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Justinian's Corpus Iuris Civilis: Oddities of Legal Development, and Human Civilisation

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The most momentous event in secular legal history is also perhaps the weirdest: Justinian's compilation, now known as the *Corpus Iuris Civilis*. Unsurprisingly, scholars have avoided stressing how odd the *Corpus Iuris* is. The most likely explanation is that it is so highly regarded that they have not noticed. They accept its high reputation, hence for them high quality is a given. This is a theme to which I return and no doubt will continue to return. The *Corpus Iuris* is so central in history, for understanding how law develops, and is so important today.

Justinian became co-emperor of the Byzantine Empire with his uncle, Justin, in 527. Later that year, when his uncle died, he became sole emperor. Probably even when Justin had been the sole ruler, Justinian was contemplating a legal codification of some kind. He issued a constitution, dated 13 February 528, establishing a commission to prepare a new collection, a *Codex*, of imperial constitutions. The word 'constitution' here is a general term to include all kinds of imperial legal rulings. The compilers were given extensive powers to collect the constitutions, to omit any, in whole or in part, that were obsolete or unnecessary, and to remove contradictions and repetitions. They were not empowered to make alterations in substance. The constitutions were then to be arranged by subject matter in titles, or named chapters, and within each title the constitutions were to be given in chronological order. The first *Code*, which was published on 7 April 529, has not survived, but it was replaced by a second revised *Code*, which came into effect on 29 December 534. The revised *Code*, which has survived and is one of the four constituent elements of what came to be called the *Corpus Iuris Civilis*, is divided into 12 books that are subdivided into titles in which the constitutions appear chronologically. The constitutions range in date from Hadrian in the early second century to Justinian himself. A considerable proportion of the texts — 2019 as against 2664 — originated after the empire became Christian; in fact, the bulk of the Christian rescripts is much greater.

On 15 December 530, Justinian ordered the compilation of a collection of juristic texts, the *Digest*, and the work came into force on 30 December 533. This massive work, twice the size of the *Code*, is in 50 books, virtually all of which are subdivided into titles. Each title consists of fragments from the writings of jurists who lived between the first century

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BC and the third century AD. About one-third of the whole work is taken from the jurist and civil servant, Ulpian, who was murdered before the middle of 224; a further one-sixth comes from his contemporary, Paul. In the opinion of some modern scholars, one jurist, Hermogenianus, was active in the fourth century,[1] but otherwise no *Digest* text is attributable to any jurist who lived after the third century except for the rather obscure Arcadius Charisius. The texts of the jurists include statements of principles, discussions of rules, commentary on the scope or interpretation of edicts and statutes, qualification of other juristic opinion, and the treatment of problem cases, real or hypothetical.

The compilers were instructed to cut out all that was superfluous or imperfect, all contradictions and repetitions, anything that was obsolete, and anything that was already in the *Code*.[2] Contrary to a frequently expressed view, the compilers of the *Digest* were not given the power to alter the substance of the law or to bring it up to date.[3] Indeed, any such alteration as occurred would have been contrary to the spirit of the instructions.

There was very little juristic writing after, say, 235, and there are very few texts after that period in the *Digest*. Changes in the law after that date were almost entirely the result of imperial constitutions. But these constitutions were collected in the *Code*, and the *Digest* commissioners were expressly instructed not to repeat in the *Digest* what was contained in the *Code*. Significantly, the commissioners were to exclude from the *Digest* what was obsolete, meaning in large measure the rules that had been replaced by imperial constitutions, which were now collected in the *Code*.

The third part of the compilation is the *Institutes*, an elementary textbook for first-year students, which was planned from 530 and was published on 21 November 533. It is structured on the *Institutes* of Gaius, a work written about 160 AD, and appears in four books, though unlike Gaius' *Institutes*, the books are further subdivided into titles. The arrangements of topics — sources of law, persons, property, succession, obligations, law of actions — for which the credit should probably be given to Gaius, was the result of planning, and it differs markedly from the arrangement found in the *Digest*, which seems haphazard and is largely the unplanned result of the gradual growth of topics as they were rather unsystematically set out annually by the praetor in the later Roman republic and early empire. The absence of a satisfactory arrangement in the *Digest* has long been a matter for unfavourable comment. Like the other parts of the *Corpus Iuris*, the *Institutes* is statute law.

With the second *Code*, Justinian's work of codifying Roman law was complete. But he continued to legislate, and this subsequent legislation is now known as the *Novels*. No

[1] On the question of dating, see Liebs, D (1964) *Hermogenians iuris epitomae. Zum Stand der römischen Jurisprudenz im Zeitalter Diokletians* Gottingen.

[2] *C Deo auctore* §7, 9-10.

[3] A typical exaggeration occurs in Jolowicz, HF and Nicholas, B (1972) *Historical Introduction to the Study of Roman Law* Cambridge University Press at 481: 'Full power was given to cut down and alter the texts, and this extended even to the works of ancient *leges* or constitutions which were quoted by the jurists'. But *C Deo auctore* §7 gives power to change quotations from laws and constitutions only where the compilers find they are *non recte scriptum*, 'incorrectly set down'. It is only to be expected that the decision of the commissioners on the correct reading was to be treated as final. For the full argument against interpolations of substance, see Watson, A (1994) 'Prolegomena to Establishing Pre-Justinianic Texts' (62) *Tijdschrift voor Rechtsgeschiedenis* 113; Lokin, JHA (1995) 'The End of an Epoch: Epilegomena to a Century of Interpolation Criticism' in Feenstra, R and Ankum, H (eds) *Collatio iuris romani: études dédiées à Hans Ankum à l'occasion de son 65e anniversaire* Vol 1 Gieben.

official collection of these constitutions was made, but there is considerable knowledge of three unofficial collections. Most of the constitutions were in Greek, some in both Greek and Latin, but translations of most of them into Latin also appeared. The bulk of the *Novels* relate to public or ecclesiastical affairs, though private law is by no means absent. Thus, *Novels* 118 and 127 reform the whole law of intestate succession, and *Novel* 22 sets out the Christian marriage law.

The first thing to notice is that the compilation of Justinian was not conceived of as a unit. It can be no surprise that the first idea was for a collection of imperial rulings. After all, there were precedents in the *Theodosian Code* of 438 and in the unofficial *Codices Gregorianus* and *Hermogenianus*. Moreover, since around 235, as already mentioned, the only new law was created by imperial rulings.

The first surprise is with the *Digest*. At some stage, as already mentioned, after the publication of the *Code*, Justinian or his advisors believed a collection of imperial rulings was not enough and had to be supplemented by a compendium of abridged juristic texts. Despite the common view, again as already mentioned, the compilers were not told to modernise the texts and they did not do so, with two minor exceptions. The exceptions were: where a constitution altered the law and a qualification to an existing juristic text was needed; and if classical law had two institutions on a subject and one was abolished, texts on it might be used for the other.[4] The common view, so obviously wrong yet so long and so firmly held, can only be explained on the basis of a belief that no one would make a codification of law in a way that is so obviously flawed. Some of the consequences of the bizarre methodology will emerge shortly.

But here we should notice a different bizarrerie. The compilers were told not to repeat anything that was set out elsewhere, ie in the *Code*. Most of the rulings of the emperors would not innovate but rather repeat existing law. Hence, much that is recorded in the *Code* would result from writings of preceding Roman jurists. The result is that the *Digest* will give a very incomplete picture of classical law. It is thus not Byzantine, and only partially classical, Roman law.

Another astonishing consequence of the approach of the compilers of the *Digest* is that the fiercely Christian Byzantium appears godless. In the body of the work there is not a single reference to Jesus, apostles, saints or fathers of the Church. In all, there are 12 references to 'god', and in none of these can we tell from the wording whether this is the Christian God or a Roman pagan god. The Roman jurists were all pagans.

Things are no different in the *Institutes*. No references to Jesus, etc. God appears only in the last text which deals briefly with criminal law (*J*4.18.12):

> But we have said this much about criminal actions for you to have touched the subject with the tip of your finger and almost with your forefinger. For the rest, with the help of God a fuller knowledge will come to you from the larger volumes of the *Digest* or *Pandects*.

There is rhetoric here, but nothing of particular legal or religious significance.

[4] For this and what follows, see Watson, A 'Prolegomena' supra note 3; Lokin, JHA 'The End of an Epoch' supra note 3.

There is rather more of Christianity in the *Code*, but this is not much of an alleviation of the problem. The first four years of legal education were comprised of the *Institutes* followed by the *Digest*. The fifth — optional — year was devoted to the *Code*. By then the students, who were intent on further education, would have had their mindset fixed.[5] Yet, there is here still another oddity. At the outset, only the *Code*, the collection of imperial rulings, was envisaged. At the end of the enterprise, the position of the *Code* had dropped to be the subject matter of the final and optional year of legal education.

Again, it is worth emphasising that the Roman jurists, with the exception of Pomponius and Gaius, were little interested in legal history. The *Digest* title 1.2, *The Origin of the Law and of All the Magistracies and the Succession of the Jurists*, contains one short text from Gaius and one long one from Pomponius. Both jurists had stopped writing by around 170 AD. So for Justinian, Roman legal history stopped then. No mention is made of the subsequent famous jurists, Papinian, Paul or Ulpian. Juristic writings were not brought up to date in the *Digest*. Better examples that the law was not modernised can scarcely be imagined.

For historical reasons connected with the political strife of the fifth century BC, the jurists were concerned only with interpretation and, at that, only interpretation of private law. Thus, there is almost no discussion of public law in the *Digest*. The public law has two dimensions. First, public law as it interacts with private law. Here we find another surprise. Astonishingly, only two *Digest* texts mention the market. First, *D*1.12.1.11 tells us that the meat trade is under control of the urban prefect so the supervision of the pig market is under his control. Secondly, *D*42.4.7.13, which concerns hiding from one's creditors, records that the older jurists believed that a person who conducted business in the market was hiding if he lurked around pillars or stalls.[6] But there are more surprises. In sharp contrast to American slave law, whether in the USA or in Latin America, there is almost no public dimension to Roman slave law: manumission is scarcely restricted by the state, restriction of punishment of recalcitrant slaves (in the *Code*) is really not enforceable, education is an issue only for the owners, there are no rules for enforcing slave behaviour, and nothing about a system of rewards for returning runaways.[7]

The second dimension of public law is administration. Here is another surprise. Only one half of one book of the *Digest*, namely book 1, titles 9 to 22, deals with public officials. Subjects treated include obsolete matters and the real elements of government do not appear. Every title (or chapter) is very short. The opening title on public offices, specifically, *D*1.9 *Senators* tells the story. The first text, *D*1.9.1. sets the scene:

> Ulpian, *Edict, book 62*: That a man of consular rank always takes precedence over a lady of consular rank is a point no one doubts. But whether a man of prefectorial rank takes precedence over a lady of consular rank remains to be seen. I should think he does, because greater dignity inheres in the male sex. 1. 'Consular,' of course, is a term we apply to ladies married to men who have been consuls. Saturninus adds also their mothers, but no case of this is reported from anywhere, nor has this ever been the received practice.

[5] For more detail, see Watson, A (2000) *Law out of Context* University of Georgia Press at 40ff.

[6] See Watson, A (1995) *The Spirit of Roman Law* University of Georgia Press at 49ff.

[7] See, eg, Watson, A (1987) *Roman Slave Law* Johns Hopkins University Press; Watson, A (1989) *Slave Law in the Americas* University of Georgia Press.

The last text, *D*1.9.12 is a fitting closure:

> Ulpian, *Census, book 2:* Women who previously have been married to a man of consular rank generally try to prevail on the emperor to let them, albeit very exceptionally, keep their consular rank despite a subsequent marriage to a man of lower rank. One case of which I know: the Emperor Antoninus gave this indulgence to his cousin Julia Mamaea. 1. By senators we should understand people whose descent from patricians and consuls stretches back to illustrious men, because these and only these men are entitled to deliver speeches in the senate.

Nothing in between tells us what the senate does or why being a senator is a matter of importance to the state.

A further peculiarity of the *Corpus Iuris* is that it is overwhelmingly in Latin, a language not understood by the majority of even the educated in Justinian's empire. Latin remained the language of legal education.

Even more bizarre is the fact that the compilers of the *Institutes*, as they worked, seem to have had no research tools in front of them except these classical elementary books. They seem not to have looked at the first *Code* or writings on the *Digest*. When the classical elementary works had nothing apropos, the compilers relied on their memories, sometimes with disastrous results. Thus, *J*4.6.7 gives the function of the *interdictum Salvianum*[8] to the *actio Serviana*. Both remedies concern real security, but they are very different. Contrary to the *Digest* (*D*9.1.1.9, 11), the main action, *actio de pauperie*, for injury caused by an animal, lay in the *Institutes* only when the animal acted *contra naturam*, contrary to nature (*J*4.9 pr).[9] The *Digest* allows the action where two rams fight and the aggressor kills the other: behaviour scarcely contrary to nature. *J*3.2 pr, gives a very different account of *arra*, earnest money in sale, from *C*4.21.17 of 528 from which it derives. Above all, the very long *J*4.6, dealing with actions, is a mixture of classical and Byzantine notions, and is quite incomprehensible. Students could not possibly learn the law of procedure from it. The explanation is that the order to compile the elementary textbook was given only when the *Digest* was completed,[10] and both works were to come into force on the same day, 30 December 533. The compilers of the *Institutes* were under enormous time constraints.[11]

In all of the peculiarities of the *Corpus Iuris*, there is remarkable historical irony. Without them, the work could not have had the impact on civilisation that it had. Without the *Institutes*, the Reception of Roman law would have been much more difficult, if it could have occurred at all. Certainly, modern civil codes would be very different.[12] If the compilation had been in Greek instead of Latin, it would not have penetrated the West.[13] If the *Digest*

[8] *D*43.33

[9] The interpretation of *contra naturam* gives rise to difficulties. In modern South African law, it is taken to mean 'contrary to the nature of the species': *O'Callagan v Chaplin* 1927 AD 310; *Hamse v Hoffman* 1925 TPD 572; *SAR v Edwards* 1930 AD 3.

[10] *Imperatoriam maiestatem* 3.

[11] See Watson, A (2001) *Legal History and a Common Law for Europe: Mystery, Reality, Imagination* Olin Foundation for Legal History at 54ff.

[12] See, eg, Watson, A (1981) *The Making of the Civil Law* Harvard University Press.

[13] See Yaron, R (1995) 'The Competitive Coexistence of Latin and Greek in the Roman Empire' in Feenstra, R and Ankum, H (eds) *Collatio ivris romani: études dédiées à Hans Ankum à l'occasion de son 65e anniversaire* Vol 2 Gieben.

had reflected Byzantine conditions, it could never have had almost universal appeal. If th Byzantine God had been prominent, the codification would have had problems in the Ag of Reason, and would not have survived the French Revolution into the *Code civil*, the mos influential modern codification.