

JUSTINIAN'S COMPILATION: CLASSICAL LEGACY AND LEGAL SOURCE

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When we think of the legacy of antiquity, we think first of Greek philosophy, Greek art, Greek drama, and when we turn to what we have received from the Romans, they gave us Roman roads and Roman law. Almost everything that we know about ancient Roman law derives from a compilation of legal materials made between the years 529 and 534 A.D. on the orders of the Byzantine emperor Justinian.¹ The *Corpus iuris*, as it is known, is composed of materials of very different origin. One part, the *Institutes*, is an elementary textbook intended for students at the beginning of their studies, based on a pioneering work by Gaius written nearly four centuries before. Another part, the *Code*, is a collection of pieces of imperial legislation, mainly the authoritative answers, issued over the years in the names of particular emperors, to questions on law put by litigants or judges. They are arranged in chronological order under specific subject headings or titles. Like the *Institutes*, the *Code* was modelled on an earlier precedent, the *Code of Theodosius II* of 438 A.D.

By far the largest part of Justinian's compilation is, however, one for which there was no Roman precedent, namely the *Digest* or *Pandects*. This is an anthology of extracts from the writings of legal experts, the classical jurists, who wrote mainly in the first two centuries A.D., the most recent being three centuries earlier than Justinian's time. It is a work of considerable bulk, being four times the size of the *Code* and one and a half times the size of the *Bible*. Despite its bulk, Justinian tells us that the *Digest* represents but one twentieth of the material with which the compilers started. Justinian's *Digest* is a backward-facing work, a conscious attempt to preserve what was best of the golden age of classical law, before the decline in legal science in the fourth and fifth centuries. The *Digest* is a legal mosaic, and Justinian insisted that each fragment be carefully attributed to the jurist and to the work from which it was originally lifted. At the same time Justinian instructed his compilers to ensure that his *Digest* should contain no repetitious matters, contradictions or out-of-date material. He gave his compilers complete power to make whatever changes they deemed necessary in the texts they selected for inclusion in order to

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1. H.F. JOLOWICZ & BARRY NICHOLAS, *HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW* 478 (3d ed. 1972).

achieve these ends, and in his introductory statement he boasted that his aims had been precisely achieved. There were, he asserted, no repetitions, no contradictions.

The material from which the three main parts of Justinian's compilation, Institutes, Code and Digest, were constructed was thus very different in each case, and the authority that such material previously enjoyed was also very different. The legislation in the Code was clearly a source of law, but the original Institutes had no more authority than a modern textbook, while the views of the individual jurists excerpted in the Digest enjoyed only the authority which the particular jurist had acquired. Like all lawyers, the classical jurists had differed from one another in their opinions, but the compilers tried to eliminate all signs of such disagreements. Justinian entirely altered the status of the material contained in the *Corpus iuris*. He made the whole work his own and gave all parts of it, even the Institutes, the status of legislation enacted with his authority. In all parts changes were made in the original material; as Justinian modestly observed of himself, one who corrects what is not stated exactly deserves more praise than the original writer (Introductory Const. Deo auctore, 6). Thenceforth, the texts approved by him were all important.

I. THE TWELFTH-CENTURY GLOSSATORS

The extraordinary thing about Justinian's work, published with such a fanfare in the 530s, was that, except for the Institutes and a few texts from the Code, it attracted hardly any attention for over five hundred years after its appearance. Written in Latin, it was not readily intelligible in the Greek-speaking East, and even if manuscripts of the Digest had been available in the West, it was far too difficult and complex to be understood by the poorly trained lawyers of the Germanic successor states to the Roman Empire. Thus there was in Western Europe no continuity of study of Justinian's law to which later generations could refer. The Institutes had been used in monastic schools of the early medieval ages as a text for teaching Latin language and methods of argumentation. Its vocabulary was different from that of standard literary texts and served as an aid to understanding some of the legal ideas about such matters as guilt and responsibility, which had found their way into the writings of the Church fathers.

The first scholars to make a systematic study of Justinian's compilation as a whole were the doctors of Bologna around the year 1100.² For the first time there were scholars capable of grappling with

2. For what follows, see F. DE ZULUETA & PETER STEIN, *THE TEACHING OF ROMAN LAW IN ENGLAND AROUND 1200*, at xiii (Selden Soc'y Supplementary Series vol. 8, 1990).

the linguistic and other problems raised by the texts. They approached those texts, in particular the Digest, in considerable awe, as a monument bequeathed to them by antiquity, which would increase their knowledge of antiquity.

The founder of the Bolognese school was Irnerius. He began as a teacher of grammar and concentrated his attention initially on the unusual and difficult Latin terms that he found in the legal texts. Many of the discussions of the jurists centred upon the application of rules to particular fact-situations and the descriptions of such facts often provide a glimpse into Roman social life which is not available in the more literary sources. For example, can a person engaged in all-in wrestling claim damages from a fellow competitor if he suffers injury at the latter's hand? The word used to describe the wrestling contest, *pancratium*, was rarely found in the classical literary sources available in the twelfth century and excited great interest among those avid for any information about antiquity, when they found it in a Digest text (9.2.7.4). Irnerius soon moved on from explanations of interesting words to explanations of whole passages, and so slid over from literary explanation to legal analysis.

It is to this moment, when Irnerius and his pupils began to view the texts as legal rather than literary sources, that the beginning of the tradition of specialist legal studies can be traced. By offering a key to new sources of law of obvious technical superiority to the Germanic customary laws, the glossators made Bologna the legal Mecca of the whole of Europe. Their teaching has been characterised as "distinguished by a refreshing clarity of thought, severe scholarship, exact references to the sources, attention to minute detail, linguistic and dogmatic exegesis."³

The glossators of the twelfth century invested Justinian's Corpus iuris with almost biblical authority. They accepted all his claims at face value. Every text in the compilation had to be given its due weight. A text at the beginning of the Digest states that "jurisprudence is the knowledge of things human and divine, the science of the just and the unjust," and that jurists are its priests (D.1.1.10). If jurists are priests, asked the glossators, does that mean that a jurist ought to study theology? Answer, no, for everything is found in the Corpus iuris (*omnia in corpore iuris inveniuntur*, gl. notitia ad D.1.1.10).

One of the main difficulties faced by the glossators was the bad arrangement of the material within the different parts of the Corpus iuris. The same topics are dealt with in the Institutes, Digest and Code, but in a different order in each, and the fragments within the various

3. WATLER ULLMANN, LAW AND POLITICS IN THE MIDDLE AGES 99 (1975).

titles of the Digest do not appear to be arranged in any rational way. Sometimes the text is obscure because it has been subjected to hasty abbreviation by Justinian's compilers or to changes made to eliminate evidence of disagreement among the classical jurists in the originals. The compilers were working under pressure; they failed to eliminate all contradictions in the texts that they included in the Digest and they overlooked the fact that texts in the Digest on occasion contradicted those in other parts of the compilation. Yet the glossators never doubted Justinian's assertion that such contradictions did not exist. Apparent contradictions, he had said, were all capable of being reconciled by one "who with a subtle mind seeks out the reasons for the difference" (*Constitutio Tanta*, 15). The glossators accepted the challenge implied by those words and never admitted that some contradictory texts just could not be reconciled. In their efforts to cope with the difficulties raised by the texts at their disposal, the glossators acquired a closer familiarity with those texts than any other generation of scholars, not only before but also since. This familiarity is shown by the way they cited them, not by number of title and fragment, as we do today, but by first words. They recognized every text in the whole compilation by its opening phrase.

The glossators were primarily schoolmen, but they could not completely ignore the political and practical implications of their work. They were faced with the question of whether the Donation of Constantine was valid. This was a document which purported to record a transfer of the western parts of the Roman Empire from the Emperor Constantine to Pope Sylvester. The popes based their claims to temporal authority over the emperors on the Donation. However the glossators took account of the texts in which Justinian proclaims the absolute authority of the Roman Emperor, even in matters ecclesiastical, and doubted that the Donation could be valid.

The glossators divided the *Corpus iuris* into five volumes; three were devoted to the Digest, one to the Code and the fifth, the *volumen parvum*, contained the Institutes and the Authenticum, a collection of Justinian's legislation after the publication of the other three parts. However, in addition the glossators slipped into the *volumen parvum* some post-Justinian material: certain constitutions of the Emperor Frederick II and more surprisingly, the *Libri feudorum*, a collection of feudal customary law of general application made privately in Lombardy in the twelfth century. By no stretch of imagination could this feudal material be considered civil law, and it is likely that the civil lawyers executed their takeover of it in order to keep it out of the hands of their rivals, the canon lawyers.

A century after Irnerius, between 1220 and 1240, the civil law glosses were collected together by Accursius. His *Glossa Ordinaria*, or Great Gloss, to all parts of the *Corpus iuris* contains 96,940 separate

glosses. It immediately superseded all earlier work and for centuries was copied, and later printed, together with the original texts. The reality was that, without the help of the Gloss, Justinian's compilation, with the exception of the Institutes, was unintelligible to the average lawyer. Thus the Gloss acquired equal authority with that of the texts themselves, and any arguments based on Roman law had to start from the interpretation given by the Gloss. The maxim was, "What the Gloss does not recognise, the court does not recognise." As a fifteenth-century commentator, Fulgosius, stated, "In court I would rather have the authority of the Gloss on my side than a text; otherwise it will be said: do you think the Gloss has not seen that text and has not understood it as well as you?"⁴ So, already in the middle ages the idea became deep-rooted that authoritative academic commentary on a statutory text is itself an authentic source of law, and this is still a feature of the civil law.

Of course, no court in Europe applied only Roman law. The main feature of medieval law was its plurality. Questions of personal status were referred to the canon law of the Church, which had its own system of courts; questions of land-holding to feudal law, applied by feudal courts, for court holding was a valuable privilege of feudal lords. Disputes among merchants went to an international mercantile customary law and other problems to the laws of particular communities. The latter, in the case of the Italian communes, were usually reduced to statutory form. What Roman law supplied to all of these bodies of law, in a greater or lesser degree, was a conceptual framework, a set of principles of interpretation, a kind of universal grammar of law, to which recourse could be made to give meaning to and fill gaps in all the prime sources. One might say that all types of courts referred to Justinian's law as a kind of supermarket, where they could find whatever they needed, if their primary sources were lacking. In the first instance they preferred to patronize their friendly neighborhood stores, which offered a specially customised service, more geared to their special needs, but the convenience of the supermarket was a great attraction and more and more they went directly to it.

The glossators made grandiose claims for the authority of Justinian's law. In Italy everyone was both a citizen of a particular community and also a citizen of the Holy Roman Empire, and the law of the Empire was the law of Justinian.⁵ In the view of the glossators,

4. WOLDEMAR ENGLEMANN, *DIE WIEDERGEURT DER RECHTSKULTUR IN ITALIEN* 196 (1938) (citing Fulgosius's statement).

5. Peter Stein, *Bartolus, the Conflict of Laws and the Roman Law*, in *MULTUM NON MULTA: FESTSCHRIFT FÜR KURT LIPSTEIN*, 251 (P. Feuerstein & C. Parry eds., 1980), reprinted in PETER STEIN, *THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW* 83 (1988).

when the particular laws of a city-state conflicted with the *ius commune* of the Empire, the latter must prevail. This was the logical school answer, but the reality was that the city-states insisted on the contrary view; a law from the *Corpus iuris*, stated the custom of Salerno, is a holy prescription, but custom is holier and when custom speaks, that law is silent. So in practice, Justinian's law was only law when local law was silent; yet all interpretation of the law had to be conducted according to the canons of legal argumentation derived from Justinian's law. In any general debate the only argument that would carry conviction was one based on a general law, as taught in a university. A university should only teach a generally applicable discipline and, apart from the canon law, the only law which could claim universality, and therefore a place in university studies, was Roman civil law.

II. THE COMMENTATORS

It was the so-called commentators of the fourteenth and fifteenth centuries who adapted Justinian's laws to the needs of contemporary practice. The most famous commentator, Bartolus of Sassoferrato, gave his name to the whole school. The Bartolists could not ignore Justinian's texts, but they reconciled them to the claims of the real world. They continued to comment on the texts of the *Corpus iuris* in the form in which they were transmitted, but their aim was no longer to explain the meaning of those texts as they stood, as the glossators had done. Rather they sought to derive from the texts rules which would carry the authority of the imperial law but were appropriate to late medieval society. They were realists and consequently they seemed sometimes to be political opportunists. Bartolus himself taught in the University of Perugia, which was within the territory of the Papal State. He did not want to offend his sovereign the Pope, and so he accepted the validity of the Donation of Constantine, despite the fact that Accursius had demonstrated that it could not be upheld.⁶

A worthier example of Bartolus's realism is offered by his treatment of conflict of laws.⁷ There are no particular rules about conflict of laws in the *Corpus iuris*, because in Justinian's time practically all residents of the Empire had Roman citizenship and so problems of conflicts did not arise. Bartolus's technique was to generalize from specific cases reported in the *Corpus iuris*. Some of these cases referred to the existence of local customs which did not contradict the general law. Thus one text states that a man is

6. ERNST ANDERSEN, *THE RENAISSANCE OF LEGAL SCIENCE AFTER THE MIDDLE AGES* 12 (1974).

7. STEIN, *supra* note 5, at 255, *reprinted in* *THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW* 83, 87 (1988).

considered to have made a contract in the place where he undertakes the obligation to perform it, and therefore must observe the custom of that place. Another text states that when a claim is made for failure to deliver wine, the damages are to be based on the price for equivalent wine in the place where the delivery should have been made. Bartolus generalizes from these texts and infers from them that the duties imposed by a contract are determined by the law of the place where the contract was made, but failure to comply with the terms of a contract is to be judged by the law of the place where it should have been performed. By making explicit the rationale which seemed to lie behind the spare rulings of the jurists and organising them into a system, Bartolus was able to produce a set of rules which are nowhere stated in the *Corpus iuris* but which still claimed to have the authority of that law.

Sometimes Bartolus developed a rule which seemed contrary to a particular rule of Roman law, but even then he observed the conventions of Roman argumentation. For example, Roman texts required a minimum of five witnesses for a valid will; the custom of Venice accorded validity to a will with only three witnesses. How could the Venetian custom be valid? Bartolus argued that the reason for holding a local rule to be void if it infringed imperial law must be the presumption that it was therefore a bad custom. But the emperors occasionally allowed local custom which conflicted with the general law to exist by way of privilege. It follows that it must have been possible to rebut the presumption that a conflicting custom was a bad custom. Justinian's law could only invalidate customs already in existence in his time. It is possible, argued Bartolus, to prove that a later custom is good, even if it conflicts with Justinian's law. The Venetians knew their own needs best. If they felt it unreasonable to expect five merchants to stop their profitable business activities in order to witness a will, such a rule could be valid. In this way Bartolus was able to use Roman arguments to stand Justinian's rule on its head.

III. THE HUMANISTS

The *ius commune* thus created by the commentators was a highly sophisticated but closed discipline which had moved a long way from ancient Rome. The commentators showed little interest in what Justinian's texts could teach them about ancient life and were unconcerned about slovenly standards of Latin. They were therefore ripe targets for the attacks of the humanists who appeared in the fifteenth and sixteenth centuries.⁸ The first salvoes were aimed at the

8. For what follows, see Peter Stein, *Legal Humanism and Legal Science*, 54 *TUIDSCHRIFT VOOR RECHTSGESCHIEDENIS* 279 (1986), reprinted in PETER STEIN, *THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW* 91 (1988).

civil lawyers' indifference to Latin purity and style. In his *Elegantiae linguae Latinae*, Lorenzo Valla extolled the virtues of the Roman jurists as exponents of good Latin. Expounding a view which became a constant theme of humanist scholars of the Roman texts, he argued that in the process of excerption, the jurists' writings had been mutilated by Tribonian, the chairman of Justinian's compilers, and all the signs of changes in the text, the *emblemata Triboniani*, were stigmatised as crimes. Tribonian's sins had been compounded by Accursius, Bartolus and their ilk, whose work was full of barbarous idioms and a tortuous, convoluted style.

Although Valla was not a jurist, he was very much impressed by the good sense and rationality of the Roman jurists' writings. He was unable to decide, he said, whether their *diligentia* surpassed their *gravitas*, whether their *prudencia* surpassed their *aequitas*, whether their *scientia rerum* surpassed their *orationis dignitas*. All this excellence had been corrupted by Tribonian and his lackeys Accursius and Bartolus. In fact Valla could himself be charged with having taken a rather unhistorical approach to the language of the texts. Most of the jurists excerpted in the Digest wrote two or three centuries after Cicero, the exemplar of Latin purity, and many of them were not from Rome but from the provinces. Ulpian, from whose writings a third of all the extracts in the Digest are taken, came from Tyre in the eastern Mediterranean. We cannot assume that the Latin that Ulpian and his contemporaries wrote conformed to the Ciceronian ideal—quite apart from the fact that in most cultures lawyers tend to debate in a language of their own.

The humanists sought to discard the accretion of commentary which had smothered the texts, as Zasius said, "like a giant creeper,"⁹ and to return to the texts themselves. Just as the Church Reformers were disputing the authority of the Church Fathers and proposing a return to the original Scriptures, so the legal humanists, who were frequently French Huguenots, appealed to the undiluted word of Justinian. But they wanted the best version of that word. They drew attention to the significance of the Florentine manuscript of the Digest, which they showed to be the archetype, and they pointed out that the traditional texts used by the commentators contained many scribal errors.

Apart from collating the received texts with the Florentine manuscript, the humanists were not shy of making conjectural emendations of those texts. Some of these were obvious improvements. For example, one text discusses the liability of the

9. ZASII EPISTOLAE, II, nr. VIII, cited in ERIK WOLF, GROSSE RECHTSDENKER DER DEUTSCHEN GEISTESGESCHICHTE 88 (4th ed. 1963).

tenant of a house whose slave falls asleep at the furnace, with the result that the house is burnt down (D.9.2.27.9). The problem arises from the fact that normally liability is based on doing something wrong, whereas in this case the damage arose from an omission. The traditional text began with the words, "si fornicarius servus coloni ad fornacem obdormisset," which implied that the slave had fallen asleep because of exhaustion from his sexual activities. The humanists observed that the original text must have read *fornacarius* (an otherwise unknown word) instead of *fornicarius* (equally unknown), i.e., the slave who fell asleep was a slave-stoker, assigned *ad fornacem*, to look after the furnace. By showing for the first time that the manuscripts of the Corpus iuris could be corrupt, the more legal of humanists demonstrated that any reading of a legal text, even one of Justinian's, should be a search for the sensible rule which was presumably in the mind of the author of the text.

Many humanist jurists were fired by a desire to recreate the law of ancient Rome, as an aspect of classical civilization, and in so doing they realised for the first time that the Corpus iuris could reveal different strata of law, i.e., not just the law of sixth-century Byzantium but also that of the second and third centuries, when the giants of the classical period flourished. Indeed by careful detective work, they could even reconstruct the law of the Twelve Tables from the early days of the Roman Republic. Certain humanists, such as François Hotman, recognized that the state of Roman law was related to the political state of Roman society and in charting its development at Rome, they noted parallels with the political changes that were going on in sixteenth-century France. The more the humanists related Roman law to what they had discovered about Roman society, the more they realised how different was their own sixteenth-century society from that of ancient Rome. This revelation in turn led them to inquire, given that there were various strata of Roman law, which one should be the best exemplar for them, i.e., the law of the classical jurists or the law of Justinian. Finally they came to question whether it was really appropriate to try to apply Roman law at all to contemporary problems.

In their efforts to recover the legal heritage of antiquity, the humanist jurists were thus, without intending it, undermining the authority of Roman law in two ways. First, they were not agreed about their purpose in studying the received texts of the Corpus iuris. Were they a vehicle for discovering the sixth-century Byzantine law of Justinian's time or should they be seen as a filtre through which the classical law of three centuries earlier could be identified? Should they be looking for the law sanctioned by Justinian or for what the great Ulpian had held three centuries earlier?

Secondly, by emphasizing the relationship between law and society, the humanists challenged the claims of the civil law to

universal validity. They acknowledged that the *Libri feudorum*, which the glossators had introduced into the Corpus iuris, sat like a cuckoo in the nest of Justinian's texts and rejected them from the civil law. By relating Roman law more closely to the circumstances of ancient society, they demonstrated how irrelevant that law was to the needs of contemporary France. As François Hotman put it, a lawyer who entered a French court armed only with the Roman rules of property and succession, i.e., without taking account of the impact of feudalism on land-holding, would be as well equipped to argue as if he had arrived among the savages of North America (*Anti-Tribonian*, c.5).¹⁰

The main centre of legal humanism was the University of Bourges, where the whole law faculty seems to have been caught up in the great ferment of deconstructing Justinian's texts in this way. Even at other centres of learning, law students thought it chic to echo the humanist slogans and to sneer at the Latin barbarisms perpetrated by Accursius and Bartolus. Yet the immediate impact of the humanist movement on the practice of the law was barely perceptible. Practitioners seemed to be completely impervious to humanist invective. This was not because the practitioners were unaware of the challenge that humanism was offering. Rather they found it irrelevant and unhelpful.

Some lawyers, it is true, saw humanism as a sinister attack on all that they held dear, and this attack had to be strenuously resisted. Especially in France, the civil law practitioners as a class were a formidable political and social force, the *noblesse de la robe*, and they would not tolerate any diminution of their status without a struggle. Quite apart from such die-hard adherents of the old order, however, any jurist in practice needed to know the contemporary law. When that was not local custom or feudal law, recourse to Roman law might be required, but it was recourse not to Justinian's law but rather to the *ius commune*, the creation of the Bartolists on the foundation of Justinian's law. It was all very well to know the pre-history of a rule, but what the practitioner needed was a precise statement, whose authority a hard-pressed judge would respect; such rules were only to be found in the writings of the Bartolists. The enormous folio volumes of their commentaries, with their tedious citation of all previous discussions and careful expression of agreement or disagreement, based on fine distinctions between one set of facts and another, manifestly offended the humanists' aesthetic tastes. However, the form could be mastered. The routine citation of all earlier authorities provided a convenient summary of the relevant opinions. The practitioner learned to skip the initial statements of the rule in its undeveloped form and jump straight to the magic phrase "*hodie tamen*" ("today however") where the

10. DONALD R. KELLEY, FOUNDATIONS OF MODERN HISTORICAL SCHOLARSHIP 106 (1970).