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The impact of the Lex citandi *on Justinian's Digest*

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Summary

It is generally taken for granted that the 426 Law of Citations (*Lex citandi*) of the emperor Valentinian III had no impact on the composition of Justinian's *Digest* and that it had already been repealed on 15 December 530 with the promulgation of Const. *Deo auctore*, announcing the composition of the *Digest*. In this article it is contended that the *Lex citandi* was only repealed on 16 December 533, with the promulgation of the *Digest* on which it had a considerable impact since it was referred to in Const. *Deo auctore* and was the main inspiration of the *Index florentinus*, which is to be regarded as an expanded version of the *Lex citandi*.

Keywords

law of citations – Composition of Justinian's *Digest* – *Index florentinus* – *Quinquaginta decisiones*

Introduction

On 7 November 426, the emperor Valentinian III issued an important statute concerning the sources of law binding on judges in the empire. It contained provisions on several other subjects causing problems in the administration of justice at the time as well. One of them concerned imperial *rescripta*. Which

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of these were to be regarded as *leges generales* and consequently as generally binding and which were merely *personales*[1]? Another subject concerned access to what was, ever since 212, the common law of the Roman empire, the *ius civile*. It consisted, in theory, of an accumulation of *leges*, *plebiscita*, *senatus consulta* and *edicta magistratuum* from Republican times to the era of the Severi. In reality, the *ius civile* was only accessible to (some) subjects and lawyers throughout the empire by means of the writings of the jurists commenting on all these traditional sources for the simple reason that the original sources themselves were practically inaccessible[2]. Consequently, traditional Roman *ius civile* came to be identified with the writings of these jurists in the later Roman empire[3]. The problem was, however, that an overview of Roman legal literature was almost as difficult to obtain as was access to the original sources themselves. Hence the need for a comprehensive introduction, which explains the success of Gaius' *Institutiones*, especially in the eastern provinces[4], and hence the need for a canon of the writings of some authoritative jurists to be depended on by judges as a reliable 'restatement' of the *ius civile*. This exigency was provided for in a section of the statute of Valentinian III which has become known to posterity as the 'Law of Citations', henceforward the *Lex citandi*[5]. It conferred *auctoritas* to the writings of five jurists, Papinianus, Ulpianus, Paulus, Modestinus, *and* Gaius[6], henceforth the *Quinqueviri*. This was not a revolutionary provision but followed an already well-established tradition to

1 See on the 426 statute G. Bassanelli Sommariva, *La legge di Valentiniano III del 7 Novembre 426*, Labeo, 29 (1983), p. 280-313, A.J.B. Sirks, *The Theodosian code, A study*, Friedrichsdorf 2007, p. 17-35, and recently J.H.A. Lokin, *Codifications of late antiquity, Exclusive and universal*, Groningen 2023, p. 14-18.

2 There is an interesting parallel: the early legal history of the United States of America. Since the original sources of English common law (Year Books, Law Reports, Statutes) were largely unavailable in North America, American lawyers relied on Blackstone's *Commentaries on the laws of England*. It was this textbook, published shortly before the war of independence, that saved the tradition of the common law of England in the United States.

3 F. Wieacker, *Römische Rechtsgeschichte, Zweiter Abschnitt*, Munich 2006, p. 201.

4 See on this issue H.L.W. Nelson, *Überlieferung, Aufbau und Stil von Gai Institutiones*, Leiden 1981, p. 220-222.

5 The text of the *Lex citandi* as published in the Mommsen-edition of the Theodosian code (CTh 1,4,3) has only survived in the collection of imperial statutes from the *Codex Theodosianus* inserted into the 507 *Lex romana visigothorum*, also known as the *Breviarium: LRV* (ed. G. Hänel, Leipzig 1849) CTh 1,4,1.

6 CTh 1,4,3: *'Papiniani, Pauli, Gaii, Ulpiani atque Modestini scripta universa firmamus ita, ut Gaium quae Paulum, Ulpianum et cunctos comitetur auctoritas, lectionesque ex omni eius opere recitentur'*. The only innovation of the *Lex citandi* was the extension of *auctoritas* to all the writings of Gaius (*lectiones ex omni eius corpore*): L. Wenger, *Die Quellen des römischen Rechts*, Vienna 1953, p. 533 and Wieacker, *Römische Rechtsgeschichte* (*supra*, n. 3), p. 203.

regard the writings of Papinianus, Ulpianus and Paulus as the quintessence of the *ius civile*[7], as is confirmed by the fact that the *Collatio legum mosaicarum et romanarum*, a work antedating the *Lex citandi*, refers to no other authorities than these jurists for its statements regarding the *ius civile*[8]. The *Lex citandi* merely consolidated that tradition by enacting it in a statute. A complicating factor of this statute, however, was that it extended the *auctoritas* conferred to the *Quinqueviri* to the writings of older jurists cited by them as well, provided the text of these writings could be assessed beyond a doubt by a comparison of manuscripts[9]. The *Lex citandi* also assigned a special position to Papinianus by providing that, whenever there was a *dissensus opinionum* among the *Quinqueviri* that could not be resolved by a majority vote, because it resulted in a tie between two equal groups, the opinion of the group counting Papinianus, that *vir excellentis ingenii*, among them ought to prevail[10].

The 426 statute of Valentinian III contained legislation foreshadowing a much more ambitious plan to codify all imperial legislation, as well as the entire Roman jurisprudence, announced by Theodosius II three years later[11]. In the meantime, judges had to work with the rules of thumb contained in the *Lex citandi*. Theodosius' prestigious plan resulted in a spectacular failure, probably because the projected merger of imperial legislation (*leges*) and jurisprudence

7 P. Krüger, *Geschichte der Quellen und Literatur des römischen Rechts* (2d ed.), Munich – Leipzig 1912, p. 344-345.

8 On the *Collatio* (or *Lex dei*) see F. Schulz, *Roman legal science*, Oxford 1946, p. 311-314, Wieacker, *Römische Rechtsgeschichte* (*supra*, n. 3), p. 237, D. Liebs, *Die Jurisprudenz im spätantiken Italien*, Berlin 1987, p. 166, G. Barone-Adesi, *L'età della* Lex dei, Naples 1992, and recently R.M. Frakes, *Compiling the* Collatio Legum Mosaicarum et Romanarum *in late antiquity*, Oxford 2011. On the *Fragmenta Vaticana* see *infra*, at fnt. 39.

9 CTh 1,4,3: '*Eorum quoque scientiam, quorum tractatus atque sententias praedicti omnes suis operibus miscuerunt, ratam esse censemus, ut Scaevolae, Sabini, Iuliani atque Marcelli omniumque, quos illi celebrarunt, si tamen eorum libri propter antiquitatis incertum codicum collatione firmentur*'. It has been contended that this section was only added to the original 426 statute in 438 by the compilers of the *Codex Theodosianus*: see Wieacker, *Römische Rechtsgeschichte* (*supra*, n. 3), p. 203-204 and *Id.*, *Textstufen klassischer Juristen*, Göttingen 1959, p. 155-163. See also F. Pringsheim, *Zur Textgeschichte des Zitiergesetzes*, SDHI, 27 (1961), p. 235-240. The contention is that the original 426 statute only contained the quite practical plan to attribute *auctoritas* to the *Quinqueviri* exclusively but that it was qualified twelve years later by extending *auctoritas* to all the older jurists cited by them as a poor substitute for the failed attempt at codifying the Roman common law, on which more shortly. All this is, of course, rather speculative.

10 CTh 1,4,3: '*Ubi autem diversae sententias proferuntur, potior numerus vincat auctorum, vel, si numerus aequalis sit, eius partis praecedat auctoritas, in qua excellentis ingenii vir Papinianus emineat, qui ut singulos vincit, ita cedit duobus*'.

11 CTh 1,1,5 (429). For the preparatory stages of the final composition of the *Codex Theodosianus* see now Lokin, *Codifications of late antiquity* (*supra*, n. 1).

(*ius*) in one all-inclusive code, along the line of the *Fragmenta Vaticana*, proved too much of a challenge. Justinian learned this lesson from the past since he did not repeat that mistake: imperial legislation and traditional jurisprudence were to be codified separately as a matter of principle[12]. In the end, the grand scheme of Theodosius II resulted in an official *addendum* to the private collections of the *codices Gregorianus* and *Hermogenianus*, the *Codex Theodosianus* (438). The plan to codify the common law, Roman jurisprudence (*ius*), had already been abandoned in 435[13], only to be revived by Justinian a century later. Consequently, practicing lawyers in court and law professors in their classes had worked with the rules of thumb of the *Lex citandi* for a century when Justinian resuscitated the plan to codify the common law of the Roman empire on 15 December 530 (Const. *Deo auctore*). A year before that, Justinian had already codified the entire imperial legislation in his first *Codex*. As, by sheer luck, we know for certain, the *Lex citandi* was incorporated in Justinian's 529 *Codex*[14] and consequently was still in force when he issued *Deo auctore*. The *Lex citandi* was only repealed on 16 December 533, the date of the promulgation of the *Digest*, a fact Justinian emphasized in 534 by inserting Const. *Tanta* into his new *Codex* at the very place where the *Lex citandi* had been inserted into the old one of 529, *i.e.* in C. 1,17,2. It is generally taken for granted that the *Lex citandi* had no impact on the composition of Justinian's *Digest* and that it had already been repealed on 15 December 530 with the promulgation of *Deo auctore*[15]. I submit that the *Lex citandi* did have an important impact on Justinian's *Digest* since, as I hope to demonstrate, it was implicitly referred to in *Deo auctore* and was the main inspiration of the famous *Index florentinus*.

12 This is an important assessment. It explains why Justinian explicitly prohibited to insert imperial constitutions already included in his *Codex* into the text of the *Digest* (Const. *Deo auctore* § 9): '*ea, quae sacratissimis constitutionibus quas in codicem nostrum redegimus cauta sunt, iterum poni ex veteri iure non concedimus, cum divalium constitutionum sanctio sufficit ad eorum auctoritatem*'. See on this issue especially H.J. Scheltema, *Les* Quinquaginta decisiones, Subseciva Groningana, 1 (1984), p. 1 (now also in: H.J. Scheltema, *Opera minora*, Groningen 2004, p. 158).

13 CTh 1,1,6 and Lokin, *Codifications of late antiquity* (*supra*, n. 1), p. 47-52.

14 I refer, of course, to the famous Oxyrhynchus papyrus no 1814 (*The Oxyrhynchus Papyri*, XV, ed. B.P. Grenfell and A.S. Hunt, London 1922, no. 1814, p. 220).

15 Wieacker, *Römische Rechtsgeschichte* (*supra*, n. 3), p. 294: 'ohne Bindung an das Zitiergesetz'. Wenger, *Die Quellen des römischen Rechts* (*supra*, n. 6), p. 534 went even further: 'Justinian hat das Zitiergesetz aufgehoben', referring to Const. *Deo auctore* § 6, an assessment still to be found in *Der neue Pauly*, s.v. 'Zitiergesetz' (Schiemann). Wenger overlooked the fact that for no less than three years after the promulgation of *Deo auctore*, from 15 December 530 until 16 December 533, judges in the empire still had to work with the rules of thumb of the *Lex citandi*.

The interim (438–533)

The insertion of the *Lex citandi* into the 438 Theodosian code (CTh 1,4,3) had important consequences for the subsequent multiplication of legal literature, since the emphasis on five jurists of authority gave rise to the production of standardized manuscripts of the works of these authors and some of their contemporaries, such as Marcianus and Florentinus, allowing the professors of the pre-Justinian law schools to refer their students to this literature with astonishing precision[16]. As we know from the *Scholia Sinaitica* and Papyrus *PSI* 14, no. 1449[17], Ulpianus' commentaries *Ad Sabinum* and *Ad edictum*, were the two textbooks dominating the pre-Justinian legal curriculum. The late Tony Honoré, who has studied Ulpianus' literary output as practically no-one has ever done before[18], notes that Ulpianus' habit to refer by book number and title to the older authorities he quotes – the standard citation style in the *Digest* by the way – was rather rare before his time[19]. Many of these detailed citations by Ulpianus have been preserved in the *Digest* for purely ornamental reasons, since a detailed reference to a text *not* incorporated into the *Digest* had lost all meaning by then, which seems to have been the reason why others have been suppressed by Justinian's compilers[20].

The law professors of the post-*Lex citandi* era added references in their courses on Ulpianus' textbooks to authorities Ulpianus himself did *not* mention, such as his contemporary Florentinus, and especially to Paulus' many works, most notably the latter's commentaries *Ad Sabinum* and *Ad edictum*, books never cited by Ulpianus. Paulus' reputation had been considerably enhanced even before the *Lex citandi* by Constantine I in 327[21] and in the pre-Justinian legal curriculum he even attained a standing on a par with Ulpianus and Papinianus since the entire fourth year of that curriculum was dedicated to a private study of Paulus' *Responsa*[22]. One can only guess at the reasons of the

16 See on this issue W.J. Zwalve [and] Th. de Vries, *The New Temple, On the origin, nature and composition of the* partes Digestorum, Tijdschrift voor Rechtsgeschiedenis, 85 (2017), at p. 496-497.

17 V. Bartoletti (ed.), *Papyri Greci è Latini*, vol. 14, Florence 1957, p. 159-170 (Arangio-Ruiz).

18 T. Honoré, *Ulpian*, Oxford 1982, esp. Ch. 9 (p. 204-248).

19 Honoré, *Ulpian* (*supra*, n. 18), p. 208.

20 Comp. for example D. 7,4,1,1 (Ulpianus, *libro septimo decimo ad Sabinum*) with *FV* 62.

21 CTh 1,4,2: '*Universa, quae scriptura Pauli continentur, recepta auctoritate firmanda sunt et omni veneratione celebranda*'. As it seems, the imperial intervention was caused by contemporary doubts about the authenticity of the *Sententiae* attributed to Paulus. The emperor left no doubt about it: '*Ideoque sententiarum libros plenissima luce et perfectissima elocutione et iustissima iuris ratione succinctos in iudiciis prolatos valere minime dubitatur*'.

22 Const. *Omnem* § 1: '*solis a professoribus traditis Pauliana responsa per semet ipsos recitabant*'.

law professors for their preference of Ulpianus over Paulus in their readings *Ad Sabinum* and *Ad edictum*, but Tony Honoré may have been right when he suggested[23] that Ulpianus seems to have aimed at a more scholarly audience than Paulus, since Ulpianus referred in his works more frequently, and more precisely, to other, older, authorities than Paulus seems to have done[24]. Nonetheless, Paulus' commentaries *Ad Sabinum* and *Ad edictum* were preferably cited in school as the most important authority in support of Ulpianus[25]. It is a pattern reiterated in the *Digest*.

As was just observed, the *Lex citandi* had granted *auctoritas* not only to the writings of the *Quinqueviri*, but also to the writings of older jurists cited by them, explicitly referring to Scaevola[26], Sabinus, Iulianus and Marcellus, provided the text of these writings could be assessed beyond a doubt 'by a comparison of manuscripts' (*codicum collatione*)[27]. One wonders what kind of manuscripts? If the legislator meant to prescribe a comparison of *two* (or even more) manuscripts *of the original work* by one of the older jurists predating the *Quinqueviri*, he imposed an *onus probandi* almost impossible to meet at the time for ordinary litigants and their legal counsel, especially in the Greek-speaking eastern empire, where manuscripts (in Latin) of Roman legal authorities must have been very rare[28], except – perhaps – in places such as Beyrout, a city with *ius italicum* and a law school to go with it. Consequently, it occurred to me that the *codices* to be compared must have been manuscripts of one or more of the *Quinqueviri* containing a specific *quotation* of one of the older jurists rather than manuscripts containing the original work by that older jurist from which the quotation was taken[29]. We know for certain that manuscripts of the

23 Honoré, *Ulpian* (*supra*, n. 18), p. 215.

24 Honoré, *Ulpian* (*supra*, n. 18), p. 207.

25 Even in the very small collection of comments on Ulpianus' *libri ad Sabinum* we know as the *Scholia Sinaitica*, there are no less than five references to Paulus' works, three of them to his commentary *Ad Sabinum*: *Sch. Sin.* VIII,18 (Paulus, *libro septimo ad Sabinum*); XII,34 (Paulus, *libro septimo ad Sabinum*) and XIII,35 (Paulus, *libro quinto ad Sabinum*).

26 The Scaevola mentioned here is, of course, Quintus Mucius, not Quintus Cervidius, as J. Harries, *Encyclopaedias and autocracy, Justinian's Encyclopaedia of Roman law*, in: J. König and G. Woolf (edd.), Encyclopaedism from Antiquity to the Renaissance, Cambridge 2013, p. 182 supposes.

27 *Supra*, fnt. 9.

28 Comp. Const. *Tanta* § 17: '*Homines etenim, qui antea lites agebant, licet multae leges fuerant positae, tamen ex paucis lites perferebant* vel propter inopiam librorum, quos comparare eis impossibile erat, *vel propter ipsam inscientiam, et voluntate iudicum magis quam legitima auctoritate lites dirimebantur*' (emphasis added).

29 Lokin, *Codifications of late antiquity* (*supra*, n. 1), p. 13, takes this for granted: 'valid only insofar as they were quoted'.

writings by these older authors themselves had ceased to be available in late fifth and early sixth century Gaul. They were only known there if, and in as far as, the *Quinqueviri* had integrated them into their own treatises[30]. Integrating extensive parts of older authorities (and of their own books) into their writings was quite common, if not a preferred practice, among jurists (and Stoic philosophers, Chrysippus most notoriously among them). Books were extremely costly and consequently the most sought-after books were books containing as much as possible from earlier books on the same subject[31]. It is a well-known fact[32] that Ulpianus copied large tracts from Pomponius' commentaries *Ad edictum* and *Ad Sabinum* in his corresponding works[33], as he did with the *Digesta* of Celsus[34] and Iulianus[35]. Precisely this may have been the main reason why his work was so appreciated by the pre-Justinian law professors. We know they added references to Paulus and other contemporaries of Ulpianus in their courses, but it is pure guesswork to speculate on the question whether these pre-Justinian law professors had any first-hand knowledge of legal authorities *predating* the *Quinqueviri*. One wonders whether manuscripts of these older

30 LRV, CTh 1,4,1, *Interpretatio*: '*Scaevola, Sabinus, Iulianus atque Marcellus in suis corporibus non inveniuntur, sed in praefatorum opera tenentur inserti*'. The public libraries in Rome itself were in a miserable state by the late fourth century, as Ammianus Marcellinus testifies (*Res gestae*, 14,6,18): '*bybliothecis sepulcrorum ritu in perpetuum clausis*'. The temple of Apollo on the Palatine, where the *iuris periti* used to assemble and debate (Sch. Iuv. 1,128, ed. Heinrichs, Bonn 1829, p. 16: '*iuxta Apollinis templum iuris periti sedebant et tractabant*') had a famous law library (Sch. Iuv. *l.c.*: *bibliothecam iuris civilis et liberalium studiorum in templo Apollinis Palatini dedicavit Augustus*). It was destroyed by fire in 363 (Amm. Marc. 32,3,3): '*hac eadem nocte Palatini Apollinis templum … in urbe conflagravit aeterna*'. See on this library R. Fehrle, *Das Bibliothekswesen im alten Rom*, Wiesbaden 1986, p. 62-64. One can only speculate about the fate of the Roman libraries after the sack of Rome by Alaric (410) and Geyseric (455).

31 As long as books were still copied by hand, this continued to be an appreciated practice. A very authoritative medieval jurist like Guillaume Durant († 1296) inserted entire treatises of other writers into his own enormous *Speculum iuris*. He was censured by one of his medieval commentators (Joannes Andreae, † 1348), not for doing so, but for failing to acknowledge that he did.

32 Honoré, *Ulpian* (*supra*, n. 18), p. 208-211.

33 On this see *infra*, at fnt. 119.

34 Lenel's *Palingenesia*, I, col. 127-168, has 274 fragments from Celsus' *Digesta*, 130 of them are indirect quotes from other jurists, most of them from Ulpianus' *Libri ad edictum* and *Ad Sabinum*.

35 Lenel's *Palingenesia*, I, col. 318-484, has no less than 839 fragments from Iulianus' *Digesta*. Many of them are indirect quotes from other authors, mostly from Ulpianus' *Libri ad edictum* and *Ad Sabinum*.

jurists were still available in the law schools[36], let alone the law courts, of the pre-Justinian era. There was, however, *one* place in the East where legal authorities predating the *Quinqueviri* may indeed have been available and that was in Constantinople. The 429 project to codify ancient Roman jurisprudence, in addition to imperial legislation, originated in the court of the eastern emperor Theodosius II and consequently there must have been a law library in that capital allowing his commissioners to put that plan into effect. Whether it was in the local 'Capitolium', where Theodosius II had recently established a university (425) and had appointed two professors 'to expound the rules of the common law and the imperial constitutions' (*qui iuris ac legum formulas pandant*)[37], or in the imperial palace itself, we do not know[38], but Constantine can hardly have failed to provide for an adequate legal library on behalf of the officials of his court in what was to be the new capital of the civilised (*i.e.* Christian) world and the new centre of the imperial administration. He, or rather his officials, may, however, have considered the writings of the *Quinqueviri* and their contemporaries as sufficient evidence of the *ius civile* since their

36 It is likely that the teacher commenting on Ulpianus' *Libri ad Sabinum* in the *Fragmenta Sinaitica* was from Beyrout (H.J. Scheltema, *Opmerkingen over Griekse bewerkingen van Latijnse juridische bronnen*, Zwolle 1940, p. 11 [now also in: Scheltema, *Opera minora* (*supra*, n. 12), p. 194]), but there are (significantly) *no* quotations in the *Fragmenta Sinaitica* from any of the jurists predating the *Quinqueviri*, whereas there are, even in this small fragment, references to Paulus (5), Modestinus (2), Marcianus (1) and Florentinus (1), that is to two of the *Quinqueviri* and to two of their contemporaries. In one of the rare cases where an older jurist (Vivianus) is indeed mentioned in a related law course predating Justinian (*Catalogue of the Greek and Latin Papyri in the John Rylands Library* III, J. Roberts, ed., Manchester 1938, no. 475, p. 67), the name comes from the text of Ulpianus' *Ad Sabinum* itself, commented on by probably the same teacher (Sab.) as is mentioned in the *Fragmenta Sinaitica*. See on the relation between the *Fragmenta Sinaitica* and *John Rylands Papyrus*, no. 475 Scheltema, *Opmerkingen* (*op. cit.*), p. 11-12 (*Opera minora*, p. 195) and Roberts in his introduction to *John Rylands Papyrus*, no. 475 at p. 66: 'the similarity both in form and content suggests that the two texts belong to the same work'.

37 CTh 14,9,3 (27 February 425). We know the name of one of the law professors. It was a certain Leontius, who was awarded a high imperial decoration (a *comitiva primi ordinis*) only a month later (15 March 425 [CTh 6,21,1]). In spite of that distinction, Leontius was not selected as a member of the committee that was to realize Theodosius' 429 project.

38 The orator and philosopher Themistius (*c.* 317 – *c.* 385), Or. IV 59d – 60d, ed. Dindorf, p. 71-72, refers to the establishment of a public library in Constantinople by the emperor Constantius II but it is clear from what Themistius tells us about it, that it must have held Greek literature and philosophy rather than practical legal literature in Latin. This must also have been true for the library established in Constantinople by the apostate emperor Julian, since he donated the contents of his own private library, as the historian Zosimus (Ἱστορία Νέα 3,11,3) reports.

work contained the highest (and latest) stage of development of that branch of the law with abundant references to more ancient authorities. It is at this point that the *Fragmenta Vaticana* come to mind again.

As was just stated, Theodosius' 429 plan to compose a codification of Roman law integrating *ius* and *leges* in one comprehensive code closely resembles the design of the *Fragmenta Vaticana*, which has even led a distinguished scholar to suggest a connection between this composition and Theodosius' grand project[39]. I will offer no opinion on that suggestion (however probable as I still think it is) but I must draw attention to the sources of the *ius civile* in the Vatican fragments instead. According to the editor of the seminal edition of the *Fragmenta Vaticana*, Theodor Mommsen, the *Fragmenta Vaticana* must have been compiled around 320 AD[40]. If this is true, it confirms the existence of a long-standing tradition to regard the writings of only three jurists, Ulpianus, Paulus and Papinianus, as quintessential at a time long before the *Lex citandi*, since the *Fragmenta Vaticana* only cite from these three jurists[41]. There are many references in the *Fragmenta Vaticana* to jurists predating these three but *only* as quotations in the works of Ulpianus, Paulus and Papinianus, suggesting that the compiler of the *Fragmenta Vaticana* either did not have first-hand knowledge of the works of these older jurists or may have regarded them as surpassed by the later jurists (who cited them anyway). The owner of an antiquarian bookshop once put it to me that no library becomes outdated (and consequently worthless) as quickly as the library of a lawyer and this may have been true for antiquity as well, as can be illustrated by the fate of Pomponius' *Libri ad edictum*[42]. It is, therefore, more than just likely that even in the early fifth century the writings of jurists predating the *Quinqueviri* were only available to lawyers through the works of the *Quinqueviri*, that is at a time long before the interpreter of the *Lex citandi* in the *Lex romana Visigothorum* explic-

39 Ph.E. Huschke, *Iurisprudentiae anteiustinianae quae supersunt*, Leipzig 1879, p. 695-698.

40 *Collectio librorum iuris anteiustiniani*, III, Berlin 1890, p. 11-12. He must allow for some later additions though, since there is a constitution of Valens and Gratianus from 372 in *FV* 37. I should note that Mommsen's assessment does not necessarily stand in the way of Huschke's suggestion which comes close to the suggestion of Wieacker, *Römische Rechtsgeschichte* (*supra*, n. 3), p. 228 ('Anregung'). Since this matter does not directly concern the issues at hand here, I will leave it at that.

41 There is a fourth anonymous jurist in *FV* §§ 90-92 on *interdicta*. Huschke, *Iurisprudentiae anteiustinianae quae supersunt* (*supra*, n. 39), p. 692-693 suggested that these fragments should be attributed to Venuleius Saturninus, but that idea was rejected on sound reasons by Paul Krüger, *Geschichte* (*supra*, n. 7), p. 340, fnt. 21. On this issue see also Liebs, *Die Jurisprudenz im spätantiken Italien* (*supra*, n. 8), p. 152.

42 See *infra*, at fnt. 119.

itly said so in 507[43]. This must have been true for the western empire and even more so for the eastern part of the Roman 'oikoumene'.

Const. '*Deo auctore*'

The four professors invited by Justinian to join Tribonian's committee to compose the *Digest* – Dorotheus and Anatolius from Beyrout and Theophilus and Cratinus from Constantinople – were equipped with a considerable *corpus* of jurisprudential learning. Not only were they familiar with the works of the *Quinqueviri*, Ulpianus foremost among them, and with the countless references to older jurists they had come across there, but they also brought with them the accumulated knowledge of generations of professors on what had become obsolete in the writings of the *Quinqueviri* and their contemporaries on account of later imperial legislation. The *Scholia Sinaitica*, that invaluable piece of information on pre-Justinian legal education, is also very illuminating on this account. There are, again even in this small part on Ulpianus' commentary *Ad Sabinum* covered by the *Scholia Sinaitica*, no less than five instructions to students to pass over whole sections of it ('Pass over (etc.)', 'Δίελθε (κ.τ.λ.)')[44] and no less than nine references to later imperial legislation[45]. The conclusion to be drawn from this is that the four professors did not have to start reading the works of the *Quinqueviri* afresh in order to find out what should be inserted in the *Digest* and what not. They had read most, if not all of them, but especially Ulpianus' commentaries *Ad edictum* and *Ad Sabinum*, over and over again for years and so they already knew. They were, however, confronted with a new fact at the start of their work at the *Digest* that may have come as a surprise to them. I will come to that later, but first I must draw attention to some other aspects.

The imperial official presiding over the project, Tribonian, must have laid out his plan of operation to the commissioners in a combined session at the very beginning of the project[46]. The session was about the more technical de-

43 See *supra*, fnt. 30.

44 *Sch. Sin.* XII,34; XVI,43 and 44; XVII,47; XVIII,49.

45 Four references to the *Codex Gregorianus* (*Sch. Sin.* I,2; V,9), two to the *Codex Hermogenianus* (*Sch. Sin.* III,5) and three to the *Codex Theodosianus* (*Sch. Sin.* I,2 and 3; XIX,52).

46 Among all the committee- and subcommittee-sessions concocted by modern scholars on the basis of Bluhme's 'Massen'-theory, I feel at liberty to introduce one hypothetical session that cannot have failed to have happened (in spite of Mommsen's reservations about this (*Hofmann v. Blume*, ZSS RA, 22 (1901), p. 2 [= *Juristische Schriften*, 2, Berlin 1905, p. 98]): a joint session of all the members of the committee – the four professors,

tails elaborating on the broad outlines as sketched in Const. *Deo auctore*, such as for example the absolute prerequisite to avoid mixing up imperial legislation with jurisprudence[47]. The *Digest* was to be *one* imperial constitution of an, at that time, still uncertain date in the future, whereas the 529 *Codex* in force contained a collection of imperial statutes, including the *Lex citandi*, all of which had their own (earlier) dates. If they were in one way or another inserted into the *Digest*, a *later* imperial constitution, the status of the constitutions inserted in the *Codex* would have been left in doubt. Another important technical issue was, of course, the status of the *Lex citandi*. Justinian had implicitly referred to that statute in *Deo auctore*, as will be explained presently, but that reference stood in need of further clarification. It is at this point that an English translation of the crucial part of *Deo auctore* (§§ 4-6) must be submitted in order to leave no doubt about our interpretation:

> (4) We order you to read and excerpt the books pertaining to Roman law by the ancient scholars to whom the most sacred emperors have granted authority to write about and interpret the law, so that all material is collected from them, leaving no possible overlap or contradiction, but that from these one work is to be composed which will suffice in place of all, since others have written books about the law as well, whose writings no author has followed nor have been generally accepted and we too do not want our statute to be stained by their works. (5) And when this material has been collected by the grace of God, all the law must be set in an order as you think is appropriate, assigning an equal rank to all legal authors and no preference to anyone, since all of them are not superior or inferior in every respect, but some of them are in some respects. (6) You must not base your opinion about what is better and more equitable on the number of writers, since it is conceivable that the opinion of only one less significant person is in some aspect far superior to the opinion of many more authoritative persons. Consequently, you must not immediately reject what has been written in the notes to Aemilius Papinianus by Ulpianus, Paulus and Marcianus, to which formerly no authority was

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the eleven practicing advocates (*patroni causarum*) from Constantinople also involved in the project, and the chief civil servant (Constantinus, the *magister scrinii*) responsible for the clerical staff supporting it – at the beginning of the project and presided over by Tribonian. The committee may or may not have been officially installed in a preceding ceremonial session presided over by Justinian himself. The emperor may even have recited Const. *Deo auctore* at this occasion, but it was hardly the occasion to go into the technical details of the project.

47 See on this important issue *supra*, fnt. 12.

> granted out of respect for the great Papinianus, but you must not hesitate to assign force of law to that as well, whenever you come to the conclusion that something in it may necessarily serve as a supplement to or as an interpretation of the works by the most ingenuous Papinianus. Let all the wise men who are mentioned in this book have authority as if their studies were the product of imperial constitutions and had been emanating from our divine lips. We do justly make it all ours, since all the authority bestowed upon them comes from us. A man who emends something improperly made is deserving of more praise than the man who first made it[48].

Justinian ordered his commissioners to read and excerpt the books of all the old jurists 'to whom the most sacred emperors have granted authority to write about and interpret the law'. It comes natural to most (if not all) legal historians to read a reference here to the '*ius respondendi*', legendarily introduced by Augustus as a prerequisite to lecture and write about the law[49]. But it was the

48 Const. *Deo auctore* §§ 4–6: '(4) *Iubemus igitur uobis antiquorum prudentium, quibus auctoritatem conscribendarum interpretandarumque legum sacratissimi principes praebuerunt, libros ad ius Romanum pertinentes et legere et elimare, ut ex his omnis materia colligatur, nulla* (*secundum quod possibile est*) *neque similitudine neque discordia derelicta, sed ex his hoc colligi quod unum pro omnibus sufficiat. quia autem et alii libros ad ius pertinentes scripserunt, quorum scripturae a nullis auctoribus receptae nec usitatae sunt, neque nos eorum uolumina nostram inquietare dignamur sanctionem.* (5) *Cumque haec materia summa numinis liberalitate collecta fuerit, oportet ... totum ius digerere ... prout hoc uobis commodius esse patuerit ... omnibus auctoribus iuris aequa dignitate pollentibus et nemini quadam praerogatiua seruanda, quia non omnes in omnia, sed certi per certa uel meliores uel deteriores inueniuntur.* (6) *Sed neque ex multitudine auctorum quod melius et aequius est iudicatote, cum possit unius forsitan et deterioris sententia et multos et maiores in aliqua parte superare. et ideo ea, quae antea in notis Aemilii Papiniani ex Ulpiano et Paulo nec non Marciano adscripta sunt, quae antea nullam uim optinebant propter honorem splendidissimi Papiniani, non statim respuere, sed, si quid ex his ad repletionem summi ingenii Papiniani laborum uel interpretationem necessarium esse perspexeritis, et hoc ponere legis uicem optinens non moremini: ut omnes qui relati fuerint in hunc codicem prudentissimi uiri habeant auctoritatem tam, quasi et eorum studia ex principalibus constitutionibus profecta et a nostro divino fuerant ore profusa. Omnia enim merito nostra facimus, quia ex nobis omnis eis impertietur auctoritas. nam qui non suptiliter factum emendat, laudabilior est eo qui primus inuenit*'. As is indicated, some passages not directly relating to the issue at hand have been left out in order to save space.

49 D. 1,2,2,49 (Pomponius). The *ius respondendi* is one of the great conundrums of Roman legal history. See the recent survey by J.M. Rainer, *Iudicia, responsa, rescripta: Zu den römischen Rechtsquellen*, *RIDA*, 66 (2019), p. 203-227. None of the *Quinqueviri* of *Lex citandi*-fame is known to have ever been granted the *ius respondendi*. We have a detailed *cursus honorum* of one of the most famous Roman jurists, Julianus, in *CIL* 8, 24094 (= *ILS* 8973),

Lex citandi rather than the *ius respondendi* that Justinian had in mind here as can be demonstrated by the significant differences between Gaius' description of the *responsa prudentium* as a source of law and Justinian's adaptation of Gaius' text in the Institutes.

Gaius 1,7	Inst. 1,2,8
Responsa prudentium sunt sententiae et opiniones eorum, quibus permissum est iura condere. quorum omnium si in unum sententiae concurrunt, id, quod ita sentiunt, legis uicem optinet; si uero dissentiunt, iudici licet quam uelit sententiam sequi; idque rescripto diui Hadriani significatur.	Responsa prudentium sunt sententiae et opiniones eorum, quibus permissum erat iura condere. nam antiquitus institutum erat ut essent qui iura publice interpretarentur, quibus a Caesare ius respondendi datum est, qui iurisconsulti appellabantur. quorum omnium sententiae et opiniones eam auctoritatem tenant ut iudici recedere a responso eorum non liceret, ut est constitutum.

Gaius still stresses that it was the *communis opinio* of the jurists that was binding on a judge: '*quorum omnium* si in unum sententiae concurrant, *id*, *quod ita sentiunt*, *legis uicem optinet*' (emphasis added). There is only a casual and rather vague reference to the *ius respondendi* itself in Gaius' treatise: '*opiniones eorum*, *quibus permissum est iura condere*', that is 'the opinions of those who are authorized to write about the law'. Justinian, however, stresses the *ius respondendi* as an imperial privilege: '*nam antiquitus institutum erat ut essent qui iura publice interpretarentur*, *quibus a Caesare ius respondendi datum est*, *qui iurisconsulti appellabantur*'. He omits Gaius' emphasis on the *communis opinio* and merely states, writing in the present tense, that the opinions (*responsa*) of *all* jurists authorized to write about the law are binding on a judge: '*quorum omnium sententiae et opiniones eam auctoritatem tenent ut iudici recedere a responso eorum non liceret*'. This assessment is corroborated as follows: '*ut est constitutum*', that is 'as is decreed by an imperial constitution'. This is a most

but there is no reference there of him having been granted the *ius respondendi*, whereas it does mention that his salary as a *quaestor* had been doubled by Hadrian on account of his great learning (*propter insignem doctrinam*). There is, in Pomponius' rather obscure account of the *ius respondendi*, an instructive anecdote that Hadrian responded to a request by some *viri praetorii* to grant them the *ius respondendi* that '*hoc non peti, sed praestari solere*'.

remarkable variation on Gaius' text, which states that, whenever there is no *communis opinio* among the jurists, a judge is free to choose the opinion he prefers: '*si uero dissentiunt, iudici licet quam uelit sententiam sequi; idque rescripto diui Hadriani significatur*'. There is no reference to Hadrian's rescript in Justinian's text, but merely a reference to an unnamed and undated imperial constitution: '*ut est constitutum*'. If Justinian had indeed referred to Hadrian's rescript here, he would not have hesitated to name that emperor explicitly, as he does elsewhere in the Institutes[50]. He does not do so here and there was a good reason for this, since for a century judges had ceased to have the license Hadrian had granted them as Gaius states. In a case of *dissensus opinionum* they were bound by the rules of thumb of the *Lex citandi* and it was *this* imperial constitution Justinian must have had in mind here. He does not mention it explicitly though, since it was, by then (16 December 533, the date of the promulgation of the Institutes), repealed by the *Digest*.

In his lecture on Inst. 1,2,8, Theophilus – who had been a member of the little committee of three responsible for the text of the Institutes[51] and who, as a law professor, had lectured on Gaius before the promulgation of Justinian's Institutes – adds important information on the *responsa prudentium* as a source of law. It is from his comments that one learns what exactly was meant by the ambiguous expression *iura condere* in Inst. 1,2,8 (and Gaius 1,7), which Theophilus translates in Greek by the verb 'νομοθετεῖν', explicitly clarifying that this verb does *not* mean 'to make the law'[52], but to *explain* the law[53]. So, this is what the *responsa prudentium* were to Justinian and his contemporaries. The writings of the classical Roman jurists were *evidence* of the law (*ius*), much like in the old traditional theory of the English 'common law' judicial decisions – the English equivalent to the *responsa prudentium* of Roman law – were also regarded as just 'evidence of what is the common law'[54]. The *Lex citandi* had

50 See Inst. 2,12*pr*. (*subscriptione divi Hadriani*); 2,20,24 (*Hadrianus rescripsit*); 3,20,2 (*ex epistula divi Hadriani*).

51 The other two members were his colleague from Beyrut, Dorotheus, and Tribonian himself: Const. *Imperatoriam* § 3.

52 As is still taken for granted by many scholars. See, for example Wieacker, *Römische Rechtsgeschichte* (*supra*, n. 3), p. 202 ('allgemeine Rechtsetzung'). A '*legum conditor*' is *not* a 'legislator' but a legal author. In the writings of the sixth century Byzantine professors inserted in the Basilica the expression 'νομοθέτης' usually means a classical jurist: see on this issue W. Zwalve, *Einige Bemerkungen zu* Constitutio Tanta/ΔΕΔΩΚΕΝ § 18, Tijdschrift voor Rechtsgeschiedenis, 51 (1983), p. 135-149(141).

53 Theophilus, *Paraphrasis Institutionum* 1,2,8 (ed. Lokin, Meijering, Stolte and Van der Wal, Groningen 2010, p. 22, r. 10): 'νομοθετεῖν ἤτοι τοὺς νόμους ἑρμηνεύειν'.

54 William Blackstone, *Commentaries on the Laws of England*, I, Oxford 1765 (first ed., repr. University of Chicago Press, Chicago 1979), p. 71.

established a 'canon' from which that evidence was to be collected and Justinian's compilers had to hold on to it[55], which explains why the writings of the *Quinqueviri* alone stand for 2/3 of the entire content of the *Digest*[56]. It was, moreover, still on the statute book, Justinian's first *Codex*, when that emperor issued Const. *Deo auctore*. But the *Lex citandi* was aimed at judges only and not even at all judges, since the highest court, the emperor, was exempt from the provisions of that statute as a matter of course: he was *legibus solutus* (D. 1,3,31), the sole arbiter between equity and the law (C. 1,14,1)[57] whose judicial decisions were binding on all lower instances (C. 1,14,12)[58]. The committee compiling the *Digest* did not share this imperial privilege though since its authority was strictly controlled by the provisions of Const. *Deo auctore*.

The '*Quinquaginta decisiones*'

The *Lex citandi* was inserted into title 17 of the first book of Justinian's first *Codex*. We have the content of that title in Oxyrhynchus papyrus no. 1814 containing a piece of the *Index titulorum* of the 529 *Codex*. We learn from that document that title 17 only had two imperial constitutions under the rubric *De auctoritate iuris prudentium*, to wit the *Lex citandi* and a constitution by Justinian himself addressed to the praetorian prefect Menas that cannot be traced now, probably because it was also superseded by the sub-

55 This contention is confirmed by Const. *Tanta* § 20: '*Legis latores autem vel commentatores eos elegimus, qui digni tanto opere fuerant et quos et anteriores piissimi principes admittere non sunt indignati*'. This cannot have been a reference to the *ius respondendi* but must be a reference to the imperial constitutions by Constantine I, Valentinian III, and Theodosius II in CTh 1,4 (*De responsis prudentium*).

56 F. Hofmann, *Die Compilation der Digesten Justinians*, Vienna 1900, p. 4. Hofmann's assessment has never been seriously disputed.

57 Constantine (316): '*Inter aequitatem iusque interpositam interpretationem nobis solis et oportet et licet inspicere*'. Constantine's provision is also reproduced, in a somewhat extended version, in the *Codex Theodosianus*, from which Justinian took it: see CTh 1,2,3. See also (on the same issue) C. 1,14,9 (Valentinianus and Marcianus (454)): (post alia) '*Si quid vero in isdem legibus latum fortassis obscurius fuerit, oportet id imperatoria interpretatione patefieri duritiamque legum nostrae humanitati incongruam emendari*'. For the original extended version see Nov. Marciani 4,1*pr*.

58 Justinian (529): '*Si imperialis maiestas causam cognitionaliter examinaverit et partibus cominus constitutis sententiam dixerit, omnes omnino iudices, qui sub nostro imperio sunt, sciant hoc esse legem non solum illi causae, pro qua producta est, sed omnibus similibus. 1. Quid enim maius, quid sanctius imperiali est maiestate? vel quis tantae superbiae fastidio tumidus est, ut regalem sensum contemnat, cum et veteris iuris conditores constitutiones, quae ex imperiali decreto processerunt, legis vicem obtinere aperte dilucideque definiunt?*'.

sequent publication of the *Digest*. The *Lex citandi* was the only of the three constitutions in CTh 1,4 (*De responsis prudentium*) Justinian deemed worthy to insert into his 529 *Codex*. The other two constitutions of CTh 1,4 were still close to his mind though when he issued Const. *Deo auctore*, as is indicated by his explicit instruction in *Deo auctore* § 6 *not* to observe Constantine's ban on the *notae* to Papinianus by Ulpianus and Paulus (CTh 1,4,1), adding Marcianus' *notae* in the process and thus implicitly confirming the *auctoritas* of this jurist as well. It is another argument for the supposition that Justinian had the *Lex citandi*, rather than the *ius respondendi*, in mind when he referred his committee to the jurists 'to whom the most sacred emperors have granted authority to write and interpret the law'. It was precisely because the emperor *did* have the *Lex citandi* in mind that he explicitly exempted the members of his committee from a particular aspect of the *Lex citandi*, *i.e.* the way that statute solved the problem of a *dissensus opinionum* among the ancient jurists. They were *not* to solve that problem as the *Lex citandi* suggested – *i.e.* by counting the number of writers, or by giving preference to one of them, Papinian, over others – but to do so on the basis of their own opinion 'on what is better and more equitable' (*quod melius et aequius est*). The problem here is that this was precisely what Justinian himself was doing at the very same time with his *Quinquaginta decisiones*, a collection of imperial constitutions specifically dealing with *altercationes* between the classical jurists[59].

The earliest of Justinian's constitutions clearly identifiable as belonging to the *Quinquaginta decisiones* is a set of nine *decisiones*[60], all issued on 1 August 530, that is before Const. *Deo auctore* was even issued (15 December 530). But Justinian did not stop 'deciding' matters like this after he had installed his committee and had issued his instructions in *Deo auctore*. There are at least four

59 Const. *Cordi* § 1: '*cum vetus ius considerandum recepimus*, tam *quinquaginta decisiones fecimus* quam *alias ad commodum propositi operis pertinentes plurimas constitutiones promulgavimus*, *quibus maximus antiquarum rerum articulus emendatus et coartatus est omneque ius antiquum supervacua prolixitate liberum atque enucleatum in nostris institutionibus et digestis reddidimus*' (emphasis added). For the *Quinquaginta decisiones* see Scheltema, *Les Quinquaginta decisiones* (*supra*, n. 12), p. 1-9 (now also in: Scheltema, *Opera minora*, p. 158-162), G.L. Falchi, *Osservazioni sulle* 'L Decisiones' *di Giustiniano*, in: Studi in onore di Arnaldo Biscardi ,v, Milan 1984, p. 121-150, J.H.A Lokin, Decisio *as a* terminus technicus, Subseciva Groningana, 5 (1992), p. 21-31, and H. Weber, *A hypothesis regarding Justinian's* decisiones *and the* Digest, Roman Legal Tradition, 11 (2015) p. 42-117.

60 For this see Justinian himself in Inst. 1,5,3: '*<constitutionem> quam promulgavimus inter nostras decisiones*, *per quas*, *suggerente nobis Triboniano*, *viro excelso*, *quaestore*, *antiqui iuris altercationes placavimus*'.

decisiones postdating Const. *Deo auctore*[61]. One of them (C. 6,27,5) may serve as a good illustration of Justinian's opinion as expressed in *Deo auctore* § 6 'that the opinion of only one less significant person may sometimes be superior to the opinion of many more authoritative persons'. The *decisio* deals with the question whether a man could name one of his slaves as his heir in his will without having previously formally manumitted that slave in his testament as well. 'There was so much debate on this question among the ancient jurists', says Justinian, 'that it seemed hardly possible to decide it'[62]. Justinian did decide the question by granting freedom to the slave, since the intention of the master to manumit that slave was to be implied from the grant of his estate to that slave. Justinian was proud of this decision as can be shown from his comments on it in the Institutes, where he emphasizes that his decision was not '*secundum plurium sententias*', *i.e.* the majority of the ancient jurists, according to whom a *heredis institutio sine libertate* was null and void. Justinian argued that his decision was not only equitable but was also supported by a rather obscure jurist from a distant past, Atilicinus, a contemporary of Proculus, as he had learned from Paulus[63]. I have given this example to show that Justinian was not inclined to leave a 'decision' like this to the compilers notwithstanding his instruction in *Deo auctore* § 6. The members of the committee were to tread very carefully since it was not up to them *alone* to substitute an equitable rule for an inequitable rule of substantive (common) law since this was an imperial privilege not to be exercised without actual imperial intervention[64]. All decisions implying a change in substantive law were, to put it in terms of modern civil servants, 'political', meaning that the direct intervention of the person politically responsible is indispensable[65]. Consequently, they had to stay within

61 Scheltema, *Les Quinquaginta decisiones* (*supra*, n. 12), p. 7 (= *Opera minora*, p. 161) refers to C. 6,30,20 and 21 and C. 6,27,5 (all promulgated on 30 April 531) and C. 6,27,6 (31 July 531).

62 C, 6,27,5,1: '*tanta inter veteres exorta est contentio, ut vix possibile sit videri eandem decidere*'.

63 Inst. 2,14*pr.*: '*et aequius erat et Atilicino placuisse Paulus suis libris quos tam ad Masurium Sabinum quam ad Plautium scripsit refert*'.

64 C. 1,14,1 (Constantinus (316)): '*Inter aequitatem iusque interpositam interpretationem nobis solis et oportet et licet inspicere*'. Constantine's provision is also to be found, in an extended version, in the *Codex Theodosianus*, from which Justinian took it: CTh 1,2,3. See also (on the same subject) C. 1,14,9 (Valentinianus and Marcianus (454)): (post alia) '*Si quid vero in isdem legibus latum fortassis obscurius fuerit, oportet id imperatoria interpretatione patefieri duritiamque legum nostrae humanitati incongruam emendari*'.

65 On this issue see J.H.A. Lokin, *The end of an epoch*, in: R. Feenstra, A.S. Hartkamp *e.a.* (edd.), *Collatio iuris Romani*, Etudes dédiées à Hans Ankum, Vol. 1, Amsterdam 1995, p. 261-273 and id.,*Decisio as terminus technicus*' (*supra*, n. 59). Both articles are now also available in Th.E. van Bochove (ed.), *Analecta Groningana ad ius graeco-romanum pertinentia*, Groningen 2010, p. 17-30 and p. 163-173.

the parameters of traditional Roman jurisprudence. They were supposed to make a comprehensive restatement of classical Roman jurisprudence based on the *Lex citandi* and to bring that in line with later imperial legislation, a job they were eminently qualified for since they had been doing precisely that in their classes on traditional Roman jurisprudence[66]. Accordingly, the old rule that a *heredis institutio sine libertate* was null and void is just not mentioned in D. 28,5 (*De heredibus instituendis*). It is still to be found in many *leges* of that title though, where slaves are named as heirs, but always with the addition *cum libertate*[67], a superfluous addition after C. 6,27,5. What the compilers were supposed to do without interfering with the imperial legislative prerogative can be effectively illustrated by comparing a text from Ulpianus' 17th book *Ad Sabinum* in the *Digest* (D. 7,2,1,2) with the original as it has been handed down to us in the *Fragmenta Vaticana* (*FV* 75,3).

FV 75,3

Idem ait et si communi seruo et separatim Titio usus fructus legatus sit, amissam partem usus fructus non ad Titium, sed ad solum socium pertinere debere quasi solum coniunctum. quam sententiam neque Marcellus neque Mauricianus probant; Papinianus quoque libro xvii quaestionum ab ea recedit. quae sententia Nerati fuerit, est libro i responsorum relatum. sed puto esse ueram Iuliani sententiam; nam quamdiu uel unus utitur, potest dici usum fructum in suo esse statu.

D. 7,2,1,2

Idem ait et si communi servo et separatim Titio usus fructus legatus sit, amissum ab altero ex sociis usum fructum non ad Titium, sed ad solum socium pertinere debere quasi solum coniunctum quae sententia vera est: nam quamdiu vel unus utitur, potest dici usum fructum in suo statu esse.

Ulpianus deals with a rather complicated case where an *ususfructus* had been bequeathed to a slave and to Titius. The problem was that the slave was owned by two persons jointly. What if one of the joint owners of the slave dies? Does his share in the *ususfructus* accrue to his associate alone or to Titius as well? In the original text of Ulpianus' commentary *Ad Sabinum* (*FV* 75,3) it is related that Julianus had held that the share of the deceased

66 See *supra*, at fnt. 45.

67 See D. 28,5,6,3; 28,5,9,16; 28,5,49(48); 28,5,51(50); 28,5,58(57) 'und sonst öfters'.

co-owner accrued to his associate, not to Titius, but that Marcellus, Mauricianus and even Papinianus had a different opinion, also held by Neratius. Ulpianus sided with Julianus. There is no trace of this ancient *altercatio* in the *Digest*. Not unsurprisingly, the compilers sided with Ulpianus (and Julianus) and suppressed the entire debate in D. 7,2,1,2. In doing so, they did not 'decide' that *altercatio* as Justinian did with contested questions of law, but simply assessed that, but for Papinian, Julianus' opinion was the prevailing opinion in the time of the *Quinqueviri* and consequently imperial interference was not called for to 'decide' a question already settled by Ulpianus since it was their charge to leave no trace of any disagreement among the *veteres* in the *Digest*[68]. Interference by the emperor himself was, however, indispensable whenever an *altercatio* could not be solved in this way, especially when the great Ulpianus himself had already asserted that imperial intervention was called for in order to solve it, as has happened with a problem 'decided' in 530 (C. 6,49,7)[69].

Other legislation affecting the composition of the *Digest*

Justinian's *Quinquaginta decisiones* had a very special objective. They all purported to solve a *dissensus opinionum* among the jurists of the pre-*Lex citandi* era. As such they ought to be distinguished from Justinian's other legislation in preparation of the *Digest*[70], such as, for example, his constitutions of 529

68 Const. *Deo auctore* § 4: '*nulla discordia derelicta*'. The case of *FV* 75,3 must be a real conundrum for some modern legal historians: here is an *altercatio* among the classical legal authorities, Papinian, Marcellus, Mauricianus and Neratius on the one hand and Julianus and Ulpianus on the other. Applying the logic of the *Lex citandi*, the opinion of Papinian ought to have prevailed, if only because the majority concurred, but it did not. This was *not* because the compilers of the *Digest* deemed the solution advanced by Ulpianus and Julianus more equitable, but because Ulpianus, who was *not* restricted by the *Lex citandi*, had already decided the question: '*puto esse ueram Iuliani sententiam*'. The difference of opinion as expressed in *FV* 75,3 was, in other words, *not* the kind of *altercatio* that called for a solution by the compilers (or even the emperor) since it had already been solved by Ulpianus and Julianus. The authority of the latter especially was paramount with Justinian and Tribonian: see *infra*, at fnt. 100.

69 C. 6,49,7 (23 October 530): '*apud veteres dubitabatur: et Domitius Ulpianus constituendum esse super his putavit. Sancimus itaque* etc.'.

70 Const. *Cordi* § 1: '*Postea vero, cum vetus ius considerandum recepimus*, tam *quinquaginta decisiones fecimus* quam *alias ad commodum propositi operis pertinentes plurimas constitutiones promulgavimus*' (emphasis added). Justinian makes this distinction twice: see also Const. *Cordi* § 2.

and 531 reforming a crucial part of the law of succession, the law of legacies (*legata*) and *fideicommissa*[71], one of the most important parts of private law to Romans. This legislation was *not* about deciding altercations among the ancient (pre-*Lex citandi*) jurists, but about real law reform concerning an issue on which there was *no* difference of opinion among the old jurists: the fundamental difference between *legata* and *fideicommissa*, as was still reflected in the 529 *Codex*, where the subjects of *legata* and *fideicommissa* were dealt with in two separate titles, C. 6,37 and C. 6,42 respectively[72]. Justinian decided to do away with the differences between these constructs by completely equalling *legata* and *fideicommissa*: '*per omnia exaequata sunt legata fideicommissis*'[73]. In doing so at a time when Tribonian's committee was already working at the *Digest*, the emperor created a considerable problem for the compilers since according to the classical jurists there were fundamental differences between the two constructs, even though there were many similarities too, as was emphasized by the title *Communia de legatis et fideicommissis* (C. 6,43) in the original 529 *Codex*[74]. Accordingly, they must have been planning two *separate* titles (or even books) for the *Digest* corresponding with the titles in the 529 *Codex*, on legacies (*De legatis*, C. 6,37) and *fideicommissa* (*De fideicommissis*, C. 6,42)[75] and a third title *Communia de legatis et fideicommissis* (C. 6,43). Justinian's legislation of 529 and 531 thwarted that plan and has eventually resulted in the curious phenomenon of what

71 C. 6,43,1–3. C. 6,43,1 was issued on 17 September 529; C. 6,43,2 on 20 February 531 and C. 6,43,3 on 1 September 531.

72 I take it for granted that Justinian's 534 *Codex*, the *repetita praelectio*, merely copied the rubrics of the titles of the 529 *Codex* on this matter.

73 D. 30,1 (Ulpianus, *libro 67 ad edictum*). The *dictum* of Ulpianus in D. 30,1 has *not* been interpolated in view of the 529/531 legislation, but has merely been isolated from its original ('Edictal') context, *i.e.* the question whether the possessory remedy available to the *bonorum possessor* of an estate against a legatee who had illegally taken possession of the property bequeathed to him (*interdictum quod legatorum*) was also available against a beneficiary of a *fideicommissum* who had taken possession without due process, a question Ulpianus answered in the affirmative by stating that, in as far as this issue was concerned, *legata* and *fideicommissa* were treated equally. It was now used deliberately by Tribonian to recapitulate the essence of C. 6,43,2,1: '*omnia, quae naturaliter insunt legatis, ea et fideicommissis inhaerere intellegantur et e contrario*'.

74 The original content of C. 6,43 in the 529 *Codex* must have been very different from the content of C. 6,43 in the 534 *Repetita praelectio* containing Justinian's constitutions *abolishing* the differences between *legata* and *fideicommissa*.

75 An indication is the division of labour as specified by the three Bluhmian 'Massen': all books concerning *fideicommissa* were assigned to the 'Papinian' mass, whereas the matter of *legata* belonged to the 'Sabinian' mass as a matter of course.

looks like *one* title *De legatis et fideicommissis* distributed over no less than *three* books of the *Digest*: D. 30–32[76].

The *Index florentinus*

It was made clear to the members of the committee in Const. *Deo auctore* that they had to work from the writings of the *Quinqueviri*, in conformity, that is, with the main provision of the *Lex citandi* and the long-established tradition that statute was based on. But what about the ancient authorities the *Quinqueviri* referred to in their works? Justinian had explicitly instructed the compilers 'to read and excerpt the books pertaining to Roman law by the ancient scholars to whom the most sacred emperors have granted authority to write about and interpret the law', but the *Lex citandi*, to which he referred here, did not contain a comprehensive list of legal scholars pre-dating the *Quinqueviri*. All it contained was a reference to Scaevola (meaning Quintus Mucius), Sabinus, Iulianus, and Marcellus, 'and of all who have been cited by them', meaning the *Quinqueviri*. This may have been sufficient for the judges of the pre-Justinian era, but it was certainly inadequate as a guideline for the compilers of the *Digest* who were to compose a comprehensive digest of the works of *all* of these jurists[77]. So, how were they to proceed? It was the central question to be deliberated and answered in the first session of the committee just referred to[78]. Still, the *Lex citandi* offered some assistance as Justinian himself had indicated in *Deo auctore*. They were, as he said, not to stain his *Digest* with the names of authors 'whose writings no author has followed nor have been generally accepted' (*quorum scripturae a nullis auctoribus receptae nec usitatae sunt*)[79]. Consequently, a list had to be composed of all legal authorities 'followed and

76 The 'Sabinian' part of that huge title is in Book 30, the 'Edictal' and the first part of the 'Papinian' part in Book 31 (D. 31,1-63 and 64-89). The rest of the 'Papinian' part is in Book 32 (D. 32, 1-43). The remaining section of Book 32 (D. 32,44-103) consists of an entire suppressed title Bluhme identified as a title 'De verborum significatione', corresponding with C. 6,38 (*Die Ordnung der Fragmente in den Pandectentiteln: Ein Beitrag zur Entstehungsgeschichte der Pandecten*, Zeitschrift für geschichtliche Rechtswissenschaft, 4 (1820), p. 299). It may have been the substitute for an originally planned, but now redundant, title 'Communia de legatis et fideicommissis', corresponding with C. 6,43.

77 Bluhme, *Die Ordnung* (*supra*, n. 76), p. 356: 'Bisher hatte man die Werke von fünf Juristen nicht mehr übersehen und zweckmäßig benutzen können; jetzt sollten die Schriften aller römischen Juristen, die jemals Ansehen und Einfluß gehabt hatten, verarbeitet werden'.

78 See *supra* at fnt. 46.

79 Const. *Deo auctore* § 4.

generally accepted'. But 'followed and generally accepted' by whom? The *Quinqueviri* are the obvious answer to this question and consequently a list had to be composed of all authorities cited by them before the committee could even begin reading and excerpting. Tribonian, the true mastermind behind the project, must have considered this before he convened his committee for the first time, and he had a list ready when he entered that meeting. Since this must also have been the occasion at which the process of reading and excerpting was to be divided over three (or maybe even four) sub-committees, Bluhme's famous 'Massen', a provisional list of all authorities to be taken into account *must* have been prepared before that division of labour could be coordinated[80]. It is generally ignored in this context, but Tribonian had made similar preparations before, when he was involved in the composition of Justinian's first *Codex* of 529. He is known to have composed two lists for that occasion, a 'Hypatikòn', a list of consuls up to the era of Justinian, and an additional 'Basilikòn', a list of emperors, also up to the age of Justinian[81], indispensable tools for the arrangement of all imperial constitutions in chronological order in the titles of each book of the *Codex* since each constitution retained its original date[82]. The list of authorities to be read and excerpted was not the only surprise Tribonian sprung on his committee at this occasion since he was also able to provide it with many of the ancient books, as he proudly proclaims: '*that very excellent man Tribonian mainly provided the bulk of books containing ancient learning, among which were many books unknown to even the most learned men*'[83]. The compilers, especially the professors among them, originally may have thought that they could just leave these ancient authorities where they traditionally found them, *i.e.* inserted into the works of the *Quinqueviri* and their contemporaries, but they were not to do so. They had to use the originals from the provisional list provided by Tribonian. A more or less revised edition of Tribonian's provisional list has survived. It is preserved in only one manuscript, the *Codex*

80 See also D. Mantovani, *Digesto e masse Bluhmiane*, Milan 1987, p. 148.

81 Suda, τ 957 (Τριβωνιανός), ed. Adler, I, 4, Leipzig 1935, p. 588: 'ἔγραψεν … Ὑπατικὸν εἰς Ἰουστινιανὸν αὐτοκράτορα, Βασιλικὸν εἰς τὸν αὐτόν'. For the identity of Tribonian, the compiler of the *Digest*, and the polymath Tribonian from Side, mentioned in *Suda* τ 957 see H.J. Scheltema, *Over getallen in het Corpus Iuris Civilis*, in: E. Alkema (ed.), Vrijheid en recht, Opstellen aangeboden aan prof. mr E.H. 'sJacob, Zwolle 1975, p. 228 (= *Opera minora*, p. 396) and Zwalve [and] De Vries, *The New Temple* (*supra*, n. 16), Tijdschrift voor Rechtsgeschiedenis, 85 (2017), at p. 514, fnt. 94.

82 Scheltema, *Over getallen in het Corpus Iuris Civilis* (*supra*, n. 81), p. 228 (= *Opera minora*, p. 396).

83 Const. *Tanta* § 17: '*Antiquae autem sapientiae librorum copiam maxime Tribonianus vir excellentissimus praebuit, in quibus multi fuerant et ipsis eruditissimis hominibus incogniti*'.

florentinus of the *Digest*, hence the designation *Index florentinus*[84].

The *Index florentinus* is, in many ways, a curious document. It has been written by a Greek hand[85] in a curious mixture of Latin and Greek to indicate the authors, sometimes in Latin, with the names always in the Greek genitive case (*e.g.* Papinian*u*, Sabin*u*, Iavolen*u etc.*), but as a rule in Greek (*e.g.* Ἰουλιανοῦ, Ἀλφενοῦ, Προκούλου *etc.*). The same mixture of Greek and Latin occurs in the references to the works ascribed to the authors, while the references to the number of books each individual work contains are always in Greek and, with some minor exceptions, in full (*per litterarum consequentiam*) as was prescribed by Justinian in Const. *Deo auctore* § 13[86]. The header of the document is in Greek as well: Ἐξ ὅσων ἀρχαίων καὶ τῶν ὑπ᾽ αὐτῶν γενομένων βιβλίων σύγκειται τὸ παρὸν τῶν Digeston ἤτοι τοῦ Πανδέκτου τοῦ εὐσεβεστάτου βασιλέως Ἰουστινιανοῦ σύνταγμα', *i.e.* 'a summary of the old books and their authors from which the present Digest or Pandects of the most pious emperor Justinian is compiled'. This header is important since it distinguishes the *Index* as we have it in the *Florentina* from the provisional list compiled by Tribonian, later to be revised in order to comply with Justinian's wish to add an official *Index auctorum* to the *Digest* (Const. *Tanta* § 20): '*And in order that it does not escape you from which books by the ancient authorities this work has been composed, we have ordered this too to be inserted into the introduction of our Digest so that it becomes manifestly clear from which authors and from which books and from how*

84 On the *Index florentinus* see G.F. Puchta, *Bemerkungen über den* Index Florentinus, in: Kleinere Civilistische Schriften, Leipzig 1851, p. 216-221, B.J. Lintelo de Geer, *De* Index florentinus *der Digesten*, in: Verslagen en Mededeelingen der Koninklijke Akademie der Wetenschappen, Tweede reeks, zesde deel, Amsterdam 1877, p. 334-355, Hofmann, *Die Compilation der Digesten Justinians* (*supra*, n. 56), p. 23-46, F. Ebrard, *Das zeitliche Rangverhältnis der Konstitutionen* De confirmatione Digestorum 'Tanta' und 'Δεδωκεν', ZSS RA, 40 (1919), p. 113-135 (124-130), P. Jörs, s.v. *Digesta*, *PWRE* V, col. 492-494, Mantovani, *Digesto e masse Bluhmiane* (*supra*, n. 80), p. 135-138, and *infra*, in fnt. 90.

85 According to Mommsen (in the *Praefatio* to his *editio maior* of the *Digest*, p. XXVI) the *Index* was written by a scribe who also wrote Const. Δεδωκεν. Mommsen did not collate the Florentine manuscript of the *Digest* himself but sent Adolph Kiessling and August Reifferscheid, 'duo viri strenui peritique' (p. XVIII), to Florence to study that manuscript, the basis of his edition. Consequently, Mommsen's remarks on the *Florentina* and its scribes are based on their assessments. In recent times they have been corrected in many ways by W. Kaiser, *Schreiber und Korrektoren des* Codex Florentinus, ZSS RA, 118 (2001), p. 133-219. On the scribe of the *Index* see Kaiser, p. 146.

86 There are only three references to books in numbers: two with Gaius and one in the list of works of Paulus. This is a remarkable small amount on a total of almost 200 listed works composed of more than one book.

many this temple of Roman justice has been constructed'[87]. As we know from an additional line in Const. Δεδωκεν § 20, an official *Index auctorum* had indeed been added to the manuscript presented to the emperor: 'τοῦτο τε γένεσθαι προσετάξαμεν, καὶ δὴ γέγονεν', *i.e.* 'we have ordered this to be done and it has been done'[88]. But the *Index florentinus* as we have it cannot be the official *Index auctorum* here referred to. The well-known fact that the *Index florentinus* does not contain an accurate and comprehensive account of *all* books by *all* authors collected in the *Digest*[89] is largely responsible for some kind of consensus among modern scholars that it must still be regarded as a preliminary list, a 'working document', to be added to, or subtracted from, in the process of compiling the *Digest*[90]. It has even been suggested that it represents the catalogue of Tribonian's library since he provided Justinian's committee with many of the books written by the ancient authorities from his own library[91]. Yet, the emphasis on the defects of the *Index florentinus* obscures an important positive element since, but for one minor exception, it *does* contain an exhaustive list of all

87 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 legis latoribus quibusque libris eorum et quot milibus hoc iustitiae Romanae templum aedificatum est.*

88 Ebrard, *Das zeitliche Rangverhältnis* (*supra*, n. 84), p. 128 suggests this remark in Δεδωκεν may have been a note by the compilers to the draft of that constitution which predates Const. *Tanta*. On this and further details concerning the relation between the two introductory constitutions see T. Wallinga, *Tanta / Δεδωκεν, Two introductory constitutions to Justinian's Digest*, Groningen 1989, p. 47-81.

89 In the definitive list of all authors and books collected in the *Digest*, compiled by P. Krüger in Appendix VI to Mommsen's *editio maior* of the *Digest* (*Digesta Iustiniani Augusti*, II, Berlin 1880, p. 59*-67*) the authors and books collected in the *Digest* but *not* contained in the *Index florentinus* are indicated with an asterix (*), while the authors and books mentioned in the *Index florentinus* but *not* actually contained in the *Digest* are indicated by the word *Index* in parentheses ((*Index*)). Krüger has extended this list in an Appendix to the *editio minor* of the *Digest* (*Corpus Iuris Civilis*, I, 6th ed., Berlin 1954, p. 932-949) with palingenetical references.

90 See Krüger, *Geschichte* (*supra*, n. 7), p. 371-372, Schulz, *Roman legal science* (*supra*, n. 8), p. 144-147, Wenger, *Die Quellen des römischen Rechts* (*supra*, n. 6), p. 588-591, Wieacker, *Römische Rechtsgeschichte* (*supra*, n. 3), p. 295, and recently T.E. van Bochove, '*There is safety in numbers*' *– when written in full: The Florentine* Index auctorum *and its subscriptio revisited*, Subseciva Groningana, 10 (2019), p. 97-109, and the literature referred to there. On G. Rotondi, *L'Indice fiorentino delle Pandette e l'ipotesi del Bluhme*, *Scritti giuridici*, I, Milan 1922, p. 298-324 see now Mantovani, *Digesto e masse Bluhmiane* (*supra*, n. 80), p. 135-146 and W. Kaiser, *Digestenentstehung und Digestenüberlieferung*, ZSS RA, 108 (1991), p. 341-342.

91 On Tribonian's library see recently Harries, *Encyclopaedias and autocracy* (*supra*, n. 26), p. 178-196.

authors represented in the *Digest*, including the ones who were represented in the *Digest* with just a few lines or even with no more than a single line.

At the end of the *Index*, listed as the penultimate author, emerges 'Maximus'[92], a completely unknown person, never mentioned in the *Digest* by any of the *Quinqueviri* or anyone of the older authors. He is represented in the *Digest* by no more than one single (and very short) *lex* at the very end of book 30 (D. 30,125), thus saving his treatise on the *Lex Falcidia* (and his full name, Rutilius Maximus) from total oblivion. Nevertheless, he must have been of some renown since Justinian had made it clear that he did not want his *Digest* to be stained by the names of authors 'whose writings no author has followed nor have been generally accepted'. In this respect the *Index florentinus* is exhaustive since it does indeed contain a list of *all* jurists whose works are represented in the *Digest.* The only real exception is Aelius Gallus[93], a contemporary of Cicero. His name is not listed in the *Index*, but there is one (very short) fragment from his book *De verborum significatione* inserted into the *Digest*: D. 50,16,157. Nevertheless, his *scriptura* was 'followed and accepted' (*recepta et usitata*) by at least one of the *Quinqueviri* since Gaius cites from it in his commentary on the XII Tables[94]. It is from the quotations taken from Gallus in Festus' book *De verborum significatione* that we know that the full title of it was *De verborum significatione quae ad ius pertinent* and it may, therefore, have been cited more frequently by other jurists than Gaius[95]. The entry of a fragment from this book in the title *De verborum significatione* of the *Digest* (D. 50,16) in particular is, of course, no coincidence. But was there really a book by a Latin author *this* old in any library in Constantinople at the time? I doubt it, which accounts for the fact that it was *not* listed in the *Index*. All other works incorporated in the *Digest* but not listed in the *Index* are by authors who are. On the other hand,

92 Μαξίμου, *ad legem Falcidiam*.

93 The jurist Claudius Saturninus is not mentioned in the *Index*, yet there is one fragment in the *Digest* from his *De poenis paganorum* (D. 48,19,16). It is in the *Index* nevertheless, but wrongly attributed to *Venuleius* Saturninus. This is clearly a clerical error, as is the erroneous repetition of Paulus' *Regulae* in the list of his works. Another rather strange error is in the attribution of *Responsa* to a jurist named as Gallus Aquila (Γάλλου Ἀκύλα) meaning Julius Aquila (represented in the *Digest* with only two very short fragments [D. 26,7,34 and 26,10,12]). Was the scribe thinking of Gallus Aquilius or even of Aelius Gallus? The corrector missed this error (as he did with others).

94 D. 22,1,19*pr. i.f.*: '*Praeterea Gallus Aelius putat, si vestimenta aut scyphus petita sint, in fructu haec numeranda esse, quod locata ea re mercedis nomine capi potuerit*'.

95 For the quotations from Gallus' book see Huschke, *Iurisprudentiae anteiustinianae quae supersunt* (*supra*, n. 39), Leipzig 1879, p. 94-98. Festus' book is an abridgement of a much more expansive work by the Augustean scholar Verrius Flaccus who must be credited with the quotations from Gallus' book reproduced by Festus.

there is only one author listed in the *Index* who is generally believed *not* to be represented in the *Digest* itself. It is none other than Masurius Sabinus and his famous *De iure civili libri tres*, the quintessential textbook on this specific, non-praetorian, part of Roman law, and the basis of the three great treatises on the subject that served as the nucleus of the *Digest* on this specific ('Sabinian') part of the law, the *Libri ad Sabinum* of (in order of importance) Ulpianus, Paulus and Pomponius. Why were he and his book listed in the *Index florentinus* but no specific excerpts from it inserted into the *Digest*[96]? In order to answer this question, we must have a closer look at the composition of that *Index*.

One of the indications that the *Index florentinus* as we have it in the *Florentina* cannot have been just a provisional working document, or a mere catalogue of some library, but rather a draft of the official *Index auctorum* based on the provisional list of authors provided by Tribonian is the order in which the authors are listed. The *Index* is headed by two jurists deliberately listed out of the (more or less) chronological order in which the other authors are recorded: Julianus and Papinianus. Their exalted position in the list betrays the hand of Justinian and Tribonian and the official character of that document since Julianus and Papinianus clearly were the favourites of the emperor and his learned minister. Julianus was mentioned prominently in the *Lex citandi* among the ancient authors predating the *Quinqueviri* but Justinian extolled him above all other jurists, including the *Quinqueviri*, because he considered Julianus responsible for the monument on the basis of which the entire composition of the *Digest* was arranged, the *Edictum perpetuum*[97], and because that great man had also proclaimed that anything imperfect in the law can be amended by imperial intervention, a favourite line of Justinian[98]. Papinianus could not be raised as high, but he was recognized by the *Lex citandi* as the greatest of all other jurists and he was central to the contemporary study of the law, as was emphasized by his special position in the new legal curriculum and even in the composition of the *Digest* itself[99]. The enormous prestige of Ju-

96 See *e.g.* Kaiser, *Digestenentstehung* (*supra*, n. 90), p. 342.

97 Const. *Deo auctore* § 5: '*tam secundum nostri constitutionum codicis quam edicti perpetui imitationem*'.

98 Const. *Tanta* § 18: '*Iulianus legum et edicti perpetui subtilissimus conditor in suis libris hoc rettulit, ut, si quid imperfectum inveniatur, ab imperiali sanctione hoc repleatur*'. Comp. Const. *Deo auctore* § 6: '*ex nobis omnis eis impertietur auctoritas. nam qui non suptiliter factum emendat, laudabilior est eo qui primus inuenit*'.

99 On Papininianus' special position in the new curriculum and consequently also in the composition of the *Digest* see W.J. Zwalve [and] Th. de Vries, *The Navel, Reflections on the composition of the* Quarta pars Digestorum, Tijdschrift voor Rechtsgeschiedenis, 88 (2020), p. 591-604.

lianus and Papinianus was already emphasized by Justinian in a *decisio* belonging to the set of *decisiones* issued on 1 August 530[100], that is at a date when the plan to codify the common law of the Roman empire was not yet advertised. C. 4,5,10[101] reports an *altercatio* among the Roman jurists where Ulpianus, Marcellus and Celsus stood against Papinianus and Julianus. According to the law as it stood at the time, *i.e.* the *Lex citandi*, the opinion of the majority ought to have prevailed, but Justinian decided otherwise: he preferred the opinion of Papinianus, especially because Papinianus had supported his opinion by referring to the concurrent opinion of Julianus, 'that man of the greatest authority and the creator of the *Edictum perpetuum*'[102].

In the rest of the *Index* there is, at first sight, no direct trace of the *Lex citandi*. This is not an indication that the list we have 'represents a library *predating* the *Lex citandi*'[103]. To the contrary: as the header and the special emphasis on Julianus and Papinianus demonstrate, it was composed at the same time as the *Digest* from the provisional list supplied by Tribonian since the *Lex citandi* was clearly inadequate for its purposes because it contained an open list of authoritative jurists predating the *Quinqueviri*: 'Scaevola, Sabinus, Julianus, Marcellus, *and* all who have been mentioned by them', meaning the *Quinqueviri*. Nevertheless, after having paid due homage to Julianus and Papinianus, the *Index* starts its list of authoritative jurists and their works with Quintus Mucius Scaevola as well, mentioning only one work attributed to him entitled Ὅρων, 'The Book of Definitions'[104]. Obviously, Tribonian knew that this book was hardly representative of the fame and authority of Quintus Mucius since that rested on his *Iuris civilis libri XVIII*[105] but that book was not available to him, so he had to come up with something else that was, being the monograph on definitions, a book containing mere excerpts from Quintus Mucius' *Ius civile* by

100 See *supra*, at fnt. 60.

101 Reported by Scheltema, *Les Quinquaginta decisiones* (*supra*, n. 12), p. 5 (= *Opera minora*, p. 160).

102 C. 4,5,10: '*Papinianus … huiusmodi sententiae sublimissimum testem adducit Salvium Iulianum summae auctoritatis hominem et praetorii edicti ordinatorem. Nobis haec decidentibus Iuliani et Papiniani placet sententia*'.

103 D. Pugsley, *On compiling Justinian's Digest* (3): *the* Florentine Index, Journal of Legal History, 94 (1993), p. 96. For this and other related subjects by the same author see his synthesis in *From the Law of citations to Justinian's Digest*, Comparative Law Review, 51 (2017), p. 1-26.

104 Quintu Muciu Scaevola ὅρων βιβλίον ἕν.

105 D. 1,2,2,41 (Pomp.): '*Post hos Quintus Mucius Publii filius pontifex maximus ius civile primus constituit generatim in libros decem et octo redigendo*'. There are some 39 indirect quotations from Quintus Mucius' *Ius civile* in the *Digest*, most of them by Pomponius (16) and Ulpianus (13).

a later anonymous compiler as he even may have known[106]. This supposition is confirmed by the fact that the book was only added at a later stage in the process of the compilation of the *Digest* since it is not in the three main Bluhmian 'Masses' (Sabinian, Edict, and Papinian), but in the so-called Appendix[107]. If I am correct in this, it is another confirmation that the *Index florentinus* is not the provisional working document, provided by Tribonian before work on the compilation had even started, but rather a draft of the official *Index auctorum*, or, more likely, a bad copy of it since we know there must have been a master copy of the official *Index* available to the corrector of the *Index* from which he added Iavolenus and his three books, inserted two books (*De officio proconsulis* and *Responsa*) into the list of works by Ulpianus and no less than four books into the list of works by Paulus (*De appellationibus*, *De actionibus*, *De legibus*, and *De senatus consultis*)[108].

The next ancient author in the *Index* is not Sabinus, as in the *Lex citandi*, but Alfenus Varus, *consul suffectus* in 39 BCE. The *Digesta* in 40 books ascribed to him in the *Index*[109] was also unavailable to Tribonian but he had two abridgements, one by an anonymous jurist, and another compiled by Paulus[110], which may have been the main reason why Alfenus was listed at all. Both abridgements were available from the start – as is confirmed by their insertion into the Sabinian 'Mass' – but were excerpted as two *different* books with *different* in-

106 For this see Lenel, *Palingenesia* I, col. 762, fnt. 7, referring to F.D. Sanio, *Zur Geschichte der römischen Rechtswissenschaft, Ein Prolegomenon*, Königsberg 1858, p. 41-42. See also Schulz, *Roman legal science* (*supra*, n. 8), p. 94.

107 T. Honoré, *Justinian's Digest, Character and compilation*, Oxford 2010, p. 115. See also Kaiser, *Digestenentstehung* (*supra*, n. 90), p. 338-340.

108 For the later addition of Iavolenus and his three books see the correction on *f.* 4 r° of the *Codex florentinus*, now available in the reproduction by Corbino and Santalucia, Florence 1988. For the additions to the works of Ulpianus and Paulus see the corrections on *f.* 4 v° and *f.* 5 r° respectively. Paulus' books *De legibus* and *De senatus consultis* originally may have been one book but the corrector did not think so since he clearly distinguished these books by a different reference sign. Remarkably, there is but one fragment from Paulus' book *De senatus consultis* in the *Digest* (D. 36,1,27) and none from *De legibus*. There are also no fragments from the added book *De actionibus* in the *Digest* and only two fragments from *De appellationibus* (D. 49,2,2 and 49,5,7).

109 Ἀλφενοῦ digeston βιβλία τεσσαράκοντα. Pomponius (D. 1,2,2,44) counts Alfenus and Ofilius among the leading jurists of their age. He mentions 'many books on *ius civile*' by Ofilius and even attributes the first comprehensive treaty on the praetorian Edict to him: '*idem edictum praetoris primus diligenter composuit*'. Remarkably for an antiquarian like Pomponius, he does not mention Alfenus' *Digesta*, which confirms my impression that Alfenus and his *Digesta* were only listed in the *Index* because Tribonian had Paulus' abridgment at hand.

110 See Lenel, *Palingenesia*, I, col. 37, fnt. 1.

scriptions although *both* were to be regarded as representing Alfenus' *Digesta* according to the *Index florentinus* since the compiler of the *Index* deliberately omitted Paulus' abridgment of Alfenus' *Digesta* among the works of Paulus. Then comes Sabinus: 'Sabinu Iuris civilion βιβλία τρία'. It is a clear indication that the *Lex citandi* was not far from the list compiled by Tribonian since it also mentions Sabinus prominently after Mucius Scaevola. But Tribonian had a similar problem with Sabinus as he had with Mucius Scaevola and Alfenus. Sabinus' fame rested on his *Ius civile*, immortalized by the great commentaries of Ulpianus, Paulus and Pomponius, but it was simply not available to him. Yet, leaving Sabinus and his fundamental book out of the list would have been incomprehensible to his contemporaries, not only because the *Lex citandi* mentioned him explicitly, but also because a major part of the books to be excerpted by the committee consisted of the three great commentaries on Sabinus' *Ius civile*. Accordingly, Tribonian put him on the list out of respect for the author and because Sabinus' *Ius civile* was represented by the commentaries of Ulpianus, Paulus and Pomponius anyway, just as was Alfenus' *Digesta* by the two abridgments available. By inserting Sabinus' *Ius civile* into the *Index* Tribonian may have breached modern standards of scholarly integrity but not listing Sabinus and his book among the authors and works from which the *Digest* was compiled would have amounted to absurd pedantry to his contemporaries. Sabinus could not have been passed over since his name was all over the *Digest*. Tribonian had a similar problem with Labeo as well. None of Labeo's original works survived, but he listed Labeo's *Pithana* and his *Libri posteriores* in the *Index* nevertheless[111]. All he had were two abridgments, one of the *Pithana* compiled by Paulus and one of the *Libri posteriores* compiled by Iavolenus[112]

111 Λαβεῶνος πιθανῶν βιβλία ὀκτώ; posteriorum βιβλία δέκα.

112 The abridgment of Labeo's *Libri posteriores* is problematic and much discussed: see T. Honoré, *Labeo's* Posteriora *and the Digest Commission*, in: A. Watson (ed.), Daube Noster, Edinburgh 1974, p. 161-181 and D. Mantovani, *Sul'origine dei* 'libri posteriores' *di Labeone*, Labeo, 34 (1988), p. 271-322. The *Digest* clearly distinguishes between two different sets. One of them is attributed to Iavolenus (*Iavolenus libro X ex posterioribus Labeonis*) and the other to Labeo himself but taken from an abridgment by Iavolenus (*Labeo libro X posteriorum a Iavoleno epitomatorum*). Bluhme, *Die Ordnung* (*supra*, n. 76), p. 318-325, regarded the fragments thus differently inscribed as being taken from two different manuscripts excerpted separately and allocated to different 'Masses' accordingly: the set with fragments beginning with *Iavolenus etc.* to the Sabinian Mass and the set with fragments beginning with *Labeo etc.* to the Appendix Mass. Lenel treated the two sets as belonging to one abridgement compiled by Iavolenus (*Palingen.*, I, col. 299-315), correctly as I think. So did Tony Honoré (*Justinian's Digest*, [*supra*, n. 107], p. 121). The question remains, however, how *one* book came to be excerpted by two different groups of compilers. On this issue see Mantovani, *Digesto e masse Bluhmiane* (*supra*, n. 80), p. 117-124.

and so he proceeded as he had done with Alfenus' *Digesta* and consequently the abridgments were not listed among the works of Paulus and Iavolenus[113].

Proculus directly succeeds Sabinus as sixth on the list in the *Index*, preceding Labeo out of the chronological order[114]. He is the first of the authors listed in the *Index* after Julianus and Papinianus with fragments in the *Digest* directly taken from the book credited to him, his *Epistolae*. From here on the compilers were able to comply with the instruction of the *Lex citandi* on the use of the ancient authors predating the *Quinqueviri*. Justinian and his learned minister were greatly concerned with problems of textual transmission. His prohibition of the use of abbreviations (*sigla*)[115] bears testimony to this and so does his famous prohibition to add commentaries to the copies of the *Digest*, referring to the mess that had been made of the concise ancient commentaries to the *Edictum perpetuum* by all kinds of obfuscating comments added to them by later writers[116]. The *Lex citandi* expressed a similar concern by prescribing a *codicum collatio* to verify the correct text of a quotation from the works of an ancient author by one of the *Quinqueviri*[117]. Now, the compilers were in a po-

113 There is one fragment from Labeo's *Libri posteriores* attributed to Proculus rather than to Iavolenus in D. 33,6,16. D. 33,6,15 contains a fragment from Proculus' *Epistulae* and D. 33,6,16 has the inscription 'Idem *libro tertio ex posterioribus Labeonis*'. This 'Idem' must be an error, as was already contended by Jacques Labitte (†1603), *Index legum omnium quae in Pandectis continentur*, ed. Frankfurt – Leipzig 1724, p. 371, who first suggested to assign this fragment to Iavolenus rather than to Proculus. See now Honoré, *Justinian's Digest* (*supra*, n. 107), p. 14, and Mantovani, *Digesto e masse Bluhmiane* (*supra*, n. 80), p. 82-83. But see Bluhme, *Die Ordnung* (*supra*, n. 76), p. 442, and Lenel, *Palingenesia*, II, col. 166, fnt. 2.

114 Προκούλου ἐπιστολῶν βιβλία ὀκτώ. The irregularity in the chronological order may be due to the fact that the order of the *Index* was inspired here by the two different schools of Sabiniani and Proculiani. After Sabinus (V) as the proverbial 'Sabinian' comes Proculus (VI) as the proverbial 'Proculian'. Labeo (VII), although older than Proculus and the founder of the 'Proculian' *secta*, comes next, followed by another 'Proculian', Neratius Priscus (VIII). Then comes a 'Sabinian', Iavolenus (IX), who is matched by a 'Proculian', Celsus (X).

115 Const. *Tanta* § 22: '*Eandem autem poenam falsitatis constituimus et adversus eos, qui in posterum leges nostras per siglorum obscuritates ausi fuerint conscribere*'.

116 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 ... ne verbositas eorum aliquid legibus nostris adferat ex confusione dedecus. Quod et in antiquis edicti perpetui commentatoribus factum est, qui opus moderate confectum huc atque illuc in diversas sententias producentes in infinitum detraxerunt, ut paene omnem Romanam sanctionem esse confusam*'. For this prohibition and the exceptions to it, see H.J. Scheltema, *Das Kommentarverbot Justinians*, Tijdschrift voor Rechtsgeschiedenis, 45 (1977), p. 307-330 (now also in *Opera minora*, p. 403-428).

117 See *supra*, at fnt. 9.

sition to do more than that by consulting the originals supplied to them by Tribonian[118]. But they were not able to do so all the time. Pomponius – number XI in the *Index* directly following Celsus – is a good example. The *Index* lists 9 books attributed to him but *not* his famous commentary *Ad edictum*, which was lost (but not forgotten) by then. Consequently, that book is only indirectly referred to in the *Digest*[119], whereas Pomponius' commentary *Ad Sabinum* is listed[120] and directly (and abundantly) represented in the *Digest*[121]. I mention this in passing because it shows clearly what the compilers did *not* do as a matter of principle: they resisted the temptation to turn the *Digest* into a *Palingenesia* by changing the quotations from Pomponius' *Ad edictum* they found in Ulpianus' commentary into separate fragments attributed to Pomponius himself, something they could have done easily since Ulpianus usually cited Pomponius with the precise book number added. Consequently, whenever a fragment from a work by an ancient author from the *Index* was inserted into the *Digest* separately, it may be taken for granted that it was cited from the original, *pace* Aelius Gallus.

The last author predating the *Quinqueviri* mentioned by the *Lex citandi* is Marcellus, who flourished under Antoninus Pius and Marcus Aurelius. He is listed as No XVII in the *Index*, directly preceding Quintus Cervidius Scaevola, the oldest of the great Severan lawyers so prominent in the *Digest*. Scaevola was not mentioned in the *Lex citandi* but he is mentioned by the youngest representative of the *Quinqueviri*, Modestinus, among 'the stars of the legal profession' (οἱ κορυφαῖοι τῶν νομικῶν), together with Paulus and Ulpianus[122], leaving no doubt about his status as an authority under the *Lex citandi*. With Scaevola the *Index* enters the era of the *Quinqueviri* and their contemporaries, such as Florentinus (No XIX), Tryphoninus (No XXVI), Marcianus (No XXIX), and others. None of the authors just referred to was mentioned in the *Lex citandi*, but

118 See *supra*, at fnt. 29.

119 All 173 fragments from Pomponius' *Libri ad edictum* in Lenel's *Palingenesia*, II, col. 15-42, are indirect quotes from the works by other jurists, no less than 143 of them are from Ulpianus. There are 28 quotes from Paulus. The difference in their style of citation is striking. The residual two quotations are taken from Marcianus and Scaevola. The preponderance of quotations from Ulpianus shows once more that his *Libri ad edictum* were the primary source of the compilers.

120 Πομπωνίου (2) ad Sabinum βιβλία τριακονταπέντε.

121 Lenel's *Palingenesia*, II, col. 86-147, has 425 fragments from Pomponius' *Ad Sabinum*, most of them direct citations, with only 70 indirect quotes from Ulpianus (53) and Paulus (17).

122 D. 27,1,13,2: 'οὕτως γὰρ καὶ Κερβίδιος Σκαίβολας καὶ Παῦλος καὶ Δομίτιος Οὐλπιανὸς οἱ κορυφαῖοι τῶν νομικῶν γράφουσιν'. Note that Modestinus leaves out Papinianus. Was it because he had recently been executed at the behest of Caracalla?

they must have been frequently cited by the *Quinqueviri*[123]. Consequently, the law professors of the post-*Lex citandi* era treated them as authorities on a par with the *Quinqueviri*[124], demonstrating that these authors contemporary to the *Quinqueviri* also complied with Justinian's ultimate test ('*scriptura recepta et usitata*') as did the ancient authorities antedating the *Quinqueviri*.

Conclusion

Herennius Modestinus, a pupil of Ulpianus and the youngest of the *Quinqueviri*, is listed in the *Index florentinus* as No XXXI. He seems to have been the last of his kind since there are very few authors with works selected for insertion into the *Digest* postdating the generation of the *Quinqueviri* of *Lex citandi* fame and their contemporaries. The *Index florentinus* lists only five additional authors after mentioning Aemilius Macer (No XXXIII)[125], who was active under Caracalla and Alexander Severus[126]: Aurelius Arcadius Charisius (No XXXIV), Licinius Rufinus (No XXXV), Furius Anthianus (No XXXVI), Maximus (No XXXVII)[127], and Hermogenianus (No XXXVIII), the last author of the *Index*. One of them, Licinius Rufinus, is a contemporary of Paulus[128] and consequently does not postdate the era of the *Quinqueviri*. Whether Furius Anthianus and Rutilius Maximus do indeed, is not even certain since we know nothing about these authors who are of minimal importance anyway[129]. This leaves us with just Charisius and Hermogenianus[130].

123 Marcianus is cited by Ulpianus in D. 28,1,5 and by Paulus in D. 7,9,8 (note the 'quidam *et* Marcianus putant'). Tryphoninus is mentioned by Paulus in D. 49,14,50.

124 See the references to Marcianus' book *Ad formulam hypothecariam* in *Scholia Sinaitica* V,11, and to the *Institutiones* of Florentinus in *Scholia Sinaitica* XIII,35.

125 No XXXII in the *Index* is Tarruntenus Paternus, author of a treatise *De re militari* (Ταρρουντηνοῦ Πατέρνου, militarion βιβλία τέσσαρα). He was executed under Commodus, demonstrating that the chronological order in the *Index* is anything but reliable. On Tarruntenus see W. Kunkel, *Herkunft und soziale Stellung der römischen Juristen*, Graz – Vienna – Cologne 1967 (2nd ed.), p. 219-222.

126 See H. Fitting, *Alter und Folge der Schriften römischer Juristen von Hadrian bis Alexander*, 2d ed., Halle 1908, p. 126-127 and Kunkel, *Herkunft und soziale Stellung* (*supra*, n. 125), p. 256-257.

127 On him see *supra* at fnt. 92.

128 He consulted Paulus: D. 40,13,4. On Rufinus see Fitting, *Alter und Folge* (*supra*, n. 126), p. 120-121 and Kunkel, *Herkunft und soziale Stellung* (*supra*, n. 125), p. 255-256.

129 Kunkel, *Herkunft und soziale Stellung* (*supra*, n. 125), p. 261-263. Furius Anthianus is only represented in the *Digest* with three fragments (D. 2,14,62; 4,3,40, and 6,1,80). Maximus with just one: D. 30, 125.

130 See the verdict of Paul Krüger, *Geschichte* (*supra*, n. 7), p. 255: 'Weder Charisius noch Hermogenianus können als Vertreter der klassischen Jurisprudenz gelten. Diese schließt mit

Charisius is represented in the *Digest* by six fragments from his three *libri singulares* mentioned in the *Index*[131]. The first time he is cited (in D. 1,11,1), he is introduced as '*Aurelius Arcadius Charisius magister libellorum*', making him the only jurist in the *Digest* to be listed with his rank as civil servant. One wonders why? Was it done because his presence among the great writers of yore needed justification since he clearly fell beyond the scope of the *Lex citandi* and consequently did not belong to the jurists 'whom the most pious former emperors did not deem unworthy to admit' (*quos et anteriores piissimi principes admittere non sunt indignati*)? Hermogenianus, on the other hand, another civil servant working as *magister libellorum* in the imperial chancery under Diocletian, needed no such introduction. The members of Justinian's committee compiling the *Digest* knew him well since he also was the editor of a famous collection of imperial rescripts, the *Codex Hermogenianus*[132]. His book *Iuris Epitomae* is what it expresses to be: it contains extracts (*epitomae*) from the works of the 'classical' jurists from the previous age. As such, this book represents the conclusion of the great age of Roman jurisprudence, a last and concise summary of what had been achieved by the previous generation. Consequently, it must have been popular among lawyers of later generations and certainly so with students in the law schools with their timeless preference for miserable excerpts over thorough textbooks[133]. After Hermogenianus, Roman legal

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Modestin ab'. But see Tony Honoré, *Emperors and lawyers* (2d ed.), Oxford 1994, p. 176 on Hermogenianus: 'a man who deserves to be called the last classical lawyer'.

131 D. 1,11,1; 22,5,1 and 21 and 25; 48,18,10, and 50,4,18. In the other five *leges* Charisius is introduced in the inscriptions in a rather odd way as 'Arcadius *qui et* Charisius'. On Charisius see Liebs, *Die Jurisprudenz im spätantiken Italien* (*supra*, n. 8), p. 131-133 and 'Charisius' in R. Herzog (ed.), *Handbuch der lateinischen Literatur der Antike*, v, Munich 1989, p. 69-71.

132 There have been doubts in the past whether the Hermogenianus of the *Iuris epitomae* was the same person as the editor of the *Codex Hermogenianus*: see Krüger, *Geschichte* (*supra*, n. 7), p. 316-317, and Wenger, *Die Quellen des römischen Rechts* (*supra*, n. 6), p. 535, fnt. 44. But see already Th. Mommsen, *Die Benennungen der Konstitutionensammlungen*, ZSS RA, 10 (1889), p. 345-351 (=*Juristische Schriften*, 2, p. 359-365), and now Honoré, *Emperors and lawyers* (*supra*, n. 130), p. 177 and Wieacker, *Römische Rechtsgeschichte* (*supra*, n. 3), p. 171, both following D. Liebs, *Hermogenians iuris epitomae: zum Stand der römischen Jurisprudenz im Zeitalter Diokletians*, Abhandlungen der Akademie der Wissenschaften in Göttingen, Phil.-Hist. Klasse, 3. Folge, Nr. 57, Göttingen 1964, p. 26; 'Hermogenianus', in: Herzog (ed.), *Handbuch* (*supra*, n. 131), p. 62-64; Liebs, *Die Jurisprudenz im spätantiken Italien* (*supra*, n. 8), p. 36-52 and 137-144, and Id., *Hofjuristen der römischen Kaiser bis Justinian*, Sitzungsberichte der Bayerischen Akademie der Wissenschaften, Phil.-Hist. Klasse, Munich 2010, p. 86.

133 Hermogenianus' book was extensively excerpted by the compilers. Lenel's *Palingenesia*, I, col. 265-278, lists more than 100 fragments in the *Digest*.

scholarship came to a full stop, at least according to Justinian. None of the law professors active in the Roman law schools of the pre-Justinian era seems to have produced anything worth preserving or even mentioning. The *Lex citandi* was largely responsible for this development since the legal opinion of a *later* legal scholar on the common law of Rome carried no weight at all in a court of law. There is, furthermore, no trace of any substantial literary output by post-*Lex citandi* legal scholars other than the fragmentary remains of lectures on the writings of Ulpianus as are handed down to us in the *Fragmenta Sinaitica*. The only exception sometimes referred to[134], a Ὑπόμνημα τῶν δεφινίτων (‘*Liber definitionum*’) supposed to have been composed by the pre-Justinian professor Cyrillus, is based on a corrupt scholion to Bas. 11,1,67 (= C. 2,3,6)[135]. Even if there had indeed been such authors, Justinian did not want his *Digest* ‘to be stained by their works’. Accordingly, the *Lex citandi* as expanded in the *Index florentinus* was the bedrock on which the *Digest* was built.

134 See K.W.E. Heimbach, *Basilicorum Libri LX Prolegomena*, Leipzig 1870, p. 9 (reprinted with an introduction by H.J. Scheltema, Amsterdam 1962) and Hofmann, *Die Compilation der Digesten Justinians* (*supra*, n. 56), p. 95-96.

135 BS 314, 17-21, ed. Scheltema. See Scheltema, *Opmerkingen over Grieksche bewerkingen* (*supra*, n. 36), p. 6-8 (= *Opera minora*, p. 191-192). As Scheltema indicates, the Ὑπόμνημα τῶν δεφινίτων mentioned here is probably a reference to the *Liber definitionum* of Papinianus rather than to a book by Cyrillus.