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## The prohibition of commentaries to the Digest and the antecessorial literature

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*Published in:*  
Subseciva Groningana

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*Document Version*  
Publisher's PDF, also known as Version of record

*Publication date:*  
2014

[Link to publication in University of Groningen/UMCG research database](#)

*Citation for published version (APA):*  
Falcone, G. (2014). The prohibition of commentaries to the Digest and the antecessorial literature. *Subseciva Groningana*, IX, 1-36. <http://ugp.rug.nl/sg/article/view/28766/26138>

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## THE PROHIBITION OF COMMENTARIES TO THE DIGEST AND THE ANTECESSORIAL LITERATURE\*

### 1.

The prohibition of commentaries on the Digest is formulated by Justinian in special passages of the introductory constitutions of the Digest (*Deo auctore* and *Tanta/Δέδοκεν*), which I shall immediately transcribe in full:

const. *Deo auct.* § 12: Nostram autem consummationem, quae a vobis deo adnuente componetur, Digestorum vel Pandectarum nomen habere sancimus, nullis iuris peritis in posterum audentibus commentarios illi applicare et verbositate sua supra dicti codicis compendium confundere: quemadmodum et in antiquioribus temporibus factum est, cum per contrarias interpretantium sententias totum ius paene conturbatum est: sed sufficiat per indices tantummodo et titulorum subtilitatem quae παράτιτλα nuncupantur quaedam admonitoria eius facere, nullo ex interpretatione eorum vitio oriundo.

const. *Tanta* § 21: 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 tantum si velit eas in graecam vocem transformare sub eodem ordine eaque consequentia, sub qua voces Romanae positae sunt (hoc quod Graeci κατά

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\* I believed that this issue could not be absent from a research initiative dealing with the early Byzantine legal teaching literature, since it essentially relates to the very presence of this literature. Moreover, to this theme the founder of the prestigious Groningen school, Herman Jan Scheltema, devoted a specific contribution, which not only, as usual, shed light on the intricate Byzantine textual material, but also marked a real turning point in historiography, which, in essence, really can be separated into 'pre-' and 'post-Scheltema'. I do not know if the visible fruit of the survey offered in this article is commensurate with the honor, that my friends and colleagues Byzantinists and the Faculty of Law of the University of Groningen have granted to me with the appointment as Honorary Professor at "*HJ Scheltema-Chair of Byzantine Law*" for the past two years. Let me say though, that discussing assiduously with the pages of this Master, filling them with thick παραγραφαί, retracing his steps for myself, going from those pages to the sources and vice versa during a tormented maturation of ideas, made me feel, proudly, as if I participated in the study community which has formed around his illustrious teaching. – Palermo, October 2013.

πόδα dicunt), et si qui forsitan per titulorum subtilitatem adnotare maluerint et ea quae παράτιτλα nuncupantur componere. Alias autem legum interpretationes, immo magis perversiones eos iactare non concedimus, ne verborum 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 constituentur, 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.

const. Δέδωκεν § 21: (...) ἀπαγορεύομεν τὸ μηδένα θαρρήσαι μήτε τῶν νῦν ὄντων μήτε τῶν ὕστερον ἐσομένων τούτων δὴ τῶν νόμων ὑπομνήματα γράφειν, πλὴν εἰ μὴ βουλευθεῖεν εἰς μὲν τὴν Ἑλλήνων γλώτταν αὐτὰ μεταβαλεῖν, μόνη δὲ τῇ κατὰ πόδα καλουμένη χρήσασθαι τῶν νόμων ἔρμηνεία, καὶ εἴ τι κατὰ τὴν τῶν ὀνομαζομένων παρατίτλων ὡς εἰκὸς προσγράψαι βουλευθεῖεν χρεῖαν· ἕτερον δὲ παντάπασιν μὴδ' ὀτιοῦν περὶ αὐτὰ πράττειν μηδὲ αὐθις δοῦναι στάσεως τε καὶ ἀμφισβητήσεως καὶ πλήθους τοῖς νόμοις ἀφορμῆν· τοῦτο ὅπερ καὶ πρόσθεν ἐπὶ τῆς τοῦ ἡδίκτου γέγονεν νομοθεσίας, ὥστε αἰετοὶ γε οὕτω βραχύτατον αὐτὸ καθεστὸς, ἐκ τῆς τῶν ποικίλων ὑπομνημάτων διαφορᾶς εἰς ἀναριθμητὸν ἐκταθῆναι πλῆθος. εἰ γὰρ τι φανεῖται τυχὸν ἀμφισβητούμενον ἢ τοῖς τῶν δικῶν ἀγωνισταῖς ἢ τοῖς τοῦ κρίνειν προκαθημένοις, τοῦτο βασιλεὺς ἐρμηνεύσει καλῶς, ὅπερ αὐτῷ μόνῳ παρὰ τῶν νόμων ἐφέεται. ὡς ὃ γε θαρρῶν παρὰ ταύτην ἡμῶν τὴν νομοθεσίαν ὑπόμνημά τι καταθέσθαι κατὰ σχῆμα τῆς ἡμετέρας κελεύσεως ἀλλοιότερον, οὗτος ἴστω τοῖς τῆς παραποιήσεως ἐνεξόμενος νόμοις, τοῦ παρ' αὐτοῦ συντεθέντος ἀφαρπαζομένου καὶ πᾶσιν διαφθειρομένου τρόποις.

With these rulings, taken together, Justinian categorically prohibits an activity designated as *commentarios applicare*, *commentarios adnectere*, ὑπομνήματα γράφειν; and justifies this prohibition with the concern that the occurrence of divergent interpretations would end up affecting the *compendium* carried out with the compiling collection. On the other hand, the emperor admits two further operations: the literal translations, respectful of the position that words have in their original context, and an activity described as *admonitoria facere* and *adnotare*, to be achieved through *tituli* and *indices* ('called παράτιτλα in Greek').

Faced with such peremptory provisions, and furthermore accompanied by the provision of the very serious penalty of *falsum* for offenders, the question always spontaneously arises of how the existence was possible, immediately following the

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publication of the Digest, of a written production connected to the teaching activity of the *antecessores*, that is not attributable to the two types of writing tolerated.

Although the matter has been repeatedly addressed specifically,<sup>1</sup> or perhaps because of this, I thought it appropriate to devote a special contribution to it, also because of the highly pre-conditional role that it assumes with respect to any type of investigation relating to Byzantine legal literature.<sup>2</sup>

### 2.

The starting point of our whole discourse is the fact that the ban was established by Justinian only for the Digest, and not also for the Codex or for the Institutes.<sup>3</sup>

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- 1 See in particular: A. Berger, 'The Emperor Justinian's ban upon the commentaries to the Digest', *BIDR* 55-56 (1951), 124-169; Id., 'Zu Justinians Verbot der Digestenkommentierung', *Labeo* 4 (1958), 66-74; F. Pringsheim, 'Justinian's Prohibition of Commentaries to the Digest', *RIDA* 5 (1950), 383-415 = Id., *Gesammelte Abhandlungen*, II, Heidelberg 1961, 86-106; G. Maridakis, 'Justinians Verbot der Gesetzeskommentierung', *SZ* 73 (1956), 369-375; P. Pescani, 'Sul divieto di Giustiniano a commentari del Digesto', *Labeo* 7 (1961), 41-54; H.J. Scheltema, 'Das Kommentarverbot Justinians', *TRG* 45 (1977), 307-331 = Id., *Opera minora ad iuris historiam pertinentia*, (collegerunt N. van der Wal, J.H.A. Lokin, B.H. Stolte, Roos Meijering), Groningen 2004, 403-428; H. Ankum, 'La 'codification' de Justinien était-elle une véritable codification?', in: *Liber amicorum John Gilissen*, Antwerpen 1983, 1-17 (8-9); Van der Wal/Lokin, *Delineatio*, 36-37; T. Wallinga, *TANTA/AEAOIKEN. Two Introductory Constitutions to Justinian's Digest*, Groningen 1989, 107-118; E. Klingenberg, 'Justinians Verbot der Digestenkommentierung', in: J. Assmann/B. Gladigow, [ed.], *Text und Kommentar*, München 1995, 407-422; M. Amelotti, 'Giustiniano interprete del diritto', in: *Nozione, formazione e interpretazione del diritto: dall'età romana alle esperienze moderne. Ricerche dedicate al professor Filippo Gallo*, (4 vols.), Napoli 1997, I, 3-9; M. Campolunghi, *Potere imperiale e giurisprudenza in Pomponio e Giustiniano*, II.1, Perugia 2001, 243-270; II.2, Perugia 2007, 241-311.
  - 2 As in G. Falcone, 'Premessa per uno studio sulla produzione didattica degli antecessores', in: J.H.A. Lokin/B.H. Stolte, [ed.], *Introduzione al diritto bizantino. Da Giustiniano ai Basilici*, Pavia 2011, 147-157 (157).
  - 3 In this sense, e.g., H. Peters, *Die oströmischen Digestenkommentare und die Entstehung der Digesten*, Leipzig 1913, 105; P. Bonfante, *Storia del diritto romano*, II, Roma 1934<sup>4</sup>, 61; Berger, 'The Emperor Justinian's ban' (note 1 above), 160-165 (for further preceding literature p. 161 note 2); more recently, D. Simon, 'Aus dem Kodexunterricht des Thalelaios. A. Methode', *SZ* 86 (1969), 334-383 (337); Klingenberg, 'Justinians Verbot' (note 1 above), 409; R. Meijering, 'Anatolius and the Codex', in: J.H.A. Lokin/R. Meijering, [ed.], *Anatolius and the Excerpta Vaticana et Laurentiana. Edition and Commentary*, Groningen 1999, 123-267 (267 nt. 45). On the other hand, in the sense of an explicit reference also to the Code and the Institutes, cf. Scheltema, 'Das Kommentarverbot' (note 1 above) 327 = *Opera minora*, 424-425, followed on this point by Ankum, 'La 'codification' de Justinien' (note 1 above), 8 and note 23. Other scholars have held that the ban, while explicitly formulated only for the Digest, is to be understood as implicitly thought also for the other two collections: thus, for example, B. Kübler, *Geschichte des römischen Rechts*, Leipzig 1925, 434; H.F. Jolowicz, *Historical Introduction to the study of Roman Law*, Cambridge 1932, 487; S.

The exclusive reference to the Digest in const. *Deo auct.* § 12 and in const. *Tanta/Δέδωκεν* § 21 might appear, at first glance, obvious and inconclusive in relation to the range of the prohibition, since the specific object of these constitutions is the Digest. However, this assumption becomes important because of the fact that these same constitutions had not failed to mention in conjunction the Digest, the Codex, and the Institutes, with the drawing up of the ban on using legal texts in the courts not incorporated in the three compilations;<sup>4</sup> and because of the fact that this joint mentioning of the three compilations occurs only a short distance from the prohibition of commentaries: in const. *Deo auctore*, even in the previous §, in const. *Tanta/Δέδωκεν*, just two §§ before. If there had been an imperial will to extend the ban to all collections, the author of the constitutions would have had no difficulty devising, also in this case, an extended reference. This did not happen, neither at the time of promulgating the three constitutions nor with the insertion of the two Latin constitutions in C. 1,17 *De veteri iure enucleando* (...).

Even more significant, then, is the fact that the prohibition of commentaries is not invoked in const. *Cordi*, which accompanies the publication of the second Code, if one considers that, on the other hand, in the same constitution (§ 5) a different prohibition is repeated, the prohibition of *siglae*,<sup>5</sup> which had already been established in the constitutions *Deo auctore* (§ 13), *Tanta/Δέδωκεν* (§ 22) and *Omnem* (§ 8).

On the other hand, the only specific argument that has been put forward to argue that the ban had been conceived by Justinian also for the Code and the Institutes cannot be accepted. In particular, it was argued that the *eadem leges* mentioned in const. *Tanta* § 21 (...*nemo audeat commentarios isdem legibus adnectere*...) are the *leges* mentioned in the words of § 19 *hasce leges adorate et observate*, which would allude to the texts collected in the Digest, the Code and the Institutes.<sup>6</sup> However, these very words of § 19 refer, in fact, only to the texts of the Digest, as is demonstrated by the fact that they are embedded between two allusions to the Digest, and specifically between the allusion to the *opus*

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Riccobono, *Lineamenti della storia delle fonti e del diritto romano*, Milano 1949, 233 ('secondo il pensiero dell'Imperatore [...] dovevano senza dubbio valere anche per il Codice e le Istituzioni'); L. Chiazzese, *Introduzione allo studio del diritto romano*, Palermo 1958<sup>3</sup>, 421; and, in more recent times, F. Gallo, 'La codificazione giustiniana', *Index* 14 (1986), 33-46 (37-38); Campolunghi, *Potere imperiale* (note 1 above), II.1, 244-245 note 103.

4 As in Berger, 'The Emperor Justinian's ban' (note 1 above), 160.

5 Const. *Cordi* § 5: *Cuius scriptura ad similitudinem nostrarum institutionum et digestorum sine ulla signorum dubietate conscribi iussimus*. Cf., again, Berger, 'The Emperor Justinian's ban' (note 1 above), 160.

6 As in Scheltema, 'Das Kommentarverbot' (note 1 above), 327 = *Opera minora*, 424-425; and in Ankm, 'La 'codification' de Justinien' (note 1 above), 8 and note 23.

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*saluberrimum* and the statement *omne quod hicpositum est ...observari censemus*.<sup>7</sup> Rather, the mention of *eaedem leges* in § 21 can be explained in two different ways, which both call into question only the Digest: on the one hand, if we aim at a connection with an earlier use of the term *leges*, we must think – rather than the distant mention of § 19 – of the mention of *leges* in the sense of texts collected in the Digest, which appears immediately before, in § 20a;<sup>8</sup> on the other hand, the comparison with the corresponding passage of const. Δέδωκεν § 21, in which ‘these νόμοι’ is the explanation of ‘this νομοθεσία’ (the Digest),<sup>9</sup> may suggest an interpretation of the *eaedem leges* of const. *Tanta* § 21 as an explanation of the words *hoc opus* from the beginning of the same paragraph, alluding once again to the Digest.

Moreover, a reference to the prohibition only to the Digest coordinates well with the very purpose of the prohibition. It is appropriate to focus specifically on this point.

### 3.

The purpose of the prohibition was laid down by Justinian explicitly and unambiguously both at the time of the presentation of the compiling project and upon completion of the work: the prohibition is intended to prevent the occurrence of divergent interpretations which would call into question the outcome of the *compendium* by increasing indefinitely the legal materials. In support of its action the emperor cites the fact that in the past, in his opinion, almost the entire legal framework had been ‘disturbed’ and ‘made confused’ because of the proliferation of conflicting stances: this situation occurred in particular

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7 Const. *Tanta* § 19: *Haec igitur omnia scientes, patres conscripti et omnes orbis terrarum homines, gratias quidem amplissimas agite summae divinitati, quae vestris temporibus tam saluberrimum opus servavit: quo enim antiquitas digna divino non est visa iudicio, hoc vestris temporibus indultum est. 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 (...).*

8 Const. *Tanta* § 20: *Ne autem incognitum vobis fiat, ex quibus veterum libris haec consummatio ordinata est, iussimus et hoc in primordiis digestorum nostrorum inscribi, ut manifestissimum sit, ex quibus legislatoribus quibusque libris eorum et quot milibus hoc iustitiae Romanae templum aedificatum est. § 20a.: Legislatores autem vel commentatores eos elegimus, qui digni tanto opere fuerant et quos et anteriores piissimi principes admittere non sunt indignati, omnibus uno dignitatis apice impertito nec sibi quodam aliquam praerogativam vindicante. Cum enim constitutionum vicem et has leges obtinere censuimus quasi ex nobis promulgatas, quid amplius aut minus in quibusdam esse intellegatur, cum una dignitas, una potestas omnibus est indulta?.* In this sense, Wallinga, *TANTA/ΔΕΔΩΚΕΝ* (note 1 above), 113.

9 In fact, the repetition of the same demonstrative adjective (...τὴν νομοθεσίαν ἀπορισθῆναι ταύτην ἐγκελεύόμενοι (...); (...) τούτων δὴ τῶν νόμων ὑπομνήματα...) shows that the νόμοι to which the prohibition refers are the same that put together the νομοθεσία-Digest. On the use of νομοθεσία to indicate the Digest, cf. *infra*, n. 5.

during and because of the interpretative work carried out by the jurists on the praetorian edict.<sup>10</sup> The ban, therefore, reflects Justinian's concern to not re-expose the *leges* to a *vana discordia*, and it is significant that this motivation is engraved at the centre of the overall arrangement, immediately before determining the penalty for offenders, with an incisive rhetorical question: *Quos si passi non sumus, quemadmodum posteritatis admittatur vana discordia?*

In addition to the objective evidence of the overall content is illuminating the specific vocabulary, which finds correspondence in certain terminological and conceptual choices adopted by Justinian in other legislative interventions.

Thus, the negative meaning of *verbositas* in relation to disputes of interpretation is encountered in the sequence of C. 6,38,4: *tanta auctorum varietas – omni huiusmodi verbositate explosa*; and it conforms to the use of *prolixitas* in C. 7,47,1: *huiusmodi prolixitatem (...) in angustum coartare*, and in const. *Cordi* § 1: *omne ius antiquum supervacua prolixitate liberum...* (thanks to the constitutions with which Justinian has cut off the *altercationes* of the jurists).

Similarly, the use of *compendium* and of the adverb *moderate* (*opus moderate confectum*) with reference to the limited size (of the Digest and the edict respectively) in comparison with the interpretations' indefinite dilation, corresponds with the fact that the imperial interventions which eliminated the accumulation of interpretative disputes are often represented in terms of concise and incisive brevity; see for instance C. 3,33,13: *auctorum iurgium decedentes, compendioso responso omnem dubitationem resecamus*; C. 3,33,14: *antiquitas dubitabat (...) tales altercationes decedentes (...) paucissimis verbis totam eorum ambiguitatem delevimus*; C. 5,4,24: *sic etenim et antiqui iuris contentio dirimetur et immensa librorum volumina ad mediocrem modum tandem pervenient*; C. 6,38,4,1: *et si quis eorum altercationes singillatim exponere maluerit, nihil prohibet non leve libri volumen extendere*; C. 6,58,13: *huiusmodi dubitationem compendioso responso duximus esse finiendam*; C. 7,40,1: *tantae moles altercationum, compendiosis sanctionibus*; and finally C. 7,47,1: *huiusmodi prolixitatem (...) in angustum coartare*.

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10 Despite the fact that very authoritative scholars have thought that the *commentatores* of const. *Tanta* § 21 (as already the *interpretantes* of const. *Deo auct.* § 12) were post-classical scholars (F. Wieacker, 'Lateinische Kommentare zum Kodex Theodosianus', in: *Symb. Freiburg. in honorem O. Lenel*, Leipzig 1931, 259-356 (313); A. Guarino, 'La compilazione dei Digesta Iustiniani', in: *Studi in onore di Gaetano Scherillo*, II, Milano 1972, 717-748 (741) = *Pagine di diritto romano*, IV, Napoli 1994, 446), I believe that the specific reference to the edict – *quod et in antiquis edicti perpetui commentatoribus factum est* – can only be understood as referring to the work of the classical jurists; cf., moreover, the correspondence with the use of *commentatores* in the opening of const. *Tanta* § 20, explicitly referring to the classical jurists.

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Again, for the reference to the confusio created by the occurrence of conflicting opinions see the sequence of C. 7,40,3: (...) apud veteres agitabatur (...) – Sed et in iudiciis in multis casibus tales altercationes ventilatas invenimus, (...) – Sancimus itaque nullam in iudiciis in posterum locum habere talem confusionem(...),<sup>11</sup> as well as the passage of const. Imperatoriam § 2, in which Justinian recalls that, thanks to the work of the (first) Code, the multiple constitutions previously confusae had been brought by him to consonantia.

Finally, for the concept of ‘infinity’ as opposed to a defined size (*opus moderate confectum (...) in infinitum detraxerunt*) see, still regarding the multiplicity of conflicting interpretations, C. 7,47,1: *dubitaciones antiquae in infinitum productae sunt – huiusmodi prolixitatem (...) in angustum coartare – finis antiquae prolixitatis.*

From another point of view, the *incipit* of const. *Deo auctore* provides a further, indirect, but very significant clue:

const. *Deo auct.* § 12: Nostram autem consummationem, quae a vobis deo adnuente componetur, Digestorum vel Pandectarum nomen habere sancimus, nullis iuris peritis in posterum audentibus commentarios illi applicare (...).

I refer to the fact that the ban is immediately and resolutely linked to the naming of the collection.<sup>12</sup> The author of this text did not reveal the meaning of the particular naming (and this makes the clue indirect). But this is explained by const. *Tanta* § 1:

Nomenque libris imposuimus Digestorum seu Pandectarum, quia omnes disputationes et decisiones in se habent legitimas et quod undique fuit collectum, hoc in sinus suos receperunt, (...).

The name is explained with reference to two circumstances: a) the work contains within it all possible *disputationes* and *decisiones legitimae*, i.e. all interpretative discussions and determinations which end them, and b) the work contains material that has been collected

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11 It is worth quoting – even if, naturally, what is directly conclusive is the Justinian material – the following *incipit* of the emperor Leo’s constitution in C. 6,60,4, which embodies some of the conceptualizations considered here: *Omnem ambiguitatis confusionem amputantes hac liquida et compendiosa lege sancimus (...).*

12 Also in the other case in which, in one of the introductory constitutions, Justinian introduces a ban with the formula *nemine audente*, it constitutes an immediate consequence of what is said immediately before; const. *Tanta* § 10: *Et ex 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 his quae nostra auctoritas introduxit, quia multa et maxima sunt, quae propter utilitatem rerum transformata sunt.*



to ‘put safe’ (*in sinos suos receperunt*), remedying the previous situation, described in the same § 1, in which *ipsa vetustatis opera* seemed *dissoluta* and *omnia* (i.e. all classical writings filtered) were *effusa* in more than three hundred thousand verses. If we admit that even the author of the const. *Deo auctore* had in mind these concepts underlying the titles of the collection, the aforementioned close connection between the name of the collection and the prohibition is itself a further expression of Justinian’s concern to avoid re-exposing the *leges* to initiatives that would bring the germ of the *ius controversum* and indefinitely increase the amount of legal material.

Now, the overcoming of the numerous lawyers’ *altercationes*, made with the *L decisiones* and with the *aliae constitutiones ad commodum operis pertinentes*, was the main pride of Justinian in relation to the putting together of the Digest. It is clearly evidenced, on the one hand, by repeated references in the introductory constitutions (const. *Tanta* § 10: (...) *et si quid inter eos dubitabatur, hoc iam in tutissimam pervenit quietem, nullo titubante relicto*; const. *Tanta* § 11: (...) *Admonuimus autem eos, ut memores etiam nostrarum fiant constitutionum, quas pro emendatione iuris promulgavimus, (...) ut sit manifestum et quid antea vacillabat et quid postea in stabilitatem redactum est*; const. *Cordi* § 1: (...) *tam quinquaginta decisiones quam alias ad commodum propositi operis pertinentes plurimas constitutiones promulgavimus, quibus (...) omne(que) ius antiquum supervacua prolixitate<sup>13</sup> liberum et enucleatum in nostris institutionibus et digestis reddidimus*); on the other hand, by the fact that the emperor emphatically considers the achievement of *moderatio* and of *legitima veritas* the most significant merit of the compiling work on the classical texts:

const. *Tanta* § 12: (...) *Omnibus itaque hominibus eandem sanctionem manifestam facere necessarium esse perspeximus, ut sit eis cognitum, quanta confusione et infinitate absoluti in quantam moderationem et legitimam veritatem pervenerunt: legesque in posterum habeant tam directas quam compendiosas (...).*<sup>14</sup>

13 We recall the reference to the *supervacua prolixitas* and to the *verbositas* in relation to the ancient jurisprudential disputes: *supra*, in the text.

14 The text, which describes the result of the compiling work, must be read taking into account the whole § 10, which illustrated the execution of the same work from within: *Tanta autem nobis antiquitati habita est reverentia, ut nomina prudentium taciturnitati tradere nullo patiamur modo: sed unusquisque eorum, qui auctor legis fuit, nostris digestis inscriptus est: 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 ex 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 his quae nostra auctoritas introduxit, quia multa et maxima sunt, quae propter utilitatem rerum transformata sunt.*

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The two terms, *moderatio* and *veritas*, that express the compilatory result allude to the elimination of *infinitas* and of *confusio*, and these negative connotations of the past consist, respectively, in the accumulation of vast and dispersed legal material and in the lack of clarity and precision because of the presence of conflicting data which involve *dubitationes* and *altercationes*.<sup>15</sup> This means that in the formulations of the ban, words such as *compendium confundere, opus moderate confectum in infinitum detrahere, Romanam sanctionem confundere*, allude precisely to the situations of the past, the overcoming of which Justinian presents as the most significant merit of the Digest's compiling initiative and the main improvement over the old state of things. Consequently, the justification of the ban through the reference to the negative example of the past, consisting in the occurrence of *contrariae sententiae* of the *edicti commentatores* (as of the *interpretantes* in const. *Deo auct.* § 12), takes on a particularly pregnant meaning.

The preceding justifies, as mentioned, the fact that the ban was designed by Justinian exclusively for the Digest.

The *commentarii/ὑπομνήματα*, clearly depicted as on the same level of interventions by the *commentatores* that made the edict and even the entire *ius* 'confused' in the given sense, would have been a catalyst of a potential new proliferation of conflicting interpretations, and this new proliferation would have ruined the success of the elimination of lawyers' *altercationes* that had been accomplished precisely for the *emendatio* of the *vetus ius* and the realization of the *consummatio*-Digest, and that was Justinian's great pride.<sup>16</sup> On the other hand, the *periculum* of a rebirth of *ius controversum* through the *commentarii/ὑπομνήματα* had to be warned about (and with it, the need for the ban) only for the Digest, and not for the Code or the Institutes, also on account of the material from which the three collections were put together. The material in the Digest was already drenched in controversy. It is often articulated through a problematizing and 'open' approach, comparisons between *rationes* and debates between *auctores* that had resulted

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*Adeo ut et si principalis constitutio fuerat in veteribus libris relata, neque ei pepercimus, sed et hanc corrigendam esse putavimus et in melius restaurandam. Nominibus etenim veteribus relictis, quidquid legum veritati decorum et necessarium fuerat, hoc nostris emendationibus servavimus. Et propter hanc causam et si quid inter eos dubitabatur, hoc iam in tutissimam pervenit quietem, nullo titubante relicto.*

15 On this point, I refer to my article 'La veritas delle leges: C.7.62.39.2a; cost. Tanta §§ 10 e 12', in: C. Cascione/C. Masi, [ed.], *Quid est veritas?*, Napoli 2013, 451-458 (455-457).

16 H.J. Scheltema, 'Les Quinquaginta decisiones', *SG I* (1984), 1-9 (9) = *Opera minora*, 158-162 (162), acutely observed that the fact that some of the *L decisiones* were inserted into the Code, even though the Digest already received their innovative content, did not respond to a legal need: 'Les décisions reprises au Code devaient conserver le souvenir de la grande réforme judiciaire; elles devaient montrer à la postérité l'image d'un Justinien arbitrant les différences des célèbres jurisconsultes du passé et par conséquent l'emportant sur eux'.

in a *verius est* or a *verius videtur*: it was by its very nature material that lent itself (or could be seen as suitable for) to soliciting personal stances from the interpreters and, therefore, to fuelling further *ius controversum*.<sup>17</sup> Otherwise, the texts collected in the Code – despite being subject to clarifications, possibly as a result of personal opinion, relating to the findings of particular elements of the case – contain clear-cut imperial determinations, not themselves set upon a controversial or problematic point of view.<sup>18</sup> As for the Institutes, the fact in itself that it was an exposition of *prima legum cunabula* is irrelevant,<sup>19</sup> since an introductory didactic work could also be made through frequent references to conflicting positions, as shown by the Institutes of Gaius, hitherto used for teaching. Rather, the fact is relevant that precisely Gaius’ topos of references to opposing opinions and solutions (which might have appear as opportunities for the formation of *contrariae sententiae interpretantium*), was overtaken in the imperial manual through a plain and unproblematic representation of the institutions.

In conclusion, that the creative-interpretative monopoly of the emperor – reiterated also in const. *Tanta/Δέδωκεν* § 21, as we shall see in a moment – is of general application is undeniable.<sup>20</sup> But what we have to consider is the range of a prohibition whose specific object is a particular sort of writing, the *commentarii/ὑπομνήματα*: and such a prohibition is formulated with exclusive reference to the Digest. Thus the question at the centre of this investigation, i.e. the existence of a literary production by the *antecessores* despite the prohibition, must be defined, in accordance with the formal aspect of the Justinian wording, in respect of the production on the Digest.<sup>21</sup>

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17 Similarly, J.E. Spruit, *Enchiridium. Overzicht van de geschiedenis van het Romeins privaatrecht*, Deventer 1975, 248.

18 I consider Berger’s reference (‘The Emperor Justinian’s ban’ (note 1 above), 163-164) to the fact that ‘even in classical times, imperial constitutions were not an object of controversial literature’ unproductive. Similarly, it seems to me that the other considerations of this scholar do not affect the substance, which, I think, is the overall nature of the material collected therein.

19 Contrary to what Berger, ‘The Emperor Justinian’s ban’ (note 1 above), 162-163, believed. For his part, F. Wieacker, *Römische Rechtsgeschichte*, II, München 2006, 300 thinks that with respect to the Code and the Institutes perhaps it was regarded as obvious that ‘vor Gericht nur authentisches Kaiserrecht zitiert werden konnte’: this reading is connected to the idea (*ibidem*) that the prohibition was intended to prevent litigants from adding (*adnectere*), in court, to the citation of the Digest also the commentaries (*infra*, note 81).

20 Gallo, ‘La compilazione giustiniana’ (note 3 above), 37-38; Campolunghi, *Potere imperiale* (note 1 above), II.1, 245 note 103 *in fine*.

21 On the basis of the surviving material one thinks – besides, of course, that of Stephanus, the best preserved commentary in the sources (on which, above all, H.J. Scheltema, *L’enseignement du droit des antecessors*, Leiden 1970, 24-29 = *Opera minora*, 75-79; H. de Jong, *Stephanus en zijn Digestenonderwijs*, Amsterdam 2008) – of the commentary of Theophilus (for which see, in particular, K.E. Zachariä von Lingenthal, *Kritische Jahrbücher f. Deutsche Rechtswiss.*, VIII (1844), 794-828 (817); Heimbach, *Prolegomena*, 33-36; Peters, *Die oströmischen Digesten-kommentare*

## 4.

The comparison with the work of the commentators on the praetorian edict within the context of the ban on commentaries deserves, for its centrality, to be further clarified through a closer consideration of the relationship between *commentarii*/ὑπομνήματα and *interpretare*/ἐρμηνεύειν in the wording of the introductory constitutions.

We have to start from the statement of const. *Tanta* (§ 21), where the subject, after the mention of actions tolerated, turns back to focus on prohibited *commentarii*: *Alias autem legum interpretationes, immo magis perversiones eos iactare non concedimus (...)*. Evidently, the qualification *aliae interpretationes* shows that not only the *commentarii* themselves, but also the types of writing considered immediately before, were to be taken as forms of *interpretationes*.<sup>22</sup> The point to recognize is, therefore, the common characteristic element.

It should first be noted, with reference to one of the tolerated types, that what in const. *Tanta* is *per titulorum subtilitatem adnotare* was indicated in the const. *Deo auct.* (§ 12) as *per indices tantummodo et titulorum subtilitatem admonitoria facere*. This is noteworthy since the literary tradition of late Antiquity provides some sources that testify to a common use of *indices* and *tituli* as equivalent terms to designate short remarks formulated for the purpose of *admonere* readers about the contents of a wider text, allowing them to better orient themselves.<sup>23</sup>

Cassiod., *Inst.* I,1,10: Sed ut textus memorati Octateuchi quodam nobis compendio panderetur, in principiis librorum de universa serie lectionis titulos eis credidimus imprimendos, a maioribus nostris ordine currente descriptos, ut lector utiliter ammonitus

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(note 3 above), *passim*; Scheltema, *L'enseignement*, 30-31 = *Opera minora*, 80), of the commentary of Cobidas (for its derivation from the teaching, cf. Falcone, 'Premessa' (note 2 above), 152), of the commentary, a trace of which is contained in PSI 55, deriving from a difficult-to-identify author (cf. G. Falcone, 'Ἀνόνομον συνάλλαγμα' e anonimo antecessor in PSI. 55', *Minima Epigraphica et Papyrologia*, IV.6 (2001), 513-529, recently followed by De Jong, *Stephanus*, 52-63, esp. 61-63). But, since each teacher held courses on the whole program established by const. *Omnem*, we must conclude that texts derived also from the didactical activity of other *antecessores* may have circulated. A concrete textual trace with respect to Thalelaeus (BS 2127/29) is discussed in F. Brandsma, *Dorotheus and his Digest translation*, Groningen 1996, 32-39.

22 The remark, of course, is not new: cf., e.g., Wieacker, 'Lateinische Kommentare' (note 10 above), 318-321 and Berger, 'The emperor Justinian's ban' (note 1 above), 146, who drew from it an argument to support, quite unfoundedly, that the ἐρμηνεία κατὰ πόδα consisted not in a literal translation, but in an interpretation to be made following step by step the text to be commented on: cf. *infra* the text.

23 See, for all this, B.J. Schroeder, *Titel und Text*, Berlin-New York 1999, 112-115; 323-326.

salubriter reddatur attentus, et facile unamquamque rem dum quaerit inveniatur, quam sibi cognoscit breviter indicatam.

Cassiod., *Inst.* I,6,5: Quorum tamen librorum titulos sub brevitate collegi, quando instructionis non minimum creditur esse compendium, res fusas latissime paucis sermonibus indicare; his enim remediis lectoris animus introductus saluberrimam Scripturarum seriem provocatus excurrit.

Aug., *Enarr. in Psalmos*, 92,1: (...) psalmi huius titulum, cum pronuntiaretur, audiivimus; et quid sibi velit, de scriptura dei, hoc est ex libro genesis, non est difficile cognoscere; in titulo enim tamquam admonemur in limine quid intus quaeramus.

Hier., in *Ezech. 4*, praef.: Vellem, si fieri posset, (...) explanationes in Hiezechiel per singulos libros propriis texere prophetiis (...); longumque et immensum interpretationis iter certis spatiis separarem, ut quasi titulis et indicibus et, ut proprius loquar, argumentis ostenderem quid libri singuli continerent.

In accordance with these attestations,<sup>24</sup> the type of operation designated as *admonitoria facere* through *tituli* and *indices* can be described as an aid to the consultation of the texts, by summarizing briefly the content of an extensive passage to ‘warn’ and prepare the reader, who consequently can find his way through the various subjects and issues dealt with in the work. The synthetic indications, in the configuration held by the writer of the const. *Deo auctore*, were to be placed on the margins of the manuscript, that is, next to the Latin text: παράτιτλα;<sup>25</sup> from the same perspective const. *Tanta* speaks of *adnotare* and of

24 As Scheltema opportunely stressed (*L'enseignement* (note 21 above), 64 (= *Opera minora*, 69) note 44 *in fine*), the phrase *quasi per indicem tangere* of Gaius 3,54 and then of (Iust.) Inst. 4,18,12 is not instead conclusive (but see still, recently, Campolunghi, *Potere imperiale* (note 1 above), II.2, 261-262).

25 For the meaning of παράτιτλα as ‘Randscholien’, ‘Randbemerkungen’ cf., above all, Scheltema, ‘Das Kommentarverbot’ (note 1 above) 319-323 = *Opera minora*, 416-420 and, most recently, W. Kaiser, *Die Epitome Iuliani. Beiträge zum römischen Recht im frühen Mittelalter und zum byzantinischen Rechtsunterricht*, Frankfurt/M. 2004, 248-249. The latter scholar, moreover, appropriately emphasizes the operations *per titulorum subtilitatem admonitoria facere*, *per titulorum subtilitatem adnotare* and παράτιτλα *componere* are equivalent. For my part, I would add that the literary attestations from late Antiquity quoted in the text lead us to conclude that also the *indices* were mentioned in const. *Deo auctore* (perhaps with some redundancy) with an equivalent connotation and function (as already stated by Heimbach, *Prolegomena*, 3); and that, probably, this term is not repeated in const. *Tanta* because of the knowledge that *index* and ἵνδιξ were used, even in legal environments, to indicate writings of considerable scale, as indeed was seen also in the Late Latin lexicon: cf. Amm. Marc. 29,1,41: *Deinde congesti innumeri codices, et acervi voluminorum multi,*

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παράτιτλα *componere*, const. Δέδωκεν speaks of προσγράφειν. And these indications should be characterized by conciseness and reduced extension (*per titulorum subtilitatem*).<sup>26</sup> Even in this latter respect there are significant correspondences in literary sources from the late period, in which *adnotationes* placed in the margins of the writing (*e latere adnotare*)<sup>27</sup> were consistently indicated in terms of ‘brevity’,<sup>28</sup> a text of Cassiodorus also refers to *adnotationes* placed in *marginē* speaking of *subtilissimae et brevissimae dictiones*, a reference to the content (and not to the amount of writing),<sup>29</sup> strongly reminiscent of the Justinian words *per titulorum subtilitatem*. The emperor had to tolerate the traditional use of these annotations (if not, indeed, to encourage their use),<sup>30</sup> for two reasons: on the one hand, he was aware of the fact that they, summarily showing the contents of the texts, were useful in orienting the reader of an articulated complex of *leges* that, even within unitary titles, embraced various issues and disparate cases; on the other hand, he believed that, because of the simplicity and dry brevity of the contents, this operation did not involve the risk of overlapping personal opinions on the meaning of the *leges* (const. *Deo auct.* § 12: *sed sufficiat per indices tantummodo et titulorum subtilitatem quae παράτιτλα nuncupantur quaedam admonitoria eius facere, nullo ex interpretatione eorum vitio oriundo*).<sup>31</sup>

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*sub conspectu iudicum concremati sunt, ex domibus eruti variis ut illiciti, ad leniendam caesorum invidiam, cum essent plerique liberalium disciplinarum indices variarum et iuris.*

- 26 Pescani, ‘Sul divieto giustiniano’ (note 1 above), 44 speaks of a ‘compensiosa stringatezza dei titoli’. The reading of Scheltema (‘Das Kommentarverbot’ (note 1 above), 323-324 = *Opera minima*, 421) of *per titulorum subtilitatem* as alluding to *indices* written in small letters does not appear convincing. The context shows that this indication is opposed to the *verbositas* of the *commentarii*: cf. Meijering, ‘Anatolius and the Codex’ (note 3 above), 266 note 44. Moreover, as Kaiser, *Die Epitome Iuliani* (note 25 above), 249 objects: ‘es liegt in der Natur von erläuternden Randbemerkungen, daß sie in kleinerer Schrift als der Text erschienen’. The consolidated and expected use of small handwriting in *marginē* was evidently imposed by requirements of space and necessity of distinction from the commented text.
- 27 Cf., e.g., Hier., *Epist.* CVI, 46; and, particularly important, LVII,2,2: (...) *ex latere in pagina breviter adnotans quem intrinsecus sensum singula capita continerent* (...).
- 28 Cf. Cassiod., *Inst.* I,3,1; I,4,2; I,8,8; I,8,11; but the list could go on.
- 29 Cassiod., *Inst.* I,8,1: (...) *annotationes conscriptas in ipso initio meae lectionis inveni, (...) sed nobis ex praecedentibus lectionibus diligenti retractatione patuerunt subtilissimas quidem esse ac brevissimas dictiones, sed Pelagiani erroris venena illic esse seminata* (...).
- 30 As the author of the *Quaestiones de iuris subtilitatibus* (q. 38A) believed: *Idem princeps permittit inmo adhortatur per titulorum subtilitatem admonitoria quaedam facere*.
- 31 For our purposes it is immaterial whether in the phrase *nullo ex interpretatione eorum vitio oriundo* the pronoun *eorum* refers to the *iuris periti* mentioned at the start of the paragraph, thus *interpretatio* having to mean the activity, or whether it refers to the term *admonitoria*, implying an allusion to the result expressed by the same *admonitoria*. For this alternative see, above all, Scheltema, ‘Das Kommentarverbot’ (note 1 above), 329 = *Opera minima*, 427; Campolunghi, *Potere imperiale* (note 1 above), II.1, 262 note 46.

As for the other exception to the ban, Berger observed at his time that the activity for which the const. Δέδωκεν speaks of ἐρμηνεία κατὰ πόδα could not consist of a translation, as is generally believed, from the moment the verb ἐρμηνεύειν is used later, in the same § 21, with regard to an emperor's interpretative intervention that does certainly not consist of a translation: instead, it is a case of 'authentic' interpretation of doubtful cases. Hence Berger's conclusion that the ἐρμηνεία in question is referring to an actual *interpretatio* as that which had been carried out by jurists in the classical age, and that the phrase ἐρμηνεία κατὰ πόδα would mean 'interpretation which explains the original text word for word'.<sup>32</sup>

Soon after its appearance, the overall reading proposed by Berger was the subject of acute and definitive objections by N. van der Wal,<sup>33</sup> to which I can certainly refer. On the other hand, as is well known, subsequent research by Holwerda and Scheltema stated that the κατὰ πόδας was a word for word translation, placed in an interlinear position in the manuscript of the ῥήτόν, and had, in essence, the role of simple lexical support,<sup>34</sup> intended to clarify the meaning of the words of the official text. Here we must specifically highlight that the comparison with the intervention of the emperor, recalled by Berger, not only does not prevent us from considering the ἐρμηνεία κατὰ πόδα as a literal translation, but also, far more interesting here, helps to reveal the element which, as previously stated, is common to all the activities provided for by const. *Tanta*/Δέδωκεν. Thus we read:

const. Δέδωκεν § 21: (...) εἰ γὰρ τι φανεῖν τυχὸν ἀμφισβητούμενον ἢ τοῖς τῶν δικῶν ἀγωνισταῖς ἢ τοῖς τοῦ κρίνειν προκαθημένοις, τοῦτο βασιλεὺς ἐρμηνεύσει καλῶς, ὅπερ αὐτῷ μόνῳ παρὰ τῶν νόμων ἐφεῖται (...).

const. *Tanta* § 21: (...) 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.

While in the Greek text there are no direct indications other than the use itself of ἐρμηνεύειν, in the corresponding passage of the const. *Tanta* the *interpretare* is explained

32 Berger, 'The emperor Justinian's ban' (note 1 above), 143.

33 N. van der Wal, *Les commentaires grecs du code de Justinien*, 's-Gravenhage 1953, 50-51.

34 D. Holwerda, 'Le Code de Justinien et sa traduction grecque', *Classica et Mediaevalia* 23 (1962), 274-292 (= J.H.A. Lokin/S.L. Radt/B.H. Stolte, [ed.], *Exempla Philologica. Vier Aufsätze von D. Holwerda*, Groningen 2000, 1-15); H.J. Scheltema, 'Subseciva IX. Das Κατὰ πόδας', *TRG* 31 (1963), 99-100 (= *Opera minora*, 130-131); Id., *L'enseignement* (note 21 above), 33-35 (= *Opera minora*, 82-83). More recently, Van der Wal/Lokin, *Delineatio*, 43; J.H.A. Lokin/Th.E. Bochove, 'Compilazione - educazione - purificazione. Dalla legislazione di Giustiniano ai Basilica cum scholiis', in: Lokin/Stolte, *Introduzione al diritto bizantino* (note 2 above), 99-146 (131-132). Brandsma, *Dorotheus* (note 21 above), 278 speaks of a 'wordlist'.

in terms of ‘making manifest’ the dubious legal issue. Not only that, but the mention of the imperial exclusivity for *condere et interpretare leges* evidently refers to the famous 529 AD constitution stored in C. 1,14,12,4, in which the imperial *interpretatio* is expressly assumed as an activity that opens up, i.e. clears up and makes manifest the *aenigmata* which can be found in the legal texts.<sup>35</sup> Well, according to this use of ἐρμηνεύειν as ‘making manifest’,<sup>36</sup> it is not surprising that also the μεταβαλεῖν the texts of the Digest,<sup>37</sup>

35 C. 1,14,12,4: (...) *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. (...) *tam conditor quam interpres legum solus imperator iuste existimabitur.* On the relationship between the statement of const. *Tanta*/Δέδοκεν § 21 and the constitution of 529 AD cf., lately, Campolunghi, *Potere imperiale* (note 1 above), II.1, in particular 271-306 and R. Martini, ‘Sul monopolio interpretativo di Giustiniano’, *SDHI LXXXVI* (2010), 425-431 (428-431). See also the constitution of Valentinian and Marcian of 454 AD significantly inserted into the Justinian Code, just before Justinian’s constitution of 529 AD: *Leges sacratissimae, quae constringunt omnium vitas, intellegi ab omnibus debent, ut universi praescripto earum manifestius cognito vel inhibita declinent vel permissa sectentur. si quid vero in isdem legibus latum fortassis obscurius fuerit, oportet id imperatoria interpretatione patefieri* (...) (C. 1,14,9).

36 For this meaning the texts of *antecessores* are particularly significant in which it is stated that there is no need to make any ἐρμηνεία as the wording of the text is already clear or, conversely, that it is appropriate ἐρμηνεύειν information that appears unclear. Cf. BS 406/6: Σαφεστάτη ἐστὶν ἡ διάταξις καὶ οὐδεμίᾳς ἐρμηνείας δεομένη; BS 1073/30: φανερόν τὸ νόμιμον ὄλον τῆς διατάξεως καὶ ἐρμηνείας μὴ δεόμενον; for the case of a lack of clarity, cf. Theoph. 4,3 pr.: ἐρμηνεύσομεν δὲ τὰ εἰρημένα τῷ νόμῳ, ἀσαφὴ κατὰ τι δοκοῦντα.

37 The idea, supported in particular by Berger, ‘The emperor Justinian’s ban’ (note 1 above), 137-138 and by Pescani, ‘Sul divieto di Giustiniano’ (note 1 above), 44-51 and taken up again very recently by Campolunghi, *Potere imperiale* (note 1 above), II.2, 247 note 106, according to which in the Greek provision the expression αὐτὰ μεταβαλεῖν would refer to ὑπομνήματα, because of the neutral plural, is certainly to be rejected. Not only does a ban on ‘writing ὑπομνήματα’ not logically coordinate with the provision of the possibility of ‘translating the same’, but a reference to the ὑπομνήματα is belied by a comparison between the sentence in which the neutral pronoun appears again (ἔτερον δὲ παντάσῃσιν μὴδ’ ὁτιοῦν περὶ αὐτὰ πράττειν (...)) and the corresponding affirmation of const. *Tanta* (§ 21): *alias autem legum interpretationes (...) iactare non concedimus.* In fact, the neutral αὐτά, as a result of the above indicated comparison with the Latin text, alludes to the νόμοι that were mentioned just before; and this circumstance is explained – as observed by Klingenberg, ‘Justinianus Verbot’ (note 1 above), 414, referring to the authority of R. Kühner/B. Gerth, *Ausführliche Grammatik der griechischen Sprache*, II.1, 1898 (repr. Hannover 1983), 61, wherein, furthermore, is also cited the example of Pl., *R.* 300 d 5, where the νόμοι are referred to with the neutral παρὰ αὐτά – in the light of a characteristic Greek grammatical usage, in which a masculine or feminine noun is referred to with a plural neuter of a demonstrative ‘wenn gleichsam der ganze Bereich eines Begriffes bezeichnet werden soll’. That this is so is confirmed by the unnoticed fact, that the same phenomenon is found also in const. Δέδοκεν § 19, in which the repeated use of the neuter plural is preceded, also in this case, by a reference to the νόμοι: (...) *χρήσθε δὲ τοῖς ἡμετέροις νόμοις, τῶν τοῖς πάλαι βιβλίοις ἐγγεγραμμένων προσέχοντες οὐδενί, οὐδὲ ἀντεξετάζοντες αὐτὰ πρὸς τὰ νῦν κείμενα(...).* Καὶ γὰρ ἀπαγορευόμεν ἐκεῖνοις τὸ λοιπὸν χρήσθαι, ταῦτα δὲ δὴ καὶ μόνοπλιτεύεσθαι τε καὶ κρατεῖν συγχαροῦμεν (...). There is no need, therefore, to imagine, like



namely translating the Greek texts, is represented, in the same context, as ἐρμηνεία, that is, as a form of revelation or clarification of the meaning of a text. The same is true with respect to *indices – tituli – παράτιλα*. These, too, coordinating the predicted use of *interpretare = manifestare* in the closing of const. *Tanta* § 21 with the mention of *aliae interpretationes*, should be understood as examples of ‘clarifications’. In fact, the function we have recognized through literary sources, of brief summaries of the contents of the *leges* can certainly be traced back to the idea of making the *leges* open, shedding light on the *leges* of the Digest. It is precisely because of this common reference to the idea of ‘clarification’ that the author of const. *Deo auct.* § 12 was able to use, in a same context, both *interpretare* in the sense of an *explanare* which involves autonomy of position (...*interpretantium contrarias sententias...*) and *interpretatio* in relation to a mere essential indication of the contents of a text (...*nullo ex interpretatione eorum vitio oriundo...*).

That being the case, then even the commentaries covered by the prohibition should be understood as an expression of *interpretationes* in the sense of ‘clarifications’. Now, this may be explained by the reference made to the work of the *commentatores* on the edict. In order to ban it, the author of the constitution had to picture a type of *interpretatio*, such as that conveyed in the *libri ad edictum*, which started, it is true, from the clarification of the meaning of the *verba* with a word-by-word approach, but could then open up to clarifications on the scope of application: and these lend themselves to possibly create deviations from the original significance and range of the commented text, personal views or original solutions. For these reasons the *intepretationes*-‘clarifications’ of this kind, *aliae* compared to those admitted, were considered as *perversiones*. And for that, probably, in the closing words the imperial monopoly was explicitly reaffirmed, not only with regard to *interpretare*, but also with reference to *condere leges*: (... *ex auctoritate Augusta manifestetur, cui soli concessum est leges et condere et interpretari (...)*).

## 5.

Having reconstructed the range and the *raison d'être* of the ban, it is time to reflect specifically on the possible reasons for the presence of an antecessorial literature on the Digest despite the establishment of the ban, starting with a survey of the hypotheses advanced so far in the literature.

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Pringsheim, ‘Justinian’s Prohibition’ (note 1 above), 400 = *Abhandlungen*, II, 96, that ἀπὸ μεταβαλεῖν alludes to διγέστα (a noun that, moreover, would have to be drawn from the too distant words τοῦ τῶν Digeston βιβλίου from the beginning of § 20) nor to conjecture, with V. Arangio Ruiz, *Storia del diritto romano*, Naples 1957<sup>7</sup>, 399 note 1, that ἀπὸτά is a copyist’s mistake replacing the original ἀπὸτός.

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Accordingly, it is appropriate to begin by reviewing Scheltema's well-known reconstruction,<sup>38</sup> who provided the most innovative and challenging analysis.

In a study full of illuminating clarifications on the different types of instruments and forms of Byzantine legal interpretation and literature – from *summae* to κατὰ πόδας, from *indices* to παράπτυλα<sup>39</sup> –, the Master from Groningen claimed that Justinian, contrary to what was traditionally considered, had not prohibited commentaries as such, but rather their placement directly in the manuscripts of the *Corpus iuris* next to the legal writing: due to such a placing, in fact, some copyists may have been induced to not differentiate between the two blocks of writing and ended up 'confusing' the text of the *leges*, in the sense of accidentally incorporating marginal annotations into it.<sup>40</sup> Not, therefore, an 'allgemeines Auslegungsverbot', but a prohibition of comments added *in margine* to the main-text, aimed at protecting the textual integrity and purity of the *leges*.<sup>41</sup> Commentaries in separate works, structurally independent from the annotated text, could certainly be made, and this fact would well explain the existence of written products related to the teaching of the *antecessores*, which, indeed, would itself confirm this particular interpretation of the ban.<sup>42</sup>

This reading, however brilliant and striking, is not without its difficulties. In this regard, I would distinguish two aspects, that of the object of the ban and that of its purpose.

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38 Scheltema, 'Das Kommentarverbot' (note 1 above), esp. 325-331 = *Opera minora*, 423-428.

39 More generally, the entire investigation has the merit of strongly calling attention to the profiles connected to the relationship between the main and accessory writings. It is no coincidence that also some scholars of the history of texts and *marginalia* such as Guglielmo Cavallo and Paolo Mari have agreed with Scheltema's explanation of the ban (*infra*, note 42).

40 Scheltema, 'Das Kommentarverbot' (note 1 above), 328-329 = *Opera minora*, 426.

41 Scheltema, 'Das Kommentarverbot' (note 1 above), 329 = *Opera minora*, 425: 'Es bestand also kein allgemeines Auslegungsverbot; man dürfte die Auslegung nur nicht in die Gesetzhandschriften hineinschreiben. Das Verbot wäre demnach eine nicht unvernünftige Massnahme zur Erhaltung der Reinheit der Gesetzhandschriften gewesen'.

42 Scheltema, *loc. cit.* Adhering to this reconstruction are: Pieler, *Rechtswissenschaften*, 404; Van der Wal/Lokin, *Delineatio*, 36-37; Sp. Troianos, *Οι πηγές του βυζαντινού δικαίου*, Αθήνα/Κομοτηνή 2011<sup>3</sup>, 102-104; G. Cavallo (*F. Magistrale*), 'Libri e scritture del diritto nell' età di Giustiniano', *Index* 15 (1987), 109 note 65; H. Nehlsen, 'Der Schutz von Rechtsaufzeichnungen gegen Fälscher', in: *Fälschungen im Mittelalter*, II, (MGH – Schriften, B. 33, II), Hannover 1988, 545-576 (552); Wallinga, *TANTA/AEAOIKEN* (note 1 above), 114-118 (with additional arguments, see *infra*); Brandsma, *Dorotheus* (note 21 above), 279-280; P. Mari, 'L' armario del filologo ed i testi giuridici nel Codice Teodosiano', *AARC* XIV (1999) (Napoli 2003), 37-143 (129-130); Kaiser, *Die Epitome Iuliani* (note 25 above), 248-249; Lokin/Van Bochove, 'Compilazione – educazione – purificazione' (note 34 above), 114-115. M. Bretone, *Storia del diritto romano*, Roma-Bari 1988, 400, shows himself inclined toward the view of Scheltema even though he observes (note 122) that this thesis 'non elimina ogni dubbio'. Within the same Groningen school, however, Meijering, 'Anatolius and the Codex' (note 3 above), 266 has retained the traditional approach.

In relation to the second aspect, the difficulties seem insurmountable. The hypothesis that the *confusio* the emperor wanted to avoid consisted in the fusion of texts mistakenly performed by a copyist, incorporating marginal notes and official text collides, in fact, with an objective obstacle, consisting of the explicit statement of the purpose put forward by Justinian himself, which calls into question a different danger: the *confusio* arising as a result of a proliferation of conflicting opinions, a new *ius controversum* (*supra*, n. 3).<sup>43</sup> And this justification for the ban, as we have seen, is clearly and articulately formulated, even by comparison with the interpretative differences which arose between the commentators of the edict, and even with reference to the emperor's interpretative exclusivity, arguments which have nothing to do with problems of textual tradition of the *leges*. Moreover, the words of const. *Deo auct.* § 12 *totum ius paene conturbatum est*, and of const. *Tanta* § 21 *ut paene omnem Romanam sanctionem esse confusam* show that *conturbatum est* and *esse confusam* – that are cited as being equivalent negative phenomena that have occurred in the past – relate to Roman law overall and not to a written text.<sup>44</sup> Why, on the other hand, would Justinian have been silent on the need to defend the authenticity of the text, if that had been the *ratio* for the ban?<sup>45</sup> Furthermore,

43 The fact is also indicated by Ankum, 'La 'codification' de Justinien' (note 1 above), 9 note 24 and, more recently, by Meijering, 'Anatolius and the Codex' (note 3 above), 266.

44 Neither does the idea of a 'physical', so to speak, *confusio* between writings find a support in the words of const. *Tanta* § 21 *in infinitum detraxerunt*. Scheltema ('Das Kommentarverbot' (note 1 above), 330 = *Opera minora*, 426) understands this phrase as alluding to the fact that in the *libri ad edictum* (the only source of knowledge for contemporaries of Justinian concerning the edict) not only there was a contiguity between *clausulae edicti* and jurisprudential interpretations, but these interpretations continually interrupted the words of the edict, so that the boundaries (*fines*) between edictal text and commentary were lost. In contrast, it may be noted first, that in the *libri ad edictum* the *verba edicti* were clearly marked and isolated from the comments in the usual *modus citandi* 'Praetor ait (...)', which circumscribed the praetorian ruling; furthermore, that in the other two uses of *infinitum* and *infinitas* in relation to the legal production (const. *Deo auctore* § 1 and const. *Tanta* § 12) the terms are used in a figurative sense; and finally, that in our § 21 the phrase *in infinitum detraxere* is directly related to the phenomenon of the accumulation of conflicting opinions, thereby placing itself on the same level as C. 7,47,1, on which *supra*, n. 3. As for the words *per titulum suptilitatem*, understood by Scheltema as alluding to *tituli* written with characters small enough to be easily distinguished by a copist from the characters of the main text, cf. *supra*, note 25.

For his part, Ankum, 'La 'codification' de Justinien' (note 1 above), 9 note 24 remarks that the danger of confusion between the main text and *marginalia* would not really have existed since the annotations were written in Greek; and the observation, it would seem to me, endures, despite that during the sixth century we witness a phenomenon of convergence between Latin and Greek uncial characters (cf. N. van der Wal, 'Die Schreibweise der dem Lateinischen entlehnten Fachworte in der frühbyzantinischen Juristensprache', *Scriptorium* 37 (1983), 29-53; Brandsma, *Dorotheus* (note 21 above), 280).

On the other hand, the literal translation *κατὰ πῶδα*, being located in an interlinear position within the main text, had an 'elevato potenziale corruttivo del testo' (so Lokin/Van Bochove, 'Compilazione – educazione – purificazione' (note 34 above), 115) and, therefore, in Scheltema's view, would have

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the prohibition is formulated only with regard to the Digest (see above, n. 2): if the emperor had felt the concern of preserving the legislative texts from possible future confusion with notes placed in the margin, he would have established a ban also for the other parts of the *Corpus iuris*.<sup>46</sup>

More problematic is the evaluation of the other aspect of Scheltema's reconstruction, concerning the material aim of the ban. The fact is that, while with regard to the purpose of the ban we have available, as we have just seen, an objective and specially constructed indication in the three introductory constitutions, as regards the alternative between *commentarii/ὑπομνήματα* conceived (according to the traditional view) as structurally autonomous and self-contained works or instead as marginal notes,

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been even more abhorred. That it was, surprisingly, tolerated by Justinian as it must have appeared particularly useful for teaching, is widely believed and explicitly stated, recently, by F. Brandsma, *loc. cit.*; but such a justification persuades until the entire disposition is considered as addressed to the *antecessores*: but cf. *infra*, n. 7.

45 The question can be formulated regarding the stance of Wallinga, *TANTA/ΔΕΔΩΚΕΝ* (note 1 above), 116. This scholar noted, in support of Scheltema's reconstruction, that § 21 is placed between two passages (§§ 20 and 22) that give instructions for copying, and that consequently it seems natural to think that the prohibition of commentaries pertains to the same type of issues. With regard to the specific topic, moreover, it may be noted that in reality § 20, rather than opening a unitary sequence up to § 22 (which would have the instructions for the copyists as its theme), concludes a series of steps that begins in § 17 and illustrates the relationship between the existing multitude of classical texts and the creation of the Digest. In particular: in § 17 Justinian emphasizes the transformation of the dispersive *multitudo* of the ancient jurisprudential production into the *opulentissima brevisitas* of the Digest; in § 18 he states that, despite the wealth of compilation, inevitably cases of dispute will be encountered which cannot find regulation and that in such cases it will be the imperial *auctoritas* to introduce a new solution; in § 19 Justinian orders to *adorare* and *observare* the *leges* collected in the Digest and to set aside all of the most ancient texts: (...) *hasce itaque leges et adore et observate omnibus antiquioribus quiescentibus* (...); and finally, in § 20 Justinian reports having instructed the insertion, at the beginning of the Digest, of an indication of the ancient books from which the collection is made and states that all ancient authors used for *consummatio* have the same dignity, since their texts, as a result of their inclusion in the Digest, attain the same value as the constitutions promulgated by him. Once the presentation of the opus made in § 20 is finished, different issues are addressed in §§ 21 and 22, namely the preservation and protection of the (now finished) collection from a variety of conflicting interpretations (§ 21) and from the obscurity and textual traps induced by the use of siglae (§ 22).

46 The same Wallinga, who accepts Scheltema's thesis, after suggesting a possible explanation for the limits on the Digest ('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'), which, however, he acknowledges being 'a somewhat unsatisfactory explanation' (and in fact, for my part, I note that it seems difficult to imagine a resemblance between the elaborate style of the classical texts and that of annotations made by readers), concludes: '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' (*TANTA/ΔΕΔΩΚΕΝ* (note 1 above), 113).

we can only rely on indirect indications to be drawn from certain textual data present in the aforementioned constitutions: and these imply a certain degree of discretion on the part of the interpreter and, above all, do not appear unequivocal in one way or another.

Emblematic, first of all, is the case of the words *commentarios adplicare* (const. *Deo auct.* § 12) and *commentarios adnectere* (const. *Tanta* § 21), highlighted by Scheltema.

Undoubtedly, the use of these words is striking, since they lend themselves to expressing the idea of concretely joining the *commentarii* to the official text according to their place *in margine*. And this indication would seem even more definite since – I add for my part – the verb *adplicare* is used three times in the constitution *Tanta* in a non-metaphorical sense, to mean the operation of inserting classical texts into the *tituli* (§§ 13 and 17) or adding books (§ 6) to compose the mosaic of the Digest.<sup>47</sup>

On the other hand, however, even the choice itself, in a passage as important as the drastic prohibition of comments, of terms which do not have strict meanings is surprising when compared with the very different precision with which, in the same context, the types of writing admitted are indicated: *quae παράτιτλα nuncupantur, hoc quod Graeci κατὰ πόδα dicunt* and, in particular, *adnotare*, a verb that this time perfectly expresses the apposition of marginal writing.<sup>48</sup> Above all, the potential probative value of these two verbs in favor of marginal comments is offset by the terminology given in const. Δέδωκεν, in which two different verbs are used for banned ὑπομνήματα and for παράτιτλα: for the latter, which are actually affixed *in margine* ('Randscholien'),<sup>49</sup> appears the compound verb προσγράφειν, while for the first the basic verb γράφειν. Is it a coincidence that the same author, in the space of a few, coordinated between themselves lines, is using two verbs which both express the idea of writing, but only one of which indicates the combination of one piece of writing to another? Or should we not rather think that he has intended in this way to juxtapose two different types of writing, one independent and one marginal? Such a question is all the more legitimate because the decision not to reuse the basic verb γράφειν occurs within the affirmation that is specifically directed to specify exceptions to the initial prohibition.

Similarly, another textual element perceptively reported by Scheltema lends itself to a plurality of interpretations, namely the words with which, in the Greek text, the behavior of the transgressor of the ban is indicated: ὡς ὃ γε θαρρῶν παρὰ ταύτην ἡμῶν τῆν

47 As for the use of the verb *adnectere* in a material/topographical sense, in the absence of other evidence in the introductory constitutions, we may refer to the indication *notitia subter adnexa* which appears in C. 1,27,1,14; 1,27,2,17 and 18.

48 Cf. also the use, precise and appropriate, of *adscribere* in const. *Deo auct.* § 6, relating to the *notae* of Paulus, Marcian and Ulpian to the writings of Papinianus.

49 As in Scheltema, 'Das Kommentarverbot' (note 1 above), 323 = *Opera minora*, 420.

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νομοθεσίαν ὑπόμνημά τι καταθέσθαι κατὰ σχῆμα τῆς ἡμετέρας κελεύσεως ἀλλοιότερον (...).

The traditional translation is as follows: ‘He who dares go against this our ruling (= the prohibition of commentaries) composes a commentary in a form diverging from our disposition (...)’. Scheltema complains that the text in this way contains a repetition, and, noting that at the beginning of § 21 the Digest is indicated by the term νομοθεσία, concludes that the aforementioned repetition can be avoided if we understand the conjunction παρά in a locative sense: παρά ταύτην ἡμῶν τὴν νομοθεσίαν = ‘neben (in örtlicher Bedeutung) unsere Gesetzgebung’.<sup>50</sup> To tell the truth, the repetition is not relevant in itself: it could be justified both as a non-rare example of bombastic phrasing of the two introductory constitutions to the Digest and with the aim of strongly emphasizing the gravity of any disobedience to the ban. Rather, what is significant and convincing is the use of the term νομοθεσία to indicate the Digest, as highlighted by Scheltema. In this direction, indeed, I would add that a full review of the uses of νομοθεσία in const. Δέδωκεν shows that this term is never used to refer to a single measure. The term can mean an overall legal regime (§ 6: twice), a structured environment such as the praetorian system or rules (§§ 5, 8 and 21), the overall production of the jurists (§ 12) or the entire Roman legal framework (τὴν (τῶν) Ῥωμαίων νομοθεσίαν: pr. and § 12); and especially, the term is used not only in § 11 (twice) with reference to another compilation of texts, the *Institutiones*, but even in the paragraph which immediately follows that on the *commentarii* and provides for the same punishment of *falsum* (against those who use *siglae*), to indicate, once again, the Digest understood as an overall written *corpus*. Moreover, when one considers that within the same § 21 νομοθεσία is used to indicate the praetor’s edict confused by the proliferation of divergent interpretations, it is clear that the author of the constitution – far from using the term in the concluding part of the paragraph in a very unusual manner compared to the other uses – intended to juxtapose an ancient νομοθεσία (the praetor’s edict) that has been damaged by the commentators and the νομοθεσία-Digest that must be safeguarded from such dangers.

However – and here is the point –, the use of νομοθεσία to indicate the Digest, while it means rejecting the aforementioned common translation, does not necessarily imply that παρά ταύτην ἡμῶν τὴν νομοθεσίαν has topographical significance, as alluding to a writing placed directly ‘next’ to the text of the Digest. It would be, in fact, equally as legitimate to recognize an indication of cause or origin: ‘because of’ this our νομοθεσία or ‘taking the moves from’ this our νομοθεσία. Or again, taking into account both the overall ‘dramatizing’ tone of the comparison with the past both of the image in const. *Tanta* § 21 of a *verbositas* that ‘brings dishonor’ (*adferre dedecus*) to the Digest, one might recognize

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50 ‘Das Kommentarverbot’ (note 1 above), 324 = *Opera minora*, 421.

in the use of παρά an idea of contrast: composing a prohibited ὑπόμνημα means to compose something ‘that goes against (i.e. that damages) the νομοθεσία-Digest’ since, as the author had said a little earlier, it would again ‘give rise to disputes, doubts and accumulations of texts’ (ἀλλ’ οὐκ ἔστι δόξαι στάσεώς τε καὶ ἀμφισβητήσεως καὶ πλήθους τοῖς νόμοις ἀφορμῆν), invalidating the work of overcoming the *ius controversum* and the clarity and synthesis so emphasized in the introductory constitutions.<sup>51</sup>

In addition to the above two cases involving textual elements already indicated by Scheltema, an ‘open’ solution, so to speak, is also set in relation to the use of the terms *commentarii*/ὑπομνήματα.<sup>52</sup>

The Greek term returns, and even this time without further clarifications, in the following indication of the reasons for the ban, where Justinian deplores the fact that the praetorian edict became too large ἐκ τῆς τῶν ποικίλων ὑπομνημάτων διαφορᾶς. These words would seem to refer to classical *libri ad edictum*, instrument and vehicle of the loathed differences of interpretation, and then, because these words are intended to justify the prohibition of ὑπομνήματα expressed above, we should conclude that the term alludes, even in the opening phrase, to structurally autonomous commentaries. As for the Latin *commentarii*, it is natural to recognize the sense of overall and autonomous works, which Justinian’s compilers found in the usage of classical jurists<sup>53</sup> and that, besides, was consolidated into the culture of late-Antiquity (where it could also allude, more specifically, to writings which specifically recorded the differing opinions of interpreters).<sup>54</sup>

51 With this representation of a commentary ‘against’ the Digest is optimally co-ordinated the use of the double reference to ‘snatching from the hands and destroying’ (ἀφαρπαζομένου καὶ (...) διαφθειρομένου) compared with the merely ‘destroying’ (*corrumpentur*) of const. *Tanta*. The comparison between the two indications will return shortly, from another point of view.

52 As rightly pointed out by Wallinga, *TANTA/ΔΕΛΩΚΕΝ* (note 1 above), 111 (regarding a position taken by Berger; but the remark may extend to the whole historiographical debate): ‘the one term that remains totally undefined is at the very heart of the problem: *commentarius*/ὑπόμνημα’.

53 To say the truth, the evidence comes only from Gaius: cf. Gaius 2,23 and 245; 3,18; 33; 38; 54; 81; 181; 201; 4,77; 85; 153; as well as D. 1,2,1 (*Gai. 1 ad l. XII tab.*). But we must admit that Gaius employed a terminology currently in use among his colleagues. Note, however, that the author of const. *Imperatoriam* § 6 uses *commentarii* not only with regard to the Institutes of Gaius, but also in relation to the works of other jurists.

54 The connotation of the *commentarii* as works in which *explanationes* of things *obscure* written are programmatically interwoven with the utterance of, and the comparison between different interpretations of the same text is especially attested, with appropriate and clear directions, in Hier., *in Rufin.* 1,16; 3,11; *in Jerem.*, praef.; 22, 24-27; *epist.* 112,5. On this point see, above all, P. Jay, *L’exégèse de Saint Jérôme d’après son “Commentaire sur Isaïe”*, Paris 1985, 69-80; P. Lardet, *L’apologie de Jérôme contre Rufin: un commentaire*, Paris 1993, 78 note 137a and 82 note 143a; M. H. Williams, *The Monk and the Making of the Christian Scholarship*, Chicago-London, 2006, 102-109. It is remarkable that Jerome states that this *consuetudo (regula, mos) commentariorum* – the aim

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On the other hand, however, we cannot overlook that in const. *Tanta* and in const. Δέδωκεν the formulas (...) *nisi tantum si velit* (...) and (...) πλὴν εἰ μὴ βουληθεῖεν (...), with which the ban is coordinated with the activities permitted, give the impression that the translation κατὰ πόδα and the *tituli* or παράτιτλα were traced back to the figure of the *commentarius/ὕπόμνημα*. Faced with this impression there are two possibilities. Either we are merely to admit the existence of an objective and unsolvable ‘illogisme’<sup>55</sup> thinking about an overly firm debut, led, so to speak, by a prohibitory overemphasis. Or we try to overcome the discrepancy, and in the latter case, once again, an alternative is looming. The solution proposed by Wallinga is to give to the terms of *commentarii/ὕπομνήματα* a very general significance, so as to be able to mean all sorts of notes and to refer both to an interlinear translation on the manuscript and to a brief summary of a main text:<sup>56</sup> therefore, prohibited *commentarii/ὕπομνήματα* and tolerated writings would be placed, structurally speaking, on the same plane. But there might also be a further solution that would keep the configuration of the *commentarii/ὕπομνήματα* as autonomous works. The author of const. *Tanta* might have had directly in mind, as a unitary point of reference of the overall argument, the figure of *interpretatio* in the sense of ‘clarification’ (above, n. 4), as the next link tends to suggest: *Alias interpretationes (...) iactare non concedimus*: therefore he would have been induced to juxtapose various ‘clarification’ instruments and to end up passing over their structural peculiarities; as in the provision of const. Δέδωκεν – where there is no expression of the type of the *alias interpretationes* (...) –, we could imagine that the author has simply closely followed the ambiguous formula of const. *Tanta*.<sup>57</sup>

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of which is that the *prudens lector, cum diuersas explanationes legerit et mutorum uel probanda uel improbanda didicerit, iudicet quid uerius sit* (in *Rufin.* 1,16) – is observed in the interpretation of sacred texts as much as in the study of Latin and Greek *saeculares* texts (in *Rufin.* 3,11; *epist.* 112,5,2).

55 The expression is from Van der Wal, *Les commentaires grecs* (note 33 above), 51.

56 Wallinga, *TANTA/ΔΕΔΩΚΕΝ* (note 1 above), 111: ‘According to the Oxford Latin Dictionary, a *commentarius*, apart from being what we call a commentary, also is ‘a notebook, private journal; an historical record or journal; a public record book (...); notes, jottings; a collection of notes, memorandum’. So it can mean all sorts of notes, and not just explanatory ones. There does not seem to be a good reason why ‘translation’ would not fit within the wide semantic range of the word. The same holds good for the Greek word ὑπόμνημα’ (with reference to LSJ).

57 This is a possibility, however, which should be examined in the broader context of the relationships between the two constitutions and should be compared with the possibility that the two versions are instead derived from a single descriptive draft, developed independently and in parallel by two extensors (cf. M. Bianchini, ‘Osservazioni minime sulle costituzioni introduttive alla compilazione giustiniana’, in: *Studi in memoria di Guido Donatuti*, I, Milano 1973, 121-135 (...) = Id., *Temi e tecniche della legislazione imperiale*, Torino 2008, 100-114 (112-113); Campolunghi, *Potere imperiale*, II.2 (note 1 above), 119-121). On the issue of the relationship between the two texts cf., in general, the contributions of T. Wallinga, ‘Das Verhältnis der Konstitutionen Tanta und Δέδωκεν’,



I note, finally, one last element of reflection deduced from the passage of const. Δέδωκεν concerning the indication of what should be destroyed in the event of a breach of the prohibition. While the words of const. *Tanta – volumina eorum omni modo corrumpentur* – fit both commentaries as autonomous works and copies of the Digest into which were added *marginalia*, and are therefore irrelevant in relation to the dilemma at hand, the Greek text provides a clear starting point: τοῦ παρ’ αὐτοῦ συντεθέντος ἀφαρπαζομένου καὶ πᾶσιν διαφθειρομένου τρόποις (...). In this case, the subject of the destruction is directly and specifically the material product that has been put in place by the offender. Well, if evaluating the proper meaning of the verb συντίθημι and that is the idea of ‘putting together’, we can evaluate it in and of itself, we might think that ‘what has been put together’ is the combination which occurred between the main text and annotations placed in its margin. But if we consider this meaning of the verb in the light of the remaining evidence within the same const. Δέδωκεν, then we must, on the contrary, think of an independent work: in fact in all other uses the verb refers to the operation of or the result of collecting together materials in view of the formation of a volume (in a couple of these comparisons, indeed, the verb has the direct object βιβλίον).<sup>58</sup> All the more reason, then, should we consider an autonomous volume if we were to postulate the use of συντίθημι in the figurative sense of ‘write’: since what is to be ‘snatched from the hand and utterly destroyed’ coincides with ‘that which is written’, it would not be possible to imagine, as a sanction, the destruction of the single note itself or all the marginal notes in themselves separately from the commented main text.

In conclusion, quite differently to what happens with regard to the purpose of the prohibition, in relation to the material object of the prohibition the data offered by the introductory constitutions seem to constitute – to use words of the same Justinian – a *circuitus inextricabilis*, regard to which it appears arduous to take a clear and decisive interpretative line.

And yet, for my part, weighing the arguments for and against of the various ideas considered thus far, and even taking into account the fact that a fear of a proliferation of

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*Orbis Iuris Romani* 4 (1998), 228-240 and of G. Di Maria, ‘Tanta/Δέδωκεν. Quando la retorica assume forma e vigore di legge’, “*Mediaeval Sophia*”. *Studi e ricerche sui saperi medievali*, 12 (2012/2), 116-140.

58 In particular, the verb is used in § 1 (συντεθείκαμεν βιβλίον) to mean the collection of imperial constitutions in the volume-Code; in § 9 (ἅπαντα συντέθειται; cf. const. *Tanta* § 9: *omnia confecta sunt*) to mean the materials put together in the Digest and ordered according to the distribution in books described in the previous paragraphs; in § 11 (συνθεῖναι βιβλους; νομοθεσίαν συνθέντες) to mean the assembly of the four books of the *Institutiones*, in § 12 (τὸ πρᾶγμα συντεθῆναι) to mean the overall work of collection achieved by the Code, Institutes and the Digest; and finally in § 19 (τῶν διατάξεων τῶν παρ’ ἡμῶν συντιθεμένων ἢ γενομένων), in which the verb distinguishes the constitutions collected by Justinian in the Code from those issued by himself.

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differing opinions (the real purpose of the prohibition, as we have seen) seems more easily conceivable in relation to independent works rather than in relation to the annotations of *iuris periti* in the margins of their copies of the Digest (which we must imagine to have been destined more for personal use rather than for circulation),<sup>59</sup> I think the traditional representation of a prohibition concerning the composition of autonomous and self-standing works is, on the whole, more preferable.<sup>60</sup> From this perspective we even find an adequate explanation of the use – rightly highlighted by Scheltema – of the verb *applicare* in const. *Deo auct.* § 12 (the same goes for *adnectere* in const. *Tanta* § 21). As you recall,<sup>61</sup> in fact, in const. *Deo auctore* the formulation of the prohibition is immediately attached to the name of the work and this name alludes to the fact that the *Digesta* or *Pandectae omnes disputationes et decisiones legitimas in se habent* (see const. *Tanta* § 1): hence, a ban on ‘adding’, with (autonomous) commentaries, further disputes to a collection already considered as including all possible ‘interpretative discussions and resolutions of the same’.

In essence, it seems to me that the purpose of the ban was to prevent, to use the expression of D. Simon, ‘ein Wiederaufleben der Kontroversenliteratur’. With that, of course, the problem of existence of the written production of the *antecessores* despite the ban, remains standing.<sup>62</sup>

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59 The phrase *interpretationes iactare* could allude precisely to the idea (and, therefore, to the fear of) circulation, if account is taken of the meaning of ‘scatter’ or ‘spread’ that the verb *iactare* can express.

60 On the other hand, I do not consider persuasive the argument put forward in support of the Scheltema’s hypothesis by Wallinga, *TANTA/AEΛΩKEN* (note 1 above), 115, according to which a direct prohibition against autonomous comments would be superfluous, since anything from books other than the *Institutiones*, the *Digesta* and *Codex* are already prohibited from use in courts in § 19: ‘Why would it be necessary to forbid the writing of commentaries, if they could not be quoted in court anyway?’. Except that – quite apart from the fact that the ‘other books’ from which citation in court were excluded are specifically pre-Justinian collections of constitutions and the writings of the classical jurists not inserted in the Digest and Institutes (in accordance with the fact that § 19 specifically deals with the relationship between the Justinian collections and the pre-existing legal materials) – the fixing in writing of the positions of the *iuris periti*, in works intended for circulation, must have been seen as the formation of written material that would have indirectly influenced the judicial interpretation-application: and this fact went both against the idea of comprehensiveness of the collection and against the idea of a creative-interpretative monopoly on the part of the emperor.

61 Cf. *supra*, n. 3.

62 D. Simon, review of Scheltema, *L’enseignement de droit des antecessors*, in: *TRG* 39 (1971), 482.

## 6.

Neither, however, can the explanations that have been proposed by the traditional view, i.e. considering the intervention of Justinian as directed at prohibiting autonomous commentaries, be regarded, in my view, as decisive.

As for the suggestion that the ban was in practice circumvented<sup>63</sup> by the *antecessores* through the expedient of designating their works ἴνδικες and thus allowing them to fit one of the categories tolerated by Justinian,<sup>64</sup> I note that the works of the *antecessores* and the short summary-notations<sup>65</sup> mentioned in const. *Deo auctore* are clearly very different products: the simple fact of the outward and formal designation would not protect the authors from the charge of *falsitas*.

Simpler and seemingly more persuasive, is the idea that the ban would not have been, in fact, violated because the *antecessores* confined themselves to oral teaching, while the written material that has reached us under their name would have come from the notebooks of students (not, therefore, from persons falling under the scope of the *iuris periti*), reporting faithfully what they heard in the classroom.<sup>66</sup> However, this solution, which begins with a statement in itself indubitable, that is, the direct link between the surviving texts and teaching activities, appears nonetheless questionable in that it postulates that the establishment in writing of the content of the lessons is attributable exclusively to the transcription and to an editorial intervention, so to speak, on behalf of the student, without ever involving their teachers. In fact, if already by the middle of the last century N. van der Wal wrote that ‘il n’est pas exclu que se soient les professeurs eux-mêmes qui aient écrit les commentaires pour leur servir de canevas de cours et qu’ils les

63 A revocation of the ban by Justinian, traces of which would not, in any case, have remained in the sources, is very difficult to imagine, taking account of the particularly strong and emphatic tone with which the prohibition had been put in place: thus, rightly Wallinga, *TANTA/ΔΕΔΩΚΕΝ* (note 1 above), 108-109; Amelotti, ‘Giustiniano interprete’ (note 1 above), 6.

64 Zachariä von Lingenthal, *Kritische Jahrb.* (note 21 above), 797; Heimbach, *Prolegomena*, 5; in recent times, in a not dissimilar order of ideas, e.g., A. Guarino, *Storia del diritto romano*, Napoli 1990<sup>8</sup>, 568; L. Lantella, ‘Dall’interpretatio iuris all’interpretazione della legge’, in: *Nozione, formazione e interpretazione del diritto* (note 1 above), III, 559-603 (590); Meijering, ‘Anatolius and the Codex’ (note 3 above), 266f.

65 *Supra*, n. 4.

66 Heimbach, *Prolegomena*, 7; P. Krüger, *Geschichte der Quellen und Literatur des Römischen Rechts*, München 1912<sup>2</sup>, 407; J. Sontis, *Die Digestensumme des Anonymos*, (Heidelb. Rechtswiss. Abh., 23), Heidelberg 1937, 5-6; Pringsheim, ‘Justinian’s Prohibition’ (note 1 above), 411 = *Abhandlungen*, II, 103-104; L. Wenger, *Die Quellen des römischen Rechts*, Wien 1953 (repr. Goldbach 2000), 682; Simon, review of Scheltema, *L’enseignement* (note 62 above), 482; F. Wieacker, ‘Antecessores. Rechtsunterricht im Zeitalter Justinians’, in: *Festschrift für H. Niederländer zum 70. Geburtstag*, Heidelberg 1991, 215-230 (218).

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aient retouchés en vue de leur publication. Cela semble même très probable’,<sup>67</sup> in the contemporary historiography, ideas were moving more and more in the sense, at least, of direct participation of the *antecessor*. Thus, W. Kaiser put forward specific arguments in favor of a publication of the *Epitome Iuliani* by the same *antecessor* Julian;<sup>68</sup> in the present volume, C. Russo Ruggeri makes some considerations that suggest the derivation of the Paraphrase of Theophilus from a text written by the teacher used as the basis for his lessons;<sup>69</sup> I, too, have recently had the occasion to uncover both a concrete trace of a written draft of Theophilus for a course on the Institutes of Gaius (which he subsequently had kept in mind in the course on the imperial Institutes)<sup>70</sup> and a specific passage in Stephanus’ commentary on the Digest (BS 1799/7), in which a question made by a student, too elaborate to have been really thought out in those terms during the lesson, leads one to imagine at least a work of revision by the same Stephanus of the ‘cahier de cours’ in view of its circulation.<sup>71</sup> I would add here a general consideration linked to the

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67 Van der Wal, *Les commentaires grecs* (note 33 above), 19. For his part, Berger, ‘The Emperor Justinian’s ban’ (note 1 above), 156, observed that it is excessive to imagine that the Byzantine students ‘were capable of making such good editions of the teachers’ lectures without their direct help’.

68 Kaiser, *Die Epitome Iuliani* (note 25 above), 179-180.

69 C. Russo Ruggeri, ‘Theophilus and the student publisher: a resolved issue?’, 99-119

70 It is Theoph. 3,10,1, in which there is a reference to a subsequent treatment of the *operarum obligatio* (‘what this is, we shall learn by and by’) which, however, is missing in the continuation of the Paraphrase. In this regard we must take into account: a) the fact that in all the other 12 cases in which such references appear, they find their conclusion in the continuation of the treatment; b) the fact that the Justinian Institutes, unlike the Institutes of Gaius (Gaius 3,96), do not discuss the *operarum obligatio*; c) the fact that it is unthinkable that Theophilus had deferred a future illustration to be made in subsequent lectures on the Digest (book 38, in which *operarum obligatio* is discussed, was not in fact being taught; and also when Theophilus refers to a future illustration that will be made in his teaching on the Digest, he always mentions this different collection). In the light of all these circumstances, the most likely explanation is that this reference had to be present in a written version of the lectures on the Institutes of Gaius (the subject of teaching up to 533 AD, as is known). Theophilus could have still used that version as a basis for the lectures to be carried out on the new textbook, not realizing, however, the supervening inconclusiveness of the reference in this special case, caused by the lack of a subsequent treatment concerning of the *operarum obligatio* in the imperial textbook. Cf. Falcone, ‘Premessa’ (note 2 above), 156-157.

71 Falcone, ‘Premessa’ (note 2 above), 154-156. The part of the scholion of interest here is the following: Εἶπας, ὅτι αὐτεξουσία γενομένη δύναται κατ’ οἰκείαν γνώμην ἢ κόρη γαμεῖν (...). Καίτοι κὰν αὐτεξουσία ἔστί, ὀφείλει μετὰ συναίνεσεως τοῦ πατρὸς γαμεῖν, ὡς ἀνήνεκται σαφῶς ἐν τῷ ε’ βιβ. τοῦ Κωδ. ὑπὸ τὸν δ’ τοῦ βιβ. τίτ. διατ. [ξ] ἢ καὶ κ’ (BS 1799/7-10). The student turns to the teacher during a lesson on D. 23,1,10 (concerning the *sponsalia*): ‘You said the girl, once emancipated, may marry according to her will (...). But, even if emancipated, she must marry with the consent of the *pater*, as is clearly reported (ὡς ἀνήνεκται σαφῶς) in book 5 of the Code, title 4 constitutions 18 and 20’. Now, title 23,1 of the Digest is an object of study in the second year of the course (const. *Omnem* § 3): the learner, therefore, has not yet reached the examination of the constitutions, to which the fifth year is dedicated, nor does the Latin text, illustrated by Stephanus,

fact that the teacher had to repeat the explanations of the ῥητόν every year to new groups of students. While, with regard to the frequent references to points previously illustrated or still to be illustrated and with regard to the παραγραφαί concerning individual words or elements of a text, one can, and maybe should, think of annotations made by the teacher in the margins of his own copy of the ῥητόν,<sup>72</sup> the same is unimaginable for the complete translation of the ῥητόν preceded by προθεωρία, even using writing material with more ample lateral margins. This means that the teacher had to allocate to the ἴνδιξ (προθεωρία + translations) an autonomous writing space compared to his own ῥητόν exemplar. And this, of course, constituted a violation of the Justinian provision, for the κατὰ πόδα translation was obviously already something else in content, in addition to its location directly between the lines of the translated ῥητόν.

Finally, I do not think that this issue can be considered resolved by thinking that, although the exceptions to the Justinian prohibition were exceeded, the borders however would not be violated in a substantial way, from the moment that ‘gli antecessores bizantini, vincolati autoritativamente ai testi, non esercitano più la funzione dei classici di proporre nuove soluzioni, ma si attengono strettamente all’esegesi, che non può essere

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contain allusions to the imperial constitutions: therefore, we could not think of a previous invitation, on behalf of the *antecessor*, to his students to consult specifically those constitutions (as for example sometimes happens in the teaching of Theophilus, in relation to a text of the *Institutiones* that alludes to an imperial disposition).

72 In this sense already Simon, ‘Aus dem Kodexunterricht’ (note 3 above), 336. More recently it has been observed (K. McNamee, ‘Another chapter in the history of scholia’, *CQ* 48 (1998), 269-288 (276); in adherence, G. Messeri Savorelli/R. Pintaudi, ‘I lettori dei papiri: dal commento autonomo agli scolii’, in: V. Fera/G. Ferrau/S. Rizzo, [ed.], *Talking to the text: Marginalia from Papyri to Print*, Messina 2002, 37-57 (55-56), that some legal papyri dating to the IV-VI centuries present such characteristics – particularly wide margins, marginal writing coming from the same scribes who edited the main text, regularity and precision in the construction of the outer and inner margins – that we are authorized to believe that the teachers entrusted professional scribes with putting together appropriate *codices* in order to provide students with textbooks already containing certain notes in the margins. This is something that, of course, would require the presence of the same annotations already in the copy of the ῥητόν that the teachers were using in class. The texts in question are: P. Berol. inv. 16976 + 16977 (R. Seider, *Paläographie der Lateinischen Papyri*, II,2, Stuttgart 1981, No. 20; E.A. Lowe, *Codices Latini Antiquiores: a palaeographical guide to Latin manuscripts prior to the ninth century*. Vol XII: Supplement, Oxford 1971 (= *CLA* Suppl.), No. 1783): ca. 400 A.D.; PSI XIII 1348: IV-V century; P. Ryl. III, 476 (*CLA* II (Oxford 1935), No. 225): IV-V century; P. Ant. III, 152 (Seider, No. 39; *CLA* Suppl., No. 1711): ca. 500 A.D.; P. Ant. III, 153 (Seider, No. 19; *CLA* Suppl., No. 1789): V century; *MPER* n.s. III, 38: V century. Of the same McNamee, cf. also ‘Missing links in the development of scholia’, *Greek, Roman and Byzantine Studies* 36 (1995), 399-414, and ‘An Innovation in Annotated Codices on Papyrus’, in: B. Kramer, [ed.], *Akten des 21. Internationalen Papyrologenkongresses, Berlin, 13.-19.8.1995*, (Archiv für Papyrusforschung, Beiheft 3), Stuttgart 1997, 669-678. According to this scholar, it is likely that the practice of using *codices* with large margin to allow the addition of annotations arose in relation to the teaching of law at Beryth.

neppure critica, ma solo diretta all'armonizzazione'.<sup>73</sup> Indeed, we can note, first, that the reconstruction of the same content-related traits of teaching hitherto made, is essentially based on texts related to the courses offered by Thalelaeus on the Code (from which, notoriously, we learn the positions of the ἤρωες of the fifth century), while with regard to the eastern teaching on the jurisprudential material – which, as we have said, lent itself to rousing a problematizing and controversial attitude from the interpreters (above, n. 3) – we have only the testimony of the *Scholia Sinaitica*, too poor to tell us something about the normal type of approach and content of teaching arising from the texts of the classical jurists. Moreover, with reference to the post-ban production, it may be noted, on the one hand, that the texts arising from the teaching of Stephanus on the *Digesta* leave not infrequent pointers to divergent interpretations of various teachers on certain elements of the ῥητόν,<sup>74</sup> which are not fully in line with the strongly negative depiction of the existence of *contrariae interpretantium sententiae* referred to by const. *Deo auctore* and, in the substance, const. *Tanta / Δέδωκεν* § 21; on the other hand, the gaps are too large in our knowledge of the production attributable to other *antecessores* to use the contents of the documentation to come to a criterion for assessment of the compatibility or otherwise between the existence of the ban and the presence of the writings related to *antecessores*: just think of the circumstance, particularly eloquent and instructive, that from Cobidas – an *antecessor* so prestigious that Stephanus (presumably, his contemporary) gave him the qualification ὁ σοφώτατος ἀντικίνσωρ and that the author of a gloss to the Paraphrase of Theophilus, dating from the second half of the sixth century, transposes the Sabiniani and Proculiani into current terms by referencing κοβιδιανοί and θυλακιανοί<sup>75</sup> – there are only very few surviving textual residues.<sup>76</sup>

73 As in Amelotti, 'Giustiniano interprete' (note 1 above), 8-9, who, with regard to the overall connotation of the approach and contents of the work of the *antecessores*, relies on the conclusions of D. Simon, 'Aus dem Kodexunterricht des Thalelaios. B. Die Heroen', *SZ* 87 (1970), 315-394 (389-394); on this connotation, cf. also F. Wieacker, 'Πόνοι τῶν διδασκάλων. Leistung und Grenzen der frühen oströmischen Rechtswissenschaft', in: *Beiträge zur europäischen Rechtsgeschichte und zum geltenden Zivilrecht: Festgabe für Johannes Sontis*, München 1977, 53-89 (67-71); Id., *Römische Rechts-geschichte*, II (note 19 above), 272-279.

74 Cf., e.g., BS 1086/27; 1419/18; 1421/12; 1427/3; 1449/15; 1450/21; 1458/18; 1485/27; 1512/9; 1555/31; 1558/28; 1562/18; 1574/1; 2127/29.

75 It concerns a gloss pertaining to Theoph. 2,1,25, ed. C. Ferrini, 'Scolii inediti allo Pseudo-Teofilo contenuti nel manoscritto Gr. Par. 1364', *Memorie del Reale Istituto Lombardo*, 3<sup>a</sup> Serie 9, Milano 1886, 13-68 (*non vidi*) (= *Opere di Contardo Ferrini*, I, Milano 1929, 139-224 (172)); as for the θυλακιανοί, the term alludes, perhaps, to an *antecessor* Θυλακᾶς, mentioned in Peira 16,9. Cf., most recently, Falcone, 'Premessa' (note 2 above), 152; R. Meijering, 'Traces of Byzantine Legal Literature in Theophilus Scholia', in the present volume, 383-398.

76 The fragments are collected in Heimbach, *Prolegomena*, 60-61; on the figure of Cobidas, see H.J. Scheltema, 'Subseciva XV. Kobidas', *RIDA* 13 (1966), 341-343 = *Opera minora*, 148-150.

## 7.

At this point, it would probably be advisable to stop and opt for the *ars nesciendi*, just as Scheltema did himself at an early stage of his scientific path, in 1970, with the volume *L'enseignement du droit des antecessors*.<sup>77</sup> And yet, precisely because of the very existence of a plurality of views that make up the historiographical landscape, I believe it is not too far-fetched to propose a hypothesis that has been emerging over the course of this current enquiry.

It revolves around a question concerning the datum that has formed the very basis of the entire historiographical debate: I wonder if – despite the recurring identification of the recipients of the prohibition with the law professors – Justinian, in speaking of *iuris periti* (in const. *Deo auct.* § 12), of ‘those who have *iuris peritia*’ (in const. *Tanta* § 21), of ‘those who currently are and who will be in the future’ (in const. Δέδοκεν), was thinking in reality of the *antecessores*.

It is hardly necessary to observe preliminarily that, even wishing to give priority to the most well-defined of the three appellations used in the introductory constitutions, namely *iuris periti*, we are faced with a wide definition, which in itself does not match with ‘teachers’. That in const. *Tanta* § 9, the *antecessor* Theophilus is qualified, together with other epithets (*vir illustris, magister*) as *iuris peritus*, does not imply a connection between this qualification and his role as a teacher: rather, a reference to this role is expressed by the subsequent words *in hac splendidissima civitate (...) optimam legum gubernationem extendentem* (see, immediately after, with regard to Dorotheus: *in Berytiensium splendidissima civitate leges discipulis tradentem*). On the other hand, Justinian includes in his Code a constitution of Leo from 460 AD, which provides for the existence of a sworn statement with which teachers must certify that the *advocati* who wish to defend in the Illyricum prefecture have earned a *iuris peritia*: *Iuris peritos etiam doctores eorum iubemus iuratos...depromere, esse eum, qui posthac subrogari voluerit, peritia iuris instructum* (C. 2,7,11,2). This wording shows the use of *iuris periti* to indicate the figure of lawyers or legal experts, and a different and separate designation, *doctores*, to specify their role as teachers. And in the same Code we find the *iuris periti* qualification in reference to the (classical) jurists not only in previous emperors’ constitutions (C. 6,61,5,1 and 9,23,1), but also in constitutions of Justinian himself (C. 6,22,10,3 of 531; 7,7,2pr. of 530).<sup>78</sup>

77 Cf. p. 17 = *Opera minora*, 70.

78 To the figure of *iuris peritus* as a jurist who provides *responsa* alludes, in the late epoch, Aug., *Epist.* 153,23 *vendit advocatus iustum patrocinium et iuris peritus iustum consilium*; Aug., *Conf.* 8,6,13 *mecum erat Alypius otiosus ab opere iuris peritorum post adsessionem tertiam, expectans quibus*

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The prohibition, therefore, is textually addressed to 'jurists', 'legal experts' and not specifically to 'teachers'.<sup>79</sup> This does not, of course, mean that the ban may not have been understood as being also addressed to professors, who obviously fall into the category of *iuris periti*;<sup>80</sup> rather, it simply shows that the mention of *iuris periti* in itself does not necessarily lead us to think of the prohibition as directed specifically at teachers. It is still to be seen whether there is more than mere terminological evidence, which can provide more precise insights.

Now, an objective fact is the absence of the prohibition in const. *Omnem*, addressed directly to the *antecessores*. At first glance, we might consider this absence insignificant: that is, we may imagine that it was seen as unnecessary to repeat the prohibition specifically for the *antecessores*, because they were already included among the subjects mentioned in const. *Deo auctore* and const. *Tanta*. However, this reasoning is difficult to sustain in the face of the fact that Justinian did not hesitate to repeat another prohibition in const. *Omnem* (also present in *Deo auctore* and in *Tanta/Δέδοκεν*), that of using the *siglae*. Furthermore, at the same date of the const. *Omnem*, const. *Tanta* rephrased the sanction concerning the commentaries with greater care than in const. *Deo auctore* § 12: the translation of the *κατὰ πόδα* was added to the permissible activities, the comparison with the past was defined with reference to the praetorian edict and the form of the violation of the ban as a case of *falsum* and the indicated penalties were added. Faced with

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*iterum consilia venderet*, and above all Nov. Th. 1,1 (...) *ne iurisperorum ulterius (...) velut ab ipsis adytis expectarentur formidanda responsa (...)*.

79 The following scholars speak opportunely of 'giuristi': R. Bonini, *Ricerche di diritto giustiniano*, Milano 1968, 235 note 5; Bianchini, 'Osservazioni minime' (note 57 above), 131 = *Temi e tecniche*, 110; Campolunghi, *Potere imperiale* (note 1 above), II.1, 235-269 (and in particular 264 note 151). G. Bassanelli Sommariva, *L'imperatore unico creatore ed interprete delle leggi e l'autonomia del giudice nel diritto giustiniano*, Milano 1983, 12 note 7 and Martini, 'Sul monopolio interpretativo' (note 35 above), 529, speak of 'giuristi e avvocati'. These indications, however, were assumed without special argument. Recently, L. Russo Ruggeri, 'Gaio, la parafrasi e le 'tre anime' di Teofilo', *SDHI LXXVIII* (2012), 197-220 (esp. 204), distinguishes, in relation to Theophilus, between teacher, *iuris peritus* and compiler. On the figures that, in the Justinian age, may ascribed to the qualification of jurists, cf. the efficacious recent contribution of F. Goria, 'Il giurista nell'impero romano d'Oriente (fra Giustiniano agli inizi del secolo XI)', *FM XI* (2005), 147-211 (154-189).

80 See, if needed, *Pragm. sanctio pro pet. Vigili* c. 22, in which *iurisperiti* refers to teachers of law; or C. 12,15,1 in which, under the rubric *De professoribus qui in urbe constantinopolitana docentes ex lege meruerint comitivam*, the following is disposed: *Grammaticos tam graecos quam latinos, sophistas et iuris peritos in hac regia urbe professionem suam exercentes et inter statutos connumeratos, si laudabilem in se probis moribus vitam esse monstraverint, si docendi peritiam facundiamque dicendi interpretandi subtilitatem copiam disserendi se habere patefecerint, et coetu amplissimo iudicante digni fuerint aestimati, cum ad viginti annos observatione iugi ac sedulo docendi labore pervenerint, placuit honorari et his qui sunt ex vicaria dignitate connumerari* (cf. already CTh. 6,21,1; 425 A.D.).



greater attention to the prohibition, it seems even more necessary to assume that this ‘non-mention’ in const. *Omnem* has a precise meaning.<sup>81</sup>

Why not look to the most natural and immediate emerging explanation: that in formulating the prohibition, Justinian did not have professors in mind as its recipients?

It is however not only this absence in const. *Omnem* that points towards this possibility.<sup>82</sup> First of all this absence coordinates, in fact, with another circumstance usually pushed into the background, and this is that the wording of the ban is linked to an overall consideration of the Digest as a collection intended for practical, forensic-judicial use.

This fact is particularly evident in the constitutions *Tanta* and Δέδωκεν. In fact, if up to § 16 the whole discourse had been set on construction of the work,<sup>83</sup> starting from § 17 the prospect of its use in courts is constantly referred to. In particular: § 17 states that in the past those who conducted trials had, in practice, the opportunity to use a limited number of legal texts, with the result that ‘most disputes were settled according to the will of the judges rather than according to the authority of the law’ (const. *Tanta: voluntate iudicum magis quam legitima auctoritate lites dirimebantur*); § 18 promises the possibility

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81 Consistent with their adherence to Scheltema’s reconstruction, some scholars have pointed out that the same lack of prohibition in const. *Omnem* coordinates with the fact that the prohibition concerned only comments affixed *in margine*: cf. Van der Wal/Lokin, *Delineatio*, 36; Lokin/Van Bochove, ‘Compilazione – educazione – purificazione’ (note 34 above), 114; in a veiled manner, Wallinga, *TANTA/ΔΕΔΩΚΕΝ* (note 1 above), 108. However, even regardless of whether or not we accept the overall interpretative model (*supra*, n. 5), this remark can not be reconciled with the fact that, in all likelihood, even the teachers were accustomed to affix, for their teaching work, marginal annotations in the manuscripts of the *leges: supra*, n. 6.

82 That the lack of prohibition in const. *Omnem* can be understood as evidence to argue that the ban was not addressed to the *antecessores* has been recently supported by Wieacker, *Römische Rechtsgeschichte*, II (note 19 above), 300. This scholar drew arguments from this absence in favour of one of the two possibilities that he himself proposes to explain the existence of the antecessorial literature: ‘Entweder das Verbot betraf überhaupt nicht die Rechtslehrer (an der drei noch autorisierten Rechtsschulen von Beryt, Konstantinopel und Rom) und ihre Lehrvorträge mit Einschluss ihrer Nieder- und Nachschriften; dafür spricht, daß gerade die an sie gerichtete *c. Omnem* das Verbot mit keinem Wort erwähnt, und vor allem, daß das vom Kaiser begünstigte und reorganisierte Curriculum ohne Paraphrasen, Exemplifikationen und gegebenenfalls Protheorien schlechthin unvorstellbar war, die sich auf keine Weise unter die (allenfalls) erlaubten *κατὰ πόδα* oder *παράτιτλα* einzwängen ließen (...). Oder aber das Verbot betraf von vorneherein nur den Gebrauch veröffentlichter und literarisch verbreiteter Erläuterungen (irgend eines *iuris peritiam habens*) vor Gericht: dafür spricht, daß es sich nach seinem ganzen Konzept gegen erneute Verwirrung der praktischen Rechtsanwendung durch neue Subtilitäten und Kontroversen richtet. Das Verbot könnte dann allenfalls solche Unterrichtskommentare betroffen haben, die literarische Verbreitung gefunden hatten und dann mit dem Gesetzestext (§ 21: *adnecti*) vor Gericht zitiert wurden’.

83 Premises of the compilation: pr. and § 1; method of completion of the Digest and Institutes: §§ 2-12; internal characteristics of the collection: §§ 13-16.

## THE PROHIBITION OF COMMENTARIES

that in the future a dispute<sup>84</sup> cannot find regulation in the Digest and that, as had been established at that time in relation to the praetorian edict, the emperor would provide an appropriate solution; § 19 states that only texts from the three Justinian collections may be used in trials; § 22 states that it will not be allowed in court to quote a text from a copy of the Digest containing *siglae* (const. *Tanta: neque ex licentiam aperimus tali codice in iudicium aliquid recitare*); § 23 states that the *leges* contained in the three collections are in force *in iudiciis* both for future cases and for those pending; finally in § 24, magistrates are ordered to ensure compliance with the texts collected by Justinian both in the courts of their own jurisdiction and in the *regia urbe*. Well, not only is § 21 inserted into this sequence, but it itself contains, as we have seen,<sup>85</sup> the reference to the hypothesis that some matter appears dubious to the parties or the judge and therefore makes a clarifying intervention of the emperor necessary. Moreover, this reference is accompanied by the following justification: to the emperor alone it was granted to create and interpret the laws (*cui soli concessum est leges et condere et interpretari*). Such a claim establishes a correlation-contrast (most evident in const. *Δέδωκεν* because of the conjunction *γάρ*) between this monolithic exclusivity of the imperial clarification for the application of *leges* in the courts and the ‘divergence of various commentaries’ (*διαφορά τῶν ποικίλων ὑπομνημάτων*), a divergence which, therefore, even more seems to be a phenomenon conceived in a forensic-judicial perspective.

As for const. *Deo auctore*, whose indications are more frugal because of an overall greater concision of content, immediately before the formulation of the ban there is a reference to the *frequentissimus ordo iudiciorum* as a criterion in selecting the material to be included in the collection (§ 10) and a lapidary hint at the use in the courts (§ 11: *Ideoque iubemus duobus istis codicibus omnia gubernari*) which corresponds to the more structured and explicit discourse of const. *Tanta/Δέδωκεν* § 19.

Well, if we put together the fact that the ban is not contained in the constitution specifically addressed to *professores legum* and the fact that the provision of prohibited and permitted activities for the *iuris periti* and for ‘those who have or will have *iuris peritia*’ is framed in an overall consideration of the practical use of the Digest, it seems that we are entitled to assume that the prohibited *commentarii/ὑπομνήματα* are understood by Justinian as referring to the Digest not as an object of teaching, but as a legal text to be used in courts and, consequently, that the recipients of the prohibition were not professors.

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84 The reference to the dispute is explicit in the Greek text: *Εἰ δὲ καὶ τι τὸ λοιπὸν ἀμφισβητηθεῖ (...), ζητήσεσιν, διαρεῖν καὶ θεραπεύειν*; as for *negotia quae non sunt legum laqueis innodata* of const. *Tanta*, it is enough to point to, among others, the following Justinian texts where *negotium* is used in the sense of a law-suit or trial: C. 1,2,21,2; 1,29,3; 1,53,1,4; 3,10,3; 4,1,1,2; 4,1,12,2; 4,21,18; 4,21,21,4; 4,30,15; 7,17,1pr.; 7,45,14; 7,62,37pr.-1; 11,48,20,5.

85 *Supra*, n. 4 on note 35.

Moreover, we know that Justinian, advocating a high view of legal teaching as an instrument for an appropriate training for future *iusitiae et rei publicae ministri*,<sup>86</sup> counted on the commitment of the *antecessores* to *leges clare et dilucide tradere* (const. *Omnem* § 2) and even expected that they applied an *interpretandi subtilitas* during their lessons (C. 12,15,1).<sup>87</sup> Therefore, on closer inspection, it would be surprising that he abhorred the idea that the concrete content of such teaching, transmitted orally in class, was fixed in a written text: even adding (at the same time as the publication of const. *Omnem*) the very serious *poena falsitatis* into the constitutions *Tanta* and *Δέδωκεν*.

In essence, I believe that Justinian, according to the perspective from which he looked at the Digest, forbade commentaries as tools and vehicles of *interpretatio* having as its object the collection as legislation to be applied in the courts. The teaching activities of the *antecessores* and the written products derived from it were unaffected by his provision, hence the non-repetition of the same in const. *Omnem*.

In terms of admissibility, then, what has been observed so far draws support from the fact that the types of writing directly related to the commentaries, namely the *indices-tituli-παράτιτλα* and translation of the *κατὰ πόδα*, were to be used, as is natural, by any *iurisperitus*, not only by the teachers. In effect, the addition *in margine* to copies of legal texts of brief references to the contents was an effective consultation tool. It aided the swift recovery of a particular legal provision in view of any need, be it for teaching, personal study, consultancy, pleading and judicial interventions.<sup>88</sup> As for the translation of Latin texts, its usefulness for the needs of practical application, and trials in the first place, is attested, if such were needed, since the same complete translation of the Digest was

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86 On this point, I refer to Falcone, 'Premessa' (note 2 above), 150-153.

87 The text is quoted *supra*, note 80. I take this opportunity to report that in 'Premessa' (note 2 above), 153, through an oversight, I indicated the inclusion of law professors as an innovation in comparison with the disposition of Theodosius: cf. in fact CTh. 6,21,1.

88 Moreover, the surviving *summae* – which may be considered more extensive versions of *indices-tituli-παράτιτλα* (as Van der Wal/Lokin, *Delineatio*, 47; Lokin/Van Bochove, 'Compilazione – educazione – purificazione' (note 34 above), 128) – come or not from jurists (Cyrillus and Anatolius) who were contemporary teachers (Scheltema, 'Das Kommentarverbot' (note 1 above), 311 = *Opera minora*, 406, considers that neither one nor the other were *antecessores*; otherwise, for an identification of Anatolius with the *antecessor* mentioned in const. *Tanta/Δέδωκεν*, cf. J.H.A. Lokin, 'Anatolius antecessor', in: Id., *Analecta Groningana ad ius graeco-romanum pertinentia*, (ed. Th.E. van Bochove), Groningen 2010, 81-87; Lokin/Meijering, *Anatolius and the Excerpta Vaticana* (note 3 above), 24-30), directly testify that the operation of synthesis of the official legal text was also necessary for the practical use of the collections: on this point see Scheltema, 'Das Kommentarverbot' (note 1 above), 309-311 = *Opera minora*, 405-407; Lokin/Meijering, *Anatolius and the Excerpta Vaticana* (note 3 above), 27-28.

soon accomplished by Dorotheus, which, as is well known and self-evident, was not created for the needs of teaching.<sup>89</sup>

And furthermore, the absence of the prohibition in const. *Omnem* perfectly coordinates both with the goal of the prohibition, that is, the intention of preventing the recurrence and spread of a plurality of conflicting interpretations, and the words with which this goal has been enshrined by Justinian. Referring to what has been noted above (n. 3-4), I point out here that the overall comparison with the negative example of the past in const. *Tanta/Δέδοκεν* § 21 establishes a direct correlation, I would say a correspondence between the *commentatores* of the edict, as carriers of divergent interpretations, and ‘those who have or will have *iuris peritia*’, to whom it is forbidden to give rise to a new *discordia*. Such a correlation-correspondence leads us to believe that, like the ancient *commentatores*, the subjects of the ban were, not professors who teach educational material, but jurists who interpret and comment on legal texts. In other words, what Justinian would prohibit was interpretive work similar to that conducted by classical jurists,<sup>90</sup> which lent itself to being solicited both from the internal structure of the collected material (*supra*, n. 3) and, ultimately, the same enhancement of the ancient jurisprudential production accomplished with the compiling:<sup>91</sup> an interpretative work which would not only reopen a *ius controversum*, fracturing the certainty of the law, but also – for its risk of expansion, innovation, deviation from the texts – undermine the exclusivity of the imperial nomopoietic and interpretative power (which for this reason is strongly emphasized in const. *Tanta/Δέδοκεν*, together with the direct attribution of ancient texts to the imperial *auctoritas*).<sup>92</sup>

89 Above all, Brandsma, *Dorotheus* (note 21 above), 70. The same author (p. 280), based on the trace offered by PSI 1350 (A<sup>r</sup> 1. 8), suggests that the translation was originally located at the margins of the manuscript, tracing back to the typology of the *παράτιτλα*.

90 In similar order of ideas, see Amelotti, ‘Giustiniano interprete’ (note 1 above), 8, albeit in a different overall framework (*supra*, on note 73). This scholar, moreover, considers the provisions of the constitutions in const. *Deo auctore* § 12 and const. *Tanta/Δέδοκεν* § 21 as directed ‘to the school’.

91 On the fear that ‘l’esaltazione del prestigio della grande giurisprudenza classica’, made with the same compiling collection, ‘avrebbe potuto indirettamente legittimare una analoga attività interpretativa da parte dei contemporanei operatori del diritto’ I refer to G. Falcone, ‘Giustiniano, i giuristi classici e i professori di diritto’, in: P. De Lucia/F. Mercogliano, [ed.], *Lezioni Emilio Betti (Camerino 2001-2005)*, Napoli 2006, 73-100 (83-87) (where, however, I followed the widespread identification between the *iuris periti* mentioned in the ban and the *antecessores*).

92 Cf. const. *Tanta* §§ 10 and 20 (already before const. *Deo auctore* §§ 6 and 7), for which, see again Falcone, ‘Giustiniano’ (note 91 above), 84-85. In particular, it is significant that the reference to *legum veritas* of const. *Tanta* § 10, which anticipates the mention of *legitima veritas* in § 12 – alluding to the result obtained (also) via the elimination of the ancient jurisprudential disputes by Justinian (*supra*, n. 3) –, is inserted in a context in which the imposition of imperial *auctoritas* over the ancient jurisprudential material is highlighted; cf., recently, Falcone, ‘La veritas delle leges’ (note 15 above), 458.

## FALCONE

In conclusion, if the hypothesis here proposed is reliable, then the whole problem of the existence of both the prohibition on commentaries and the ‘antecessorial literature’ (not just on the Digest) would be resolved. The scene of prohibited *interpretatio* was not the teaching activities, nor were the *antecessores* the subjects of the prohibition of commentaries. Between the creation and development of this literature and the prohibition of commentaries there would no longer be any tension. The written production coming from (more or less directly) the professors of law would not have been created – very strangely indeed – in defiance of the will of the creator of the Digest.

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