor of laws; and this does by no means restrict the founders of the ancient *ius*, because it was the imperial majesty who allowed them this.

> *Imp. Iustinianus A. Demostheni pp.* 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. 1. Quid enim maius, quid sanctius imperiali est maiestate? vel quis tantae superbiae fastidio tumidus est, ut regalem sensum contemnat, cum et veteris iuris conditores constitutiones, quae ex imperiali decreto processerunt, legis vicem obtinere aperte dilucideque definiunt? 2. Cum igitur et hoc in veteribus legibus invenimus dubitatum, si imperialis sensus legem interpretatus est, an oporteat huiusmodi regiam interpretationem obtinere, eorum quidem vanam scrupulositatem tam risimus quam corrigendam esse censuimus. 3. Definimus autem omnem imperatoris legum interpretationem sive in precibus sive in iudiciis sive alio quocumque modo factam ratam et indubitatam haberi. si enim in praesenti leges condere soli imperatori concessum est, et leges interpretari solum dignum imperio esse oportet. 4. Cur autem ex

> suggestionibus procerum, si dubitatio in litibus oriatur et sese non esse idoneos vel sufficientes ad decisionem litis illi existiment, ad nos decurritur et quare ambiguitates iudicum, quas ex legibus oriri evenit, aures accipiunt nostrae, si non a nobis interpretatio mera procedit? Vel quis legum aenigmata solvere et omnibus aperire idoneus esse videbitur nisi is, cui soli legis latorem esse concessum est? 5. Explosis itaque huiusmodi ridiculosis ambiguitatibus tam conditor quam interpres legum solus imperator iuste existimabitur: nihil hac lege derogante veteris iuris conditoribus, quia et eis hoc maiestas imperialis permisit. *Recitata septimo milliario urbis Constantinopolitanae in novo consistorio Iustiniani. D. iii k. Nov. Decio vc. cons.* (529).[9]

3.

The final clause of this constitution – C. 1,14,12,5 – is slightly enigmatic and deserves some comment. For, this clause clearly states that only the emperor shall rightly be looked upon as both creator and interpreter of laws: *tam conditor quam interpres legum solus imperator iuste existimabitur*. However, in the next sentence we read that the present law, viz. C. 1,14,12 in its entirety, in no way diminishes the authority of the creators of ancient jurisprudence: *nihil hac lege derogante veteris iuris conditoribus*. These words appear to imply that the *ius* still existed as a separate source of law in its own right. Thus, we are confronted with the side by side existence of two separate sources of law, the *ius* and the emperor, despite Justinian's assertion that only the emperor ought to be looked upon as creator and interpreter of laws. How is this little riddle to be solved?

As has been said, Justinian promulgated C. 1,14,12 in October 529, i.e. prior to the compilation of the *Digest*. In 529, the *ius* was still very much alive and kicking as an independent source of law. This is clearly shown by the presence of the so-called *Lex citandi* in the first edition of Justinian's *Code*, the *Novus Codex* from April 529. The *Lex citandi* (*Law of Citations*) was originally issued by the emperors Theodosius II and Valentinian III on 7 November 426, and eventually ended up in the *Theodosian Code* from 438.[10] The *Law of Citations* contained a regulation designed to help judges cope with the enormous amount of writings of the ancient jurists, thus enabling the judges to pronounce judgement: CTh. 1,4,3 prescribed which *iurisprudentes* could be cited in the law courts – viz. Papinian, Paul, Gaius, Ulpian and Modestinus (and some other jurists directly quoted by them, such as Scaevola and Julianus) –, and also established a hierarchy between them. The gist of the

9 C. 1,14,12.
10 CTh. 1,4,3 *Impp. Theod(osius) et Valentin(ianus) AA. ad senatum urbis Rom(ae)*.

regulation of the *Law of Citations* was that, in order to find the correct opinion concerning any given legal issue, judges had to weigh the opinion of the various *iurisprudentes* on the relevant legal issue by simply counting their heads and then adopt the opinion of the majority. The presence of the *Lex citandi* in the *Novus Codex* is based on the evidence of a papyrus from the Egyptian town of Oxyrhynchus, viz. P. Oxy. XV 1814. This papyrus contains a register of imperial constitutions adopted into the first book of the *Novus Codex*, citing only title rubrics and inscriptions of constitutions. On the verso of the papyrus we come across a title – numbered as 15 – dealing with the authority of jurists. Only the word *iuris* survives intact, but in all editions the rubric is restored as [*de auctoritate*] *iuris* [*prudentium*]. What follows is the inscription of CTh. 1,4,3, the *Lex citandi*:

> R(ubrica) ιε [de auctoritate] iuris | [prudentium] R(ubrica) | [impp· Theodosius et V]alent· a ad se | [ad] ṣẹ[natu]m.[11]

On the basis of the above, we may assume that the *Law of Citations* featured in the *Novus Codex* as C. 1,15,1. To this can be added that the *Lex citandi* has left no trace whatsoever in the second edition of Justinian's *Code*, the *Codex repetitae praelectionis* from December 534. In this edition of the *Code*, the corresponding title dealing with the authority of the *iurisprudentes* is title 17 of the first book. Its rubric reads:

> De veteri iure enucleando et auctoritate iuris prudentium qui in Digestis referuntur.[12]

As this rubric refers to the authority of *iurisprudentes* whose writings occur in the *Digest*, it is obvious that C. 1,17 reflects a state of affairs after the compilation of the *Digest* and its promulgation in December 533. The contents of C. 1,17 completely concurs with this. For, C. 1,17 contains two constitutions. The first of these (C. 1,17,1) is const. *Deo auctore* which commissioned Tribonian with the compilation of the *Digest*. The second (C. 1,17,2) is none other than const. *Tanta* which officially promulgated the *Digest*.[13]

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11 P. Oxy. XV 1814, ll. 42-45 (ed. M. Amelotti / L. Migliardi Zingale, (a cura di), *Le costituzioni giustinianee nei papiri e nelle epigrafi*, (Florentina studiorum universitas. Legum Iustiniani imperatoris vocabularium. Subsidia, I), Milano 1985^2, 22).

12 C. 1,17 rubr.

13 For this entire section, in particular P. Oxy. 1814 and the *Lex citandi*, cf. S. Corcoran, 'Justinian and His Two Codes: Revisiting *P. Oxy.* 1814', *The Journal of Juristic Papyrology* XXXVIII (2008), 73-111, especially 75 (with full references in note 8), and 95-99; S. Corcoran, 'Anastasius, Justinian, and the Pagans: A Tale of Two Law Codes and a Papyrus', *Journal of Late Antiquity* 2.2 (2009), 183-208 (184 and 186-187); S. Corcoran, 'The *Novvs Codex* and the *Codex repetitae praelectionis*: Justinian and His Codes', in: St. Benoist / A. Daguet-Cagey / Chr. Hoët-van Cauwenberghe, (eds.), *Figures*

As a temporary solution to the above problem, viz. a solution adapted to the circumstances of the year 529, Justinian declared that his constitution (C. 1,14,12) in no way harmed the authority of the creators of ancient jurisprudence, because it was the imperial majesty that had given them the privilege to create law in the first place: *quia et eis hoc maiestas imperialis permisit*. It has been suggested that this phrase may refer to an – imaginary or simply non-extant Augustan – ruling granting certain lawyers the *ius publice respondendi*.[14] However this may be, his statement enabled Justinian to argue that in 529 there was ultimately indeed only one source of law, i.e. the emperor, because it was an emperor who had granted lawyers the privilege to be the creators of ancient jurisprudence. The definitive solution to the above riddle was, of course, reached by the promulgation of const. *Tanta* / *Δέδωκεν* on 16 December 533, which granted the *Digest* full force of law as of 30 December of that year. While promulgating const. *Tanta* / *Δέδωκεν*, Justinian also issued his official ban on the collation of the texts of the *iurisprudentes* and that of the *Digest*, provided the *Digest* with exclusivity, and turned the excerpts of the *iurisprudentes* incorporated into the *Digest* into his own words.[15] The *Digest* was promulgated as one very extensive imperial constitution. In this way, Justinian formally abrogated the *ius* as an independent source of law, leaving the emperor – and his imperial constitutions – indeed as the sole source of law.

4.

The phraseology of C. 1,14,12 appears to be a veritable prequel of Justinian's famous prohibition of commentaries as laid down in const. *Tanta*, § 21. For, the phrases *leges condere soli imperatori concessum est, et leges interpretari solum dignum imperio esse oportet* in C. 1,14,12,3; *is, cui soli legis latorem esse concessum est* in C. 1,14,12,4, and, finally, *tam conditor quam interpres legum solus imperator iuste existimabitur* in C. 1,14,12,5 have a very clear echo in the final clause of the prohibition in const. *Tanta*, § 21: *Si quid vero (...) ambiguum fuerit visum, hoc ad imperiale culmen per iudices referatur et ex auctoritate Augusta manifestetur, cui soli concessum est leges et condere et interpretari*. This connection between the prohibition of commentaries and C. 1,14,12 is already well-known for quite a long time, of course,[16] but how is it to be interpreted? In what way

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d'empire, fragments de mémoire. Pouvoirs et identités dans le monde romain impérial (II^e s. av. n. è. – VI^e s. de n. è.), (Archaiologia), Villeneuve d'Ascq (Lille) 2011, 425-444 (434-435 and 440-443).

14 Cf. in this sense Humfress, 'Law and Legal Practice' (note 8 above), 168-169.

15 For all this, cf. § 1 with the notes 3-5 above.

16 For this, cf. e.g. H.J. Scheltema, 'Das Kommentarverbot Justinians', *TRG* 45 (1977), 307-331 (330-331) (repr. in: H.J. Scheltema, *Opera minora ad iuris historiam pertinentia*, (collegerunt N. van der

can C. 1,14,12 shed light on the prohibition of commentaries, in view of the fact that this prohibition is fraught with problems?[17]

5.

In the prohibition of commentaries in const. *Tanta*, § 21, Justinian first came up with a direct reference to the same prohibition as expressed in const. *Deo auctore*, § 12. He then ruled that none of the present or future *iuris periti* was allowed to append comments – here regardless the exact meaning of this term – to the regulations contained in the text of the *Digest*. Next, the emperor formulated exceptions to his ruling: he allowed translations, or rather transformations, of the Latin text into Greek, in the same order and sequence of words as those of the Latin text; the Greeks called this mode of rendering κατὰ πόδα. The κατὰ πόδας was a new exception: it did not occur in *Deo auctore*. The second exception permitted by Justinian in *Tanta* were captions in headings styled παράτιτλα (*per titulorum suptilitatem adnotare maluerint et ea quae παράτιτλα nuncupantur componere*). Justinian then expressly forbade the *iuris periti* to add other interpretations of regulations, regarding those rather as perversions, and reasoning that by their verbosity the *iuris periti* ought not to cause discredit to his *Digest*, brought about by confusion. The emperor continued to argue that that was exactly what had happened in the case of the old commentators on the Perpetual Edict: by extending a work of modest dimensions in various directions to diverse opinions, they had endlessly stretched it, resulting in a confusion of nearly the entire Roman legal system. Justinian concluded that transgressors of the prohibition would be found guilty of committing forgery, and that their books would be completely destroyed. In case of ambiguity, the judges were obliged to refer the matter to the emperor, who alone had the right to create law and interpret it:

> Hoc autem, quod et ab initio nobis visum est, cum hoc opus fieri deo adnuente mandabamus, tempestivum nobis videtur et in praesenti sancire, ut nemo neque eorum, qui in praesenti iuris peritiam habent, nec qui postea fuerint audeat commentarios isdem legibus adnectere: nisi

Wal, J.H.A. Lokin, B.H. Stolte, Roos Meijering), Groningen 2004, 403-428) (428); G. Falcone, 'The Prohibition of Commentaries to the Digest and the Antecessorial Literature', *SG* IX (2014), 1-36 (15 with further references in note 35).

17 On the prohibition of commentaries in general, cf. Scheltema, 'Kommentarverbot' (note 16 above), *passim*; Falcone, 'Prohibition of Commentaries' (note 16 above), *passim*, with further references in note 1; T. Wallinga, *TANTA / ΔΕΔΩΚΕΝ. Two Introductory Constitutions to Justinian's Digest*, Groningen 1989, 107-116; Sp. Troianos, *Le fonti del diritto bizantino*. Traduzione a cura di P. Buongiorno, Torino 2015, 55-57 with further references.

> tantum si velit eas in Graecam vocem transformare sub eodem ordine eaque consequentia, sub qua et voces Romanae positae sunt (hoc quod Graeci κατὰ πόδα dicunt), et si qui forsitan per titulorum suptilitatem adnotare maluerint et ea quae παράτιτλα nuncupantur componere. Alias autem legum interpretationes, immo magis perversiones eos iactare non concedimus, ne verbositas eorum aliquid legibus nostris adferat ex confusione dedecus. Quod et in antiquis edicti perpetui commentatoribus factum est, qui opus moderate confectum huc atque illuc in diversas sententias producentes in infinitum detraxerunt, ut paene omnem Romanam sanctionem esse confusam. quos si passi non sumus, quemadmodum posteritatis admittatur vana discordia? si quid autem tale facere ausi fuerint, ipsi quidem falsitatis rei constituantur, volumina autem eorum omnimodo corrumpentur. Si quid vero, ut supra dictum est, ambiguum fuerit visum, hoc ad imperiale culmen per iudices referatur et ex auctoritate Augusta manifestetur, cui soli concessum est leges et condere et interpretari.[18]

6.

One of the problems regarding the prohibition of commentaries is the question why this prohibition only pertained to the *Digest*, and why it did not relate to the *Institutes* and in particular the *Code* as well.[19] In other words: why was the prohibition omitted from const. *Cordi* which officially promulgated the second edition of the *Code* on 16 November 534?

Various attempts have been made to deal with this issue. Scheltema, e.g., argued that the prohibition explicitly related to Justinian's codification in its entirety, and interpreted the wordings of the ban in both *Deo auctore* and *Tanta* in such a way as to fit in with this point of view.[20] Other scholars maintained that the prohibition referred to the *Institutes* and the *Code* only implicitly. Both explanations have been refuted by reason of the fact that the wording of the prohibition is incompatible with them.[21] In his turn, Wallinga tried to find a solution via the difference in character and style between the *Digest* and the *Code*, but ultimately concluded that his explanation remained somewhat unsatisfactory.[22] However all

18 Const. *Tanta*, § 21.

19 On this issue in general, cf. e.g. Falcone, 'Prohibition of Commentaries' (note 16 above), 3-5 with further references in note 3.

20 Scheltema, 'Kommentarverbot' (note 16 above), 326-327 (= 423-425)

21 Cf. Wallinga, *TANTA / ΔΕΔΩΚΕΝ* (note 17 above), 112-113; Falcone, 'Prohibition of Commentaries' (note 16 above), 4-5, and 3 note 3 (literature on the implicit reference of the prohibition to the entire codification).

22 Cf. Wallinga, *TANTA / ΔΕΔΩΚΕΝ* (note 17 above), 113: 'I think that the different character of the Digest and the Code may well be the explanation. The Code was not a new thing; a similar one had

this may be, an answer to the above questions is important, if only because Falcone recently argued that if Justinian had really intended his prohibition of commentaries to be a measure to protect the authenticity of the text (viz. of his codification), he would have issued this ban not only with reference to the *Digest*, but to the *Institutes* and the *Code* as well.[23]

7.

In the end, various factors may have contributed to Justinian's decision to issue his prohibition of commentaries only with reference to the *Digest*. But it is at this point that C. 1,14,12 comes into play. We have already seen that three phrases from this constitution have a very clear echo in the final clause of the prohibition in const. *Tanta*, § 21.[24] But there is more to be said about this. For, C. 1,14,12 provides very clear evidence of Justinian's preoccupation with the imperial prerogative of being the sole interpreter of the laws.[25] Even at the time of the promulgation of the constitution, viz. in the year 529, when the *ius* still existed as an independent source of law in its own right, including its many conflicting opinions and interpretations, Justinian exhibited a certain 'touchiness' on the subject. He was very insistent on his role of being the only one allowed to give interpretations. The promulgation of the *Digest* as one imperial constitution in 533 meant that Justinian had, at least legally speaking, eliminated all those conflicting interpretations and opinions of the old *iurisprudentes* whose text fragments had been adopted into the *Digest*. The official promulgation of the *Digest* formally abrogated the *ius* as an independent source of law: by this, Justinian had appropriated the words of the ancient *iurisprudentes* and made them his very own.[26]

Henceforth, there existed only the *Digest*: legally speaking, it contained Justinian's selection of excerpts from the writings of the old *iurisprudentes* and, more importantly, the emperor's own interpretation thereof. He could formally regard the *Digest* as his very own work: from a legal perspective, it was indeed the mouth of the emperor that hath spoken the *Digest*. Seen against this background, Justinian was most probably extra keen on the

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been in use for almost a century. Moreover, its style was very different from the Digest's: more sober and to the point. The Digest, summarizing the works of the jurists and retaining their more elaborate style, was probably regarded as a potential invitation to start thinking about legal issues and possibly writing down some notes in the margins. Because of the similarity in style, these could then more easily be mistaken for parts of the text than in the case of the Code. But this remains a somewhat unsatisfactory explanation, and unless the absence of a prohibition of commentaries in constitutio Cordi is ever found to be the result of a faulty transmission of the text, it will always remain a problem.'

23 Cf. Falcone, 'Prohibition of Commentaries' (note 16 above), 18-19 with the notes 45 and 46.

24 Cf. § 4 above.

25 Cf. the contents of C. 1,14,12 as rendered in § 2 above.

26 For all this, cf. § 1 above.

possibility of textual corruption, more so than in the case of the *Code* and the *Institutes*. It is quite possible that the elimination of the old conflicting interpretations led Justinian to consider his *Digest* text as vulnerable in terms of running an increased risk of corruption by the illicit addition of marginal comments – in whatever form, and again regardless the exact meaning of the term – containing new diverging interpretations but pretending to be authentic *Digest* text. In any case, the emperor would surely feel such additions a personal affront, an infringement of his imperial prerogative as sole interpreter of the laws. Seen from this perspective, it is no more than logical to argue that Justinian left no stone unturned in order to preclude the possibility of new additions being made to his *Digest*, additions containing new interpretations that might openly challenge 'his' interpretation as established in the *Digest* text. For Justinian, the appropriate means to avoid this was, of course, to issue his prohibition of commentaries pertaining to the *Digest* alone, first in 530 in const. *Deo auctore*, and then in greater detail in 533 in const. *Tanta* / *Δέδωκεν*. After the completion of the *Digest* text, and even when the work on its compilation was first commissioned, the prohibition of commentaries was merely the logical sequel to C. 1,14,12.

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