
JUSTINIAN TO THE STUDENTS AND *CONSTITUTIO IMPERATORIAM*, 6

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1. No Roman law professor with a heart for his students will have been untouched by the solemn, conceited, but nevertheless warm address of Justinian to the *cupidae legum iuventuti*, the "young enthusiasts for law",¹ in the opening *Constitutio Imperatoriam* to the *Institutiones*. This expression, however, endlessly repeated with ironic smiles by professors grown cynical by experience,² includes the dream of generations of law students, often young enthusiasts themselves. Undoubtedly our friend Eric Pool has always cherished his students, as well as his innumerable friends and colleagues in the field of Roman law. Let this small contribution be a token of friendship and gratitude to a man who in so many scientific and other meetings has proven to be equally *cupidus* for both Roman law and friendship.

The idea for the following short remarks comes from another friend, Jan Lokin from the University of Groningen, in his contribution to the *Festschrift* that has been presented to me at the end of my academic career.³ In fact I will do no more than turn the key he has already put in the lock.

2. No certainty exists regarding the exact time the *Institutes* were written. According to the *Constitutio Imperatoriam* it was after the compilation of the *Digest*.⁴ We may accept that the work was undertaken only after the realisation of the idea of the *Digest*.⁵ T. Honoré surmises that "the first draft of the *Digest* was not finished until Mid-March at the earliest".⁶ In any event, the book was published on 21 November 529 by the *Constitutio Imperatoriam*, that is nearly a month prior to the promulgation of the *Digest* by the *Constitutio Tanta* of 16 December 529. It is the same *Constitutio Tanta* by which the *Digest* as well as the *Institutes* received their binding force legally as from 30 December 529: "These our laws, which we have set out in these works, that is to say, the *Institutes* or *Elements* and the *Digest* or *Encyclopaedia*, we proclaim [*sancimus*] are to be in force from our third most fortunate consulship, on the

1 See P. Birks & G. McLeod, *Justinian's Institutes*, Ithaca, New York, 1987, 33.

2 Cf. M. v.d. Vrugt, "*Institutiones*", *Lampas*, XXVI (1993) 432.

3 J.H.A. Lokin, "Romeins onderwijsrecht", in: X., *Ad amicissimum amici scripsimus, Vriendenboek Raf Verstegen*, Brugge, 2004, 185-186.

4 *Constitutio Imperatoriam*, 2: "*iam adimplevimus*"; 4: "*post libros quinquaginta digestorum seu pandectarum*."

5 J.E. Spruit, "Inleiding", in: *Corpus Iuris Civilis, Tekst en Vertaling*, I, *Instituten*, Zutphen - 's-Gravenhage, 1993, XV: "nadat het creatieve denkwerk ten behoeve van de Digesten was verricht."

6 T. Honoré, *Tribonian*, London, 1978, 187.

third day before the Kalends of January in the present twelfth indiction."⁷ It is clearly not the *Constitutio Imperatoriam* that changes the textbook into a legal code. Indeed in this *Constitutio* we read: "We have read and examined them [the *Institutes*] and have endowed them [*accomodavimus*] with the full force of our own pronouncements."⁸ In the *Constitutio Tanta* the emperor explains how, after reading and studying the text, he has been convinced of the merits of the book, which he then declares to have the same legal value as the imperial pronouncements.⁹ In a juridical sense the promulgation of the *Institutes* as a source of law is to be found not in the *Constitutio Imperatoriam*, directed to the students (*infra*), but in the *Constitutio Tanta* addressed "*ad senatum et omnes populos*".

3. And here arises the problem that has been pointed out by J. Lokin: How can we explain the above-mentioned past tense of "*nostrarum constitutionum robur accomodavimus*" in respect of a decision that, at the moment of writing, will be formally taken only a month later? Should we rather not have expected the future "*accomodabimus*"? Lokin has found some evidence in the manuscripts for a conjecture in this direction. Both the *Codex Bambergensis* (12th-13th century) and the *Codex Vercellensis* (10th-11th century) contain the future tense "*accomodabimus*".¹⁰ Lokin suggests adopting this conjecture in future editions of Justinian's *Institutiones*. He writes that he had already made this suggestion on an earlier occasion, without eliciting any reaction. I therefore trust that he will be pleased by the following reflection, even if it does not support his conjecture. And as I already announced, I think his article includes a better solution for the problem mentioned above. In his *Institutes* Justinian repeatedly refers the students to the *Digest* as a subsequent and deeper step in the study of law. I will limit myself to one example: "*quod ex latioribus digestorum libris perfectius apparebit*."¹¹ The explanation for the future tense referring to the earlier elaborated *Digest* is

7 "*Leges autem nostras, quae in codicibus, id est institutionum seu elementorum et digestorum vel pandectarum posuimus, suum optinere robur ex tertio nostro felicissimo sancimus consulatu, praesentis duodecimae indictionis tertio calendas Ianuarias*" (emphasis mine) *Constitutio Tanta*, 23 (C. 1.17.2.23), translation A. Watson, *The Digest of Justinian*, vol. I, Philadelphia, 1998, lxi.

8 "... *et legimus et cognovimus et plenissimum nostrarum constitutionum robur eis accomodavimus*" *Constitutio Imperatoriam*, 6.

9 *Constitutio Tanta*, 11 (C. 1.17.2.11): "*nostris sensibus non indignum esse iudicavimus et predictos libros constitutionum vicem habere iussimus: quod in oratione nostra, quam eisdem libris praeposuimus, apertius declaratur.*"

10 J. Lokin, *l.c.*, 186 refers to the edition of the *Institutes* by Eduard Schrader (1832), a book that we didn't have at our disposal.

11 *Inst.* 3.12pr.: "The *Digest* gives the complete picture" (transl. P. Birks); see also *Inst.* 1.10.11; 3.12.1; 3.23.2 i.f.; 4.6.2; 4.6.5; 4.6.37; 4.13.6; 4.14.3. It remains a matter of discussion whether the famous "*uno casu*" in *Inst.* 4.6.2, can really be found in the *Digest*; see the discussion and a suggestion: J.H.A. Lokin, "*Sane uno casu*", in: J.A. Ankum, J.E. Spruit & F.B.J. Wubbe (eds.), *Satura Roberto Feenstra*, Fribourg, Switzerland, 1985, 251-271; J.E. Spruit, *l.c.*, XV, note 2 (doubtful).

found in the educational priority of the *Institutes* to the *Digest*.¹² In the new law school programme of Justinian students started with the study of the *Institutes*, followed by the study of the *Digest*, beginning with the first four books (*Prota*) in the first year.¹³ The teaching order is also expressly mentioned in the closing sentence of the *Institutes*: "But, God willing, you will go on to study these matters more deeply in the great books of the *Digest* or *Pandects*."¹⁴ However, if the *Institutes* are conceived to be a permanent address by the emperor to subsequent generations of students,¹⁵ how could it be different for the introductory *constitutio Imperatoriam*? It is, as said, addressed to the "*cupidae legum iuventuti*", the "young enthusiasts for law", whom the emperor wishes good luck in their studies and invites to take part later on in the administration of the empire: "Study our law. Do your best and apply yourselves keenly to it. Show that you have mastered it. You can then cherish a noble ambition; when your course in law is finished you will be able to perform whatever duty is entrusted to you in the government of our state."¹⁶ In this context all references in the *Institutes* to the *Digest*, which would constitute the second part of the study programme, should be in the future tense. But, the reference to the imperial decision to give force of law to the *Institutes* should be in the past tense, even for the students of the first generation. So: "*Nostrarum constitutionum robur eis accomodavimus*", and not "*accomodabimus*". This leaves us with the question regarding those manuscripts which read "*accomodabimus*". It proves that some copyists are comparable to a modern editor who tries to avoid apparent contradictions by an intelligent conjecture. We know that many of these conjectures are superfluous once a better understanding of the meaning of the text and its historical setting has been reached.

12 J. Lokin, *I.c.*, 185.

13 *Constitutio Omnem*, 2 (16 December 533) (addressed at the law professors, the *antecessores*); P. van Warmelo, "The *Institutes* of Justinian as students' manual", in: P.G. Stein & A.D.E. Lewis (eds.), *Studies in Justinian's Institutes in Memory of J.A.C. Thomas*, London, 1983, 164-180. Here Justinian was realistic. It was, for new students, impossible to start with the *Digest*: "*ad portandam tantae sapientiae molem non sunt idonei homines rudes*" *Constitutio Tanta*, 11. T. Honoré, *I.c.*, 187 calls it "the need to temper the wind to the shorn lamb".

14 "*Alioquin diligentior eorum scientia vobis ex latioribus digestorum sive pandectarum libris deo propitio adventura est*", *Inst.* 4.18.12.

15 See J. Spruit, *I.c.*, XVI.

16 "*Summa itaque ope et alacri studio has leges nostras accipite et vosmet ipsos sic eruditos ostendite, ut spes vos pulcherrima foveat toto legitimo opere perfecto posse etiam nostram rem publicam in partibus eius vobis credendis gubernare*", *Constitutio Imperatoriam*, 7 (transl. P. Birks). In the ironic way of T. Honoré: "The caviar of intellectual snobbery [references to Homer, Vergil etc.] is accompanied by the carrot of appointments to come" (*I.c.*, 187-188).