MAREK NOVÁK

GLOSSATORS AND COMMENTATORS AT THE STRAHOV LIBRARY

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Marek Novák

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INTRODUCTION

GETTING TO KNOW THE FOUNDATIONS

On January 1, 2014, the new Civil Code came into effect in the Czech Republic. It replaced the older one originating in 1964, when the former Czechoslovakia had supposedly achieved the quality of socialism under the leadership of the authoritarian regime of the Communist Party. The Code of 2014 has already managed to establish itself as applicable in practice and has shown its bright and shady sides. In any case, it has one unquestionable merit. It has reminded Czech lawyers that the theory of civil law is not subject to hot-headed interventions of the socialist legislator but rather has firm roots in Roman law. It was in ancient Rome that the foundations of today's private law were formed, which reached its peak in the form of a comprehensive codification elaborated on by the initiative of the East Roman emperor Justinian I between 528 and 534 AD and was later called the *Corpus iuris civilis*. In it, Justinian's jurists summarised the content of the imperial decrees issued up to that time and a large selection of statements made by classical Roman jurists, thus capturing in one place the results of the development of law over a period of several centuries. The subsequent detailed study of Justinianic codification during the Middle Ages and the modern period led to the conviction that it was useful to codify civil law. It gave rise to a whole set of civil codes from around the mid-18th century onwards and developed the belief, at least in a system of continental law, that it is useful today to have some sort of civil code based on Roman law theory.

It is not surprising, therefore, that many lawyers and legal historians have recently focused on a closer examination of the Roman law roots of the effective Civil Code. Many useful comparisons of the current law with the norms captured by the Justinianic codification have emerged, and the context of Roman law can certainly inspire contemporary legal practice in filling gaps in the law and resolving difficulties in the interpretation of legal norms. However, while most attention is focused on comparing the law in effect in 534 and 2014, it is easy to overlook the period of 1480 years that separates these two moments. Yet, it was during this period that the process of reception of Roman law took place, during which the *Corpus iuris civilis* was analysed in detail. The beginnings of such adoption of older law date back to

the second half of the 11th century, when jurists, later referred to as glossators, identified the hidden benefits of the Justinianic codification and started studying them. The next generation of jurists, known as commentators, abstracted more rigorously from the casuistic and often imperfect ancient texts to abstract general rules and began to notice their internal systems. Legal humanists subjected the sources to textual criticism, and their followers in various parts of Europe continued to analyse the sources and formulate rules that could be deduced from them. Individual authors built on each other, disputed the results presented, and subjected them to criticism. Since legal scholars typically combined the study of ancient sources with teaching in law schools, they also provided education for future lawyers. Only when the theory was thus developed and prepared did it become useful for the creation of modern codifications. Without centuries of careful work, the codification of civil law would be impossible. In fact, civil law theory and contemporary civil codes are not so much based on the raw text of the *Corpus iuris civilis* as on the results of a long process of reception of Roman law.

Unfortunately, researching how medieval and modern scholars processed Roman law over the centuries is not easy. Their ideas are hidden to modern jurists not only behind a language barrier, but also in the recesses of extensive archives and in dusty old prints that were produced hundreds of years ago using museum-like technologies. The writings of Roman law scholars are challenging to read and hard to find.

The purpose of this book is to change this situation, or at least to contribute to its improvement. Its aim is to map the works of authors belonging to the first two periods of the reception of Roman law, i.e., glossators and commentators, in the library of the Royal Canonry of Premonstratensians at Strahov in Prague, which contains one of the most extensive collections of manuscripts, incunabula, and old prints in the Czech Republic. This library was chosen because of its importance; the extent of its collection, including legal writings; and its good accessibility for researchers. The records of the Strahov Library collection are available in the form of an electronic catalogue, but the research in this book faced two kinds of difficulties. Firstly, the catalogue,[1] although according to its own statistics it contains 4,828 manuscripts, 1,782 incunabula, and 103,517 old prints, does not sort its contents thematically in any useful way. Individual authors may be listed under more than one name, and there is no indication of the affiliation of individual volumes or bibliographical units to Roman law, let alone to particular stages of reception of Roman law. Indeed, such a task cannot even be asked of librarians, as their mission is to cover the entire library collection, comprising a multitude of

1 Online library catalogue, Royal Canonry of the Premonstratensians at Strahov, accessed 20 August 2024, https://strahovskyklaster.tritius.cz.

different disciplines, at a reasonable level of detail. Law, naturally, did not play a key role in the monastic library. Furthermore, to the displeasure of scholars and librarians, the catalogue contains errors that obscure the actual content of the volumes processed. In part, this may be the result of inattention; in other cases, it may be the result of the incorrect differentiation between titles and their authors. Often, even a glance at the title page of an old print is not sufficient to reliably reveal its true content, which is again a natural consequence of working with old literary works. As a result, there is no idea of to what extent Roman law as a whole or its related topics, including the reception of Roman law, are represented at the Strahov Library. It must be represented in some way, but no one knows exactly how.

This book should, therefore, serve as a guide for scholars interested in studying the works of glossators and commentators, especially at the Strahov Library. It traces the results of the work of glossators and commentators in the library collection, examines them, and revises the records in the current catalogue. Individual volumes and titles present in the library are identified and described. On this occasion, information on the life and work of individual glossators and commentators is added in order to provide a comprehensive overview. The very existence of the two schools of reception of Roman law aforementioned is also explained, since the affiliation to them links the individual authors to each other. A catalogue of the bibliographical units by the glossators and commentators is attached, which makes it easier to find the titles present.

The objectives pursued are reflected in the structure of the book, which is divided into three parts. The first part, the introductory chapter, places the beginnings of the reception of Roman law into historical context and explains the conditions that could have supported this process. The next two chapters, focusing first on the glossators and then on the commentators, provide first an account of the legal school in question and then an alphabetically arranged overview of individual jurists, containing their biographical information, details of their professional output, and an identification and a description of examples of their works preserved at Strahov. In addition, annexes provide an overview of all the described bibliographical units and authors.

The first impulse and inspiration for the exploration of part of the Roman law collection of the Strahov Library was the publication *Historická knihovna hospitalu Kuks a její romanisticko-kanonistický fond* [*Historical Library of the Kuks Hospital and its Roman Law and Canon Law Collection*], published in 2014 by Jindřich Kolda and † Ignac Antonín Hrdina.[2] In it, the authors went through the collection of the local nobleman library and selected volumes relating to

2 Jindřich Kolda and Ignác Antonín Hrdina, *Historická knihovna hospitalu Kuks a její romanisticko-kanonistický fond* (Pavel Mervart, 2014).

the areas of Roman, church, and religion law. The authors presented the contents of the hospital library and contributed to the popularisation not only of Roman law but also of one of the most beautiful Czech historical sites. This book seeks to similarly uncover hidden volumes and to convey information about them to the reader.

STATE OF KNOWLEDGE AND RESOURCES

The Roman law collection of the Strahov Library has not been systematically researched or processed so far, so its mapping cannot be based on anything other than primary sources – such as the catalogues and the volumes represented in the library. Information on the presence of bibliographical units is primarily provided by the electronic catalogue, which was created by digitising data from the paper index.[3] This process has only recently been finished, and unfortunately, although the catalogue is complete, it suffers from an inevitable human error rate. Nevertheless, the catalogue is valuable, and virtually the only source of information on old prints, as it contains references to prints with an issue date of January 1, 1501 and later.[4] Older printed publications are referred to as incunabula. Their defining feature is that they were produced between the beginning of the massive use of printing for book production, probably from 1447, to December 31, 1500. Their design is very specific. For instance, at the time of their creation, the form of the title page, indicating the title, the author, and the publisher details, was not yet established. The Strahov incunabula were revised and newly catalogued by Petr Voit in a 2015 publication.[5] It provides reliable information and describes the incunabula in great detail from a professional librarian point of view, accompanied by extensive indexes taking into account, among other things, historical shelf marks, provenance, printers, publishers, and bookbinders. However, at first glance, it is evident that glossators and commentators are rarely represented among the incunabula at Strahov.

Finally, the works of glossators and commentators are represented at Strahov in the form of manuscripts. Although it is typical of these authors that their work was first distributed in the form of manuscripts, and only

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3 Old prints inventories are summarised in the following article: Věra Břeňová, "Katalogy Strahovské knihovny," in *Strahovská knihovna, sborník Památníku národního písemnictví* 12–13 (1977–78), 105–119.

4 Petr Voit, *Nauka o starých tiscích* (Ústav informačních studií a knihovnictví, Filosofická fakulta Univerzity Karlovy v Praze, 2007), accessed 20 August 2024, https://sites.ff.cuni.cz/uisk/wp-content/uploads/sites/62/2016/01/Nauka-o-star%C3%BDch-tisc%C3%ADch_Voit.pdf.

5 Petr Voit, *Katalog prvotisků Strahovské knihovny v Praze* (Královská kanonie premonstrátů na Strahově, 2015).

many years after their death did the manuscripts begin to be processed by printers and thus published more widely, they are not present at the Strahov Library. This is understandable, given that manuscripts from these periods are generally rare, and their distribution network was not primarily in the Czech lands. They are rather preserved in large numbers in Italian libraries and archives, from where they originated. For the purposes of this book, only a few manuscript sheets bound in one volume with old prints, which readers used as aids to more efficiently work with these prints, are of interest. Their content, therefore, comes from the readers of these prints, not from glossators and commentators. Since the manuscripts are not reliably processed in the electronic catalogue, information about them must be obtained from other partial sources. These include, in particular, the registers compiled in the 1970s by Bohumil Ryba,[6] the catalogue of illuminated manuscripts compiled by Pavel Brodský and Jan Pařez,[7] and the papers published by Marie Tošnerová.[8] The Strahov Library is not included in charts made by Friedrich Schulte, Miroslav Boháček, Gero Dolezalek, and Hermann Fitting.[9]

The catalogue of the collection of the Strahov Library is similar to the work presented by Douglas J. Osler, who extensively researches old prints on legal topics in Europe.[10] He usually defines his subject of interest in terms

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6 Bohumil Ryba, *Soupis rukopisů Strahovské knihovny*, vol. III, DF–DG (no. 1236–1821) (Památník národního písemnictví, 1979); Bohumil Ryba, *Soupis rukopisů Strahovské knihovny*, vol. IV, DH–DK (no. 1822–2425) (Památník národního písemnictví, 1970); Bohumil Ryba, *Soupis rukopisů Strahovské knihovny*, vol. V, DL–DU (no. 2426–3286) (Památník národního písemnictví, 1971); Bohumil Ryba, *Soupis rukopisů Strahovské knihovny*, vol. VI/2, Index to vol. III, IV, V (Památník národního písemnictví, 1979).

7 Pavel Brodský and Jan Pařez, *Katalog iluminovaných rukopisů Strahovské knihovny* (Masarykův ústav a Archiv Akademie věd České republiky, Královská kanonie premonstrátů na Strahově, 2008).

8 Marie Tošnerová, *Průvodce po rukopisných fondech v České republice*, vol. IV, Rukopisné fondy centrálních a církevních knihoven v České republice (Archiv Akademie věd ČR, 2004); Marie Tošnerová, "Rukopisy předbělohorského období (1526–1620), signatury DA–DE v knihovně Královské kanonie premonstrátů na Strahově," *Studie o rukopisech*, 2005, no. 35 (2002–2004), 115–156.

9 Johann Friedrich von Schulte, *Die canonistischen Handschriften der Bibliotheken 1. der k. k. Universität, - 2. des Böhmischen Museums, - 3. des Fürsten Georg Lobkowitz, - 4. des Metropolitan-Kapitels von St. Veit in Prag* (Böhmische Ges. der Wiss., 1868); Miroslav Boháček, "On the spread of legist manuscripts in the Czech lands," *Studies on Manuscripts*, 1971, no. 10, 1–63; Gero Dolezalek, *Verzeichnis der Handschriften zum römischen Recht bis 1600*. Bände I -IV (Max-Planck-Institut für Europ. Rechtsgeschichte, 1972); Hermann Fitting, *Juristische Schriften des früheren Mittelalters. Aus Handschriften meist zum Ersten mal Herausgegeben und Erörtert von Hermann Fitting* (Waisenhauses, 1876).

10 Douglas J. Osler, *Catalogue of books printed in Spain, Portugal and the Southern and Northern Netherlands from the beginning of printing to 1800 in the library of the Max-Planck-Institut für Europäische Rechtsgeschichte* (Vittorio Klostermann, 2000); Douglas J. Osler, *Catalogue of books printed on the continent od Europe from the beginning of printing to 1600 in the library of the Max-Planck-Institut für Europäische Rechtsgeschichte* (Vittorio Klostermann, 2000); Douglas J. Osler, *Jurisprudence of the Baroque. A Census of Seventeenth Century Italian Legal Imprints*, 1. A–G (Vittorio Klostermann, 2009); Douglas J. Osler, *Jurisprudence of the Baroque. A Census of Seventeenth Century Italian Legal Imprints*,

of time and territory, and has thus systematically processed prints from Spain, Portugal, and the Netherlands up to the year 1800 in the library of the Max Planck Institute for European Legal History in Frankfurt, Germany; all units represented in the same library published before 1600; and also Italian legal prints from the 17th century. Osler compiles the information into bibliographic reference works and provides detailed descriptions of each copy, including its title, author, date of publication, publisher, and physical characteristics. He has not yet focused on the holdings of the Strahov Library, but his own database of prints is larger than the already published scope. Osler's approach is characterised by the identification of selected works in the collection of a selected library and the attempt to describe bibliographical units reliably. This book, however, focuses more on the area of legal history and adds a set of general information about individual lawyers and their works in addition to the mere cataloguing of data. On the other hand, it does not focus in such detail on the technical description of the library and the archival data on the volumes under study.

The need to add the context of the individual titles, and to present the life and work of the glossators and commentators represented at Strahov in order to make the imaginary handbook complete for future researchers, requires working with a second type of sources: legal-historical publications focused on the history of law in Europe and the reception of Roman law. Many foreign sources focus on this area, most of them by authors from Italy and Germany, but publications on this topic are still rare in the Czech legal environment. The process of the reception of Roman law is briefly described in textbooks by Valentin Urfus and David Falada, while Miroslav Černý has written articles on partial topics or authors. Thus, the aim of this book is also to publish information on glossators and commentators in sufficient detail and in a comprehensive manner.

METHOD OF RESEARCH

The process of researching the Strahov Library collection concerning the schools of glossators and commentators can be divided into several phases. Because this research has no parallel in the past, it had to be continuously modified and dead ends had to be avoided. First, it was necessary to compile a list of jurists who were active in the relevant periods and could potentially have dealt with the reception of Roman law. The names of 600 possible authors were searched in the library catalogue and checked to see if they

2. H–S (Vittorio Klostermann, 2009); Douglas J. Osler, *Jurisprudence of the Baroque. A Census of Seventeenth Century Italian Legal Imprints*, 3. T–Z and sources (Vittorio Klostermann, 2009).

were represented in the library at all, with their works identified. In this context, it is worth noting that this book does not include the contents of the library of the archbishop's seminary, which was acquired by the Strahov Library in the 1990s but has not been fully catalogued, nor the Manderscheid and Brus libraries, which were only taken over in 2020, during the conduct of this research. In the next step, a major selection of identified titles was made. Only Italian glossators and commentators, who are represented at the Strahov Library by at least one bibliographical unit that performed an exegesis of some part of the Justinianic codification, remained research subjects. In the case of these authors, then, writings that do not concern sources of Roman law, especially canon law writings and commentaries on specialised collections of feudal law, were set aside. This leads to the definition of the subject of this book. The editions of the sources of law also fall outside this research focus, since they are not the result of the creative activity of glossators or commentators.

The identified units had to be subsequently examined in order to verify the validity of the data recorded at the Strahov Library catalogue and to fill in any missing data. Electronic databases of books that offer the possibility of viewing incunabula and old prints in electronic form, especially Google Books, were helpful in this phase. In about half of the cases, it was possible to find the same edition of the title in electronic form. Thus, if two identical copies of the same edition were found, and if the catalogue did not raise any particular doubts that they were identical, the Strahov copy was described on the basis of its digital equivalent. For half of the identified units, however, it was not possible to use this procedure, either because of their unavailability in electronic form or because of questionable data provided by the catalogue. These units were, therefore, examined in physical form at the Strahov Library study room. When examining them, it was necessary to find out, first of all, information about the title, the authors, and the publisher, which was stated on the title pages and in the introductory or concluding passages of the text, referred to as incipit and explicit. The declared information was then compared to the actual contents of the volume, which in some cases revealed discrepancies between the contents, the title page, and the catalogue. This book provides a transcription of significant passages of title pages, or incipit or explicit, because they can be used to identify specific editions and because they provide a useful and detailed description of the contents.

A specific difficulty in researching the Strahov Library collection was the widespread practice of combining more bibliographical units into one convolute. This refers to the binding of at least two originally separately published units into a single final volume. Such a volume comprises multiple units, which have their own title pages, series of page numbers, and series of printer folder markings, which served as an aid to the printer in assembling

the volumes, and which were typically placed in the lower right-hand corners of selected pages. Multiple titles may have been bound into a single convolute by the owner, either the Strahov Library or its predecessor, for example, in an effort to bring together various thematically related writings of shorter length. Identifying the convolute is challenging because it may have originated not only from the owners of the copies but also from the printers. This is probably why the library catalogue formerly concealed the existence of many convolutes and neglected to identify them. This is evident in the fact that a single shelf mark was assigned to the convolute, making it unable to distinguish the individual bound parts, such as a separate commentary on the Digest and a subsequent commentary on the Codex of Justinian. Sometimes, the absence of proper identification of a convolute led the catalogue to mistakenly list only the main unit as contents of the entire volume. This occurred because, when the volume was opened, the first title page typically identified only the main bound unit. The catalogue, then, failed to indicate that other units were also available in the convolute – and indeed at the Strahov Library. This study attempts to correct these errors, firstly by identifying them and describing exactly where they lie. However, the output of the research is, among other things, a set of proposals for corrections to the catalogue and shelf marks. These corrections were implemented by the library before publication of this book. The present study, therefore, offers an updated status of shelf marks that reflect the newly identified convolutes.

The titles described are placed into the necessary context. Biographical information on the relevant authors and general information on their writings was gathered in order to provide the reader with a comprehensive picture of the library's legal collection. In the general sections focused on the schools of glossators and commentators, special attention was paid to the modes of their work, i.e., the forms of their professional output. These literary forms are then described, with an emphasis on their distinctive features and with the aid of previews of pages from the examined Strahov units. The patterns of work within the process of reception of Roman law are thus demonstrated through real cases in pictures. On the other hand, the original expectation to explore the origins of the physical volumes described has proved unrealistic. To derive this information from the ownership marks in the volumes would require advanced knowledge of palaeography, which was beyond the scope of this research. Beyond that, one can only compare entries in older catalogues in order to trace the moment when the entry first appeared in the records. However, such a procedure would be hindered by the fact that there are no catalogues dating to before the 17th century or archival records, and that the library was partly looted in 1648 during the last battles of the Thirty Years War. It is, therefore, not possible to trace the provenance of all the volumes being processed in such detail.

To sum up, this book empirically examines the Strahov Library collection, and expands the current state of knowledge and provides an overview of the writings produced by lawyers belonging to the Italian medieval schools of legal glossators and commentators in the process of reception of Roman law. It, then, analyses the contents of the collection. It presents a guide for researchers interested in studying this segment of legal history and introduces modifications to the library catalogue to bring the recorded data into line with the actual status of the collection. The list of all the bibliographical units included is presented in the annex. This book is interdisciplinary in its content, as it links legal history and substantive law – through its examples of the application of law in the works of glossators or commentators – with bibliography and library science.

1. THE BEGINNINGS OF THE RECEPTION OF ROMAN LAW

Like the Roman Empire, the norms of Roman law did not exist in a single static form throughout antiquity but rather evolved gradually. The sources of law, through the interpretation of which we recognise the content of legal norms and which give the norms their external form, therefore also changed. Looking at the sources that played the most important role in the period of the Dominate (284–476 AD) and the fall of the Western Roman Empire, which ended in 476 AD, two noticeable trends in their development can be traced. The first is the process of concentration of power in the hands of the emperor, who achieved the status of absolute monarch, and the acquisition of a monopoly of legislative power during the reigns of Diocletian and Constantine the Great.[11] This is the result of a development that took place over many years, beginning with the conferral of the legislative initiative and the right to issue official decrees (*ius edicendi*) on republican magistrates elected by assemblies of Roman citizens, and then shaped by Octavianus Augustus at the end of the first century BC when he accumulated both official functions and powers derived from the authority of magistrates. The second tendency can be seen as a strengthening of the importance of legal science. While in the archaic period of the Roman kingdom, the power to construe the law was reserved to the priests, during the Roman republic the interpretation of the law was opened to the laity. To this day, we know the names of a number of lawyers who have become famous for their expertise. The respect and acknowledgment they received from society naturally gave their legal opinions an accepted authority. However, these opinions remained the private results of their legal interpretations; they were not binding sources of law. The transformation of this state of affairs goes back to Octavianus Augustus, as he and his successors began to grant various privileges to selected jurists in order to win their favour. The privilege of giving legal advice in the name of the emperor (*respondere ex auctoritate principis*) initially had no formal weight, and lawyers endowed with this title enjoyed only increased popularity. However, judges, who did not have the courage to resist the legal opinions of these lawyers, began to attribute greater authority to them. The next logi-

11 Leopold Heyrovský, *Dějiny a systém soukromého práva římského* (Otto, 1910), 51.

cal step was the emergence of a general belief that the opinion of privileged lawyers was binding and had the force of law.[12] The special laws of citation in the Dominate period then prescribed precisely under what conditions the opinions of the classical and post-classical jurists were to be followed, and consequently, their statements became recognised as true sources of law.

It is not surprising, therefore, that when the Eastern Roman emperor Justinian the Great decided to codify Roman law as part of a general effort to restore the glory of the ancient empire, it was the imperial decrees and pronouncements of the Roman jurists that caught his attention. Shortly after he took office, Justinian ordered the compilation of a collection of imperial decrees in the constitution *De novo codice componendo* of February 13, 528. In doing so, he aimed to facilitate such an essential source of law, as subsequently stated:

> Hence We have hastened to bring these matters to your notice, in order that you may be informed to what an extent Our daily care is occupied with matters having reference to the common welfare, by collecting such laws as are certain and clear, and incorporating them into a single code, so that, by means of this code, designated by Our auspicious name, the citation of the various constitutions may cause decisions to be more readily rendered in all litigation.[13]

The Novus Iustinianus Codex was promulgated by the constitution *Summa rei publicae* of April 7, 529 and came into force on April 16, 529.[14] A year later, by the constitution *Deo auctore* of December 15, 530, work began on a collection of the opinions of Roman jurists, which bears the title *Digesta seu Pandectae*. Justinian's intention was to reconstruct the content of classical civil law through the opinions of jurists, their commentaries, and their arguments, and to collect them from scattered sources and publish them in one place:

> We therefore command you to read and work upon the books dealing with Roman law, written by those learned men of old to whom the most revered emperors gave authority to compose and interpret the laws, so that the whole substance may be extracted from them, all repetition and discrepancy being as far as possible removed, and out of them

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12 Jaromír Kincl, Valentin Urfus and Michal Skřejpek, *Římské právo* (C. H. Beck, 1995), 29.

13 § 3 *De novo codice componendo*. Source: Paulus Krueger and Theodorus Mommsen, eds., *Corpus iuris civilis*, Editio stereotypa quinta, volumen secundum (apud Weidmannos, 1892). "*Haec igitur ad vestram notitiam ferre properavimus, ut sciatis, quanta nos diurna super rerum communium utilitate cura sollicitat, studentes certas et indubitatas et in unum codicem collectas esse de cetero constitutiones, ut ex eo tantummodo nostro felici nomine nuncu pando codice recitatio constitutionum in omnibus ad citiores litium decisiones fiat iudiciis.*" Source of translation: Samuel P. Scott, ed., *The Civil Law*, vol. XII (The Central Trust Company, 1932).

14 For an overview of constitutions, see David Falada, *Recepce římského práva* (Aleš Čeněk, 2016), 61–64.

> one single work may be compiled, which will suffice in place of them all. (...) but that in these fifty books the entire ancient lawin a state of confusion for almost fourteen hundred years, and rectified by us may be as if defended by a wall and leave nothing outside itself. All legal writers will have equal weight and no superior authority will be preserved for any author, since not all are regarded as either better or worse in all respects, but only some in particular respects.[15]

With the constitution *Tanta* of December 16, 533, Justinian thus published one of the most extensive codices of mankind, which, in a volume of 50 books, compiled excerpts from the works of classical and post-classical Roman jurists. The constitution came into effect on December 30, 533. However, selecting such content presents two types of risk. First, the opinions of jurists included are not usually written in the nature of theoretical postulates and explanatory interpretations. They do not offer abstract theses, but specific solutions to real disputes which the jurists either encountered directly or which, again based on practical experience, occurred to them as hypothetical examples. It is thus a set of case law. The explicit formulations of the Digest do not reveal the underlying theoretical legal order. Only from the study of a wide range of case law can such general principles be abstracted. Further, in compiling the Digest, the compilation committee headed by the jurist Tribonian selected legal opinions from the works of several different jurists who, moreover, did not live in the same period. It is also common for a single author to contradict himself in multiple works published during his lifetime. Disputes between multiple lawyers who differ in their views on the solution of a particular legal issue are common. It is understandable, then, that differences in the law are subject to change over time. All of this leads to the inevitable result, which is an inherent contradiction between the fragments of the Digest. The emperor Justinian was aware of this danger, and therefore in both aforementioned constitutions he explicitly empowered the commission to carry out interpolations, i.e., interventions in the texts of the Roman jurists by which they were edited, supplemented, but also amended. Although the commission tried to eliminate contradictions, it was not successful to the

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15 § 4–5 *Deo auctore*. Source: Paulus Krueger and Theodorus Mommsen, eds., *Corpus iuris civilis*, Editio stereotypa duodecima, volumen primum (apud Weidmannos, 1911). "*Iubemus igitur vobis 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. (...) sed his quinquaginta libris totum ius antiquum, per millesimum et quadringentesimum paene annum confusum et a nobis purgatum, quasi quodam muro vallatum nihil extra se habeat: omnibus auctoribus iuris aequa dignitate pollentibus et nemini quadam praerogativa servanda, quia non omnes in omnia, sed certi per certa vel meliores vel deteriores inueniuntur.*" Source of translation: Alan Watson, ed., *The Digest of Justinian*, vol. 1 (University of Pennsylvania Press, 1998).

full extent. Thus, if the reader has the ambition to abstract general rules from the case law presented and to discover the theoretical system behind it, it soon turns out that such expectations were unrealistic, because the Digest offers no uncontroversial system. This says nothing about the actual state of the law in the classical period of Roman history, but the fact is that the Digest is not an ideal means of reconstructing it.

As the third part of the codification, Justinian published the *Institutiones seu Elementa*, which can be understood as a textbook or manual of Roman law, but at the same time still as a source of law, which the inhabitants of Byzantium were obliged to follow. The *Institutes* were promulgated by the constitution *Imperatoriam maiestatem* of December 21, 533, in which Justinian made it clear that his intention was to provide students with a modern textbook giving correct insights into civil law:

> After the completion therefore of the fifty books of the Digest or Pandects, in which all the earlier law has been collected by the aid of the said distinguished Tribonian and other illustrious and most able men, we directed the division of these same Institutes into four books, comprising the first elements of the whole science of law. In these the law previously obtaining has been briefly stated, as well as that which after becoming disused has been again brought to light by our imperial aid.[16]

The *Institutes* came into effect on December 30, 533. After the completion of the Digest and the *Institutes*, the need arose to revise the Codex, which, as the oldest part of the codification, did not correspond to the contents of the later parts, nor did it reflect the further amendments made by the constitutions of the emperor Justinian. A newly formed commission, therefore, revised the form of the original Codex during 534, and at the end of that year the revised code – *Codex Iustinianus repetitae praelectionis* – was published by the constitution *Cordi* of November 16, 534. The Codex, effective from December 29, 534, replaced the original version of 529, completing the process of creating the Justinianic codification, which was subsequently referred to as the *Tria volumina*, in reference to the number of its parts, or *Corpus iuris civilis*, a name first used by the French legal humanist Dionysius Gothofredus (Denis Godefroy) in 1583 on the occasion of its publication. However, Justinian's work did not

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16 § 4–5 *Imperatoriam maiestatem*. Source: Paulus Krueger and Theodorus Mommsen, eds., *Corpus iuris civilis*, Editio stereotypa duodecima, volumen primum (apud Weidmannos, 1911). "*Igitur post libros quinquaginta digestoram seu pandectarum, in quos omne ius antiquum collatum est (quos per eundem virum excelsum Tribonianum nec non ceteros viros illustres et facundissimos confecimus), in hos quattuor libros easdem institutiones partiri iussimus, ut sint totius legitimae scientiae prima elementa. Quibus breviter expositum est et quod antea optinebat et quod postea desuetudine inumbratum ab imperiali remedio illuminatum est.*" Source of translation: John Baron Moyle, ed., *The Institutes of Justinian*, fifth edition (Clarendon Press, 1913).

end with the three volumes mentioned above. He and his successors naturally issued new imperial decrees known as *Novellae*. The *Novellae of Justinian* were later assembled into collections and, because they changed the content of Justinianic codification, they in effect formed a continuation of it.

Justinian had Roman law codified with the intention of creating an up-to-date, binding codification for the inhabitants of the entire Roman Empire, at least to the extent of the territory he controlled at this time. The selected imperial constitutions and the mass of classical law collected in the Digest were intended to replace private collections of constitutions in use up to that time from the period between the reigns of the emperors Hadrian and Diocletian, that is, the *Codex Gregorianus and Codex Hermogenianus*, as well as the *Codex Theodosianus*, the first public collection in force from 438 to 439. This intention was explicitly expressed by Justinian at the beginning of the works on the *Corpus iuris civilis* in the constitution *Summa rei publicae* of April 7, 529, which promulgated an earlier version of the Codex:

> Therefore We have had in view the perpetual validity of this Code in your tribunal, in order that all litigants, as well as the most accomplished advocates, may know that it is lawful for them, under no circumstances, to cite constitutions from the three ancient codes, of which mention has just been made, or from those which at the present time are styled the New Constitutions, in any judicial inquiry or contest; but that they are required to use only the constitutions which are included in this Our Code...[17]

By the three codices mentioned in the quoted constitution he meant precisely *Codex Gregorianus, Codex Hermogenianus*, and *Codex Theodosianus*. After the defeat of the Ostrogoths and the conquest of Italy, Justinian enforced his idea through the *Pragmatica sanctio pro petitione Vigilii* of August 13, 554, a regulation issued – as the name reveals – at the request of pope Vigilius, by which he stabilised the situation in Italy and annulled all the constitutions of the Gothic kings.[18] In the eleventh of the twenty-three constitutions that make up the Pragmatic Sanction, he explicitly declared the Justinianic codification valid and binding in Italy:

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17 § 3 *Summa rei publicae*. Source: Paulus Krueger and Theodorus Mommsen, eds., *Corpus iuris civilis*, Editio stereotypa quinta, volumen secundum (apud Weidmannos, 1892). "*Hunc igitur in aeternum valiturum iudicio tui culminis intimare prospeximus, ut sciant omnes tam litigatores quam disertissimi advocati nullatenus eis licere de cetero constitutiones ex veteribus tribus codicibus, quorum iam mentio facta est, vel ex iis, quae novellae constitutiones ad praesens tempus vocabantur, in cognitionalibus recitare certaminibus, sed solis eidem nostro codici insertis constitutionibus necesse esse uti...*" Source of translation: Samuel P. Scott, ed., *The Civil Law*, vol. XII (The Central Trust Company, 1932).

18 Miroslav Černý, "Počátky školy glosátorů a znovuobjevení Digest," in *Historia et interpretatio Digestorum seu Pandectarum. Zborník z 18. konferencie právnych romanistov Slovenskej republiky a Českej republiky, uskutočnenej v dňoch 27.–28. mája 2016 na Právnickej fakulte Trnavskej univerzity v Trnave*, ed. Peter Mach and Vojtech Vladár (Leges, 2016), 54.

> That laws of the emperor shall be extended into his provinces. The laws, moreover, and the statutes included in our Code, which have long ago been sent into Italy by edict, shall be in force. The constitutions, too, which we thereafter promulgated, shall be published by edict, and shall be in force in the land of Italy from the time that they were made public by edict, so that the state being united by God's will, the authority of our laws shall also be extended everywhere.[19]

He argued that steps to restore the ancient empire and regain control of Italy also required the unification of the law and its imperial power. It is noteworthy that he explicitly demanded a binding force for both *leges*, that is, imperial decrees regarded as new law, and *iura* in the sense of the conclusions of legal science contained in the Digests, that is, law described as old, in fact classical and post-classical.[20] He, therefore, did not merely achieve a quantitative extension of the three regulations aforementioned, with additional constitutions, but intentional qualitative change consisting in the necessity to take into account the voices of the classical and post-classical Roman jurists.

Despite Justinian's efforts, however, the inhabitants of the Italian Peninsula were unwilling to adopt the Justinianic codification as their own and did not replace the pre-Justinian law that had been in use until then.[21] The authority of the Eastern Roman emperors did not persuade them to change their minds because in 568 northern Italy was conquered by the Lombards, and Byzantium gradually lost its power over the Italian Peninsula. The limited number of manuscripts of the new codification and related materials only intensified the problem. Nor did the Church support the transition to Justinian law, since it derived its existing privileges from the older Theodosian Codex. The Church continued to refer to the older codex not only in cases where its rights were limited by Justinian's legislation, but also consistently in situations where privileges were accepted by Justinian. The codes of the new Germanic states, which applied because of personality law to the Roman population, were also based on the Theodosian Codex and older law. The Germanic codes did not follow Justinian law and may have been attractive to the local population precisely because they contained familiar

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19 C. 11 *Pragmatica sanctio pro petitione Vigilii*. Source: Rudolfus Schoell and Guilelmus Kroll, eds., *Corpus iuris civilis. Editio stereotypa,* volumen tertium, Novellae (apud Weidmannos, 1895). "*Ut leges imperatorum per provincias ipsorum dilatentur. Iura insuper vel leges codicibus nostris insertas, quas iam sub edictali programmate in Italiam dudum misimus, obtinere sancimus. Sed et eas, quas postea promulgavimus constitutiones, iubemus sub edictali propositione vulgari, (et) ex eo tempore, quo sub edictali programmate vulgatae fuerint, etiam per partes Italiae obtinere, ut una deo volente facta republica legum etiam nostrarum ubique prolatetur auctoritas.*" Source of translation: Josip Banic, ed., *Fontes Istrie medievalis*, vol. 1: A seculo VI usque ad 803, accessed 20 August 2024, https://fontesistrie.eu/554_IPS.

20 Francesco Calasso, *Medio evo del diritto*, I - Le fonti (Dott. A. Giuffrè editore, 1954), 83.

21 Calasso, *Medio evo del diritto*, 84–92.

norms untouched by the reforms that the emperor Justinian had made in creating the *Corpus iuris civilis*.

While the development of Justinianic law continued in Byzantium and in the territories of the Italian Peninsula under its reign, in the West, i.e., in the territories outside the influence of the Eastern Roman Empire, this influence was limited. Moreover, there was no uniform development, since the unity of law was also lost with the collapse of the Western Roman Empire.[22] It is safe to say that pre-Justinian law retained its influence in the period from the 6th to the 11th century AD.[23] In Spain and France, the *Codex Theodosianus* played an important role. Shortly after the collapse of the Western Roman Empire and before the publication of the Justinianic codification, new Germanic kings issued the so-called *leges Romanae barbarorum*, Germanic law codes that conveyed Roman law to their Roman subjects on the basis of personality of law. This was the *Lex Romana Burgundiorum* or *Lex Romana Visigothorum* issued in 506 at Toulouse, known as the *Breviarium Alaricianum*, which, although replaced in the Visigothic Empire in 654 by the *Lex Visigothorum Recesvindiana*, which applied to the entire population on a territorial basis, continued to retain considerable influence in the Frankish Empire. Both codes contained, in addition to the imperial constitutions (*leges*) and also to a limited extent texts of Roman jurists (particularly an extract from the *Institutes* of Gaius), an extract from the *Sentences of Paul* and one responsum of Papinianus, all partly supplemented by interpretation from earlier works. Beyond this limited conveyance of the content of the ancient law (*ius*), however, classical Roman jurisprudence was left out. Another representative of Roman influence was the *Edictum Theodorici*, published in southern France for both Roman and Visigothic populations in 458 and 459, before the collapse of the Western Roman Empire. In addition to pre-Justinian collections of imperial constitutions, the edict was based on fragments of the *Sentences of Paul*. The Lombard *Edictum Rothari* of 643 also shows the influence of Roman law, although its content was already predominantly Germanic.

There is evidence that the Codex of Justinian continued to be used to some extent in the West, as were the *Institutes*.[24] With regard to the Codex, there is not a single manuscript known until the early twelfth century that carries

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22 Erich Grenzmer, "Die iustinianische Kodifikation und die Glossatoren," in *Atti del congresso internazionale di diritto romano (Bologna e Roma XVII-XXVII aprile MCMXXXIII)*, Volume primo (Premiata tipografia successori fratelli Fusi, 1934), 354.

23 Calasso, *Medio evo del diritto*, 72–77, 106–108; Valentin Urfus, *Historické základy novodobého práva soukromého* (C. H. Beck, 2001), 11; Kincl, Urfus and Skřejpek, *Římské právo*, 42.

24 Max Conrat, *Geschichte der Quellen und Literatur des römischen Rechts in früheren Mittelalter*, Erster Band (J. C. Hinrichs'sche Buchhandlung, 1891), 54, 57; Hermann Lange, *Römisches Recht im Mittelalter*, Band I, die Glossatoren (Beck, 1997), 11–13; Paul Koschaker, *Europa und das römische Recht* (C. H. Beck'sche Verlagsbuchhandlung, 1953), 58.

the full text of all twelve, or at least the first nine, books. The Codex survives only in the form of extracts and summaries, which, moreover, do not include passages written in Greek or the last three books. A poor representative of the literature on the Codex is the *Summa Perusina*, dating from the 7th to the 9th century, which contains serious errors. We should also mention the Gloss of Pistoia and the *Epitome Codicis*, an extract from the constitutions contained in the first three books of the Codex produced in the 7th or 8th century. The *Institutes* were used then for teaching purposes, and there is knowledge of two manuscripts of the text dating back to the 11th century, but this does not indicate frequent use. The Gloss of Turin on the *Institutes* was probably written in the mid-6th century and may have been produced by an unknown Byzantine author in Italy. The Gloss of Bamberg, dating from the 11th century, contains parts of the text dating from an earlier period, perhaps again from the reign of emperor Justinian. Furthermore, only small extracts were made. The *Novellae* of Justinian[25] were not used in full, but in the form of the *Epitome Iuliani*, an abbreviated version of a selection of 124 *novellae*, which were probably written in the mid-6th century. Shorter joint extracts and summaries were further elaborated on in sections of the *Institutes*, Codex, and *Novellae* of Justinian. We can mention the *Lex Romana canonice compta*, a selection of Roman law rules intended for the use of the Church, which was written in Italy in the 9th century. It contains excerpts from the *Epitome Iuliani*, the *Institutes* of Justinian, and the extended *Epitome Codicis*, probably still through another collection.[26]

However, the Digest, the most extensive part of the Justinianic codification, probably fell out of use completely from the 7th to the 11th century.[27] It cannot be ruled out that the collection was not opened in any circumstances during that period, but from today's perspective there is no evidence of its use. It seems that the reason was not necessarily physical loss in the strict sense of the word, as is sometimes simplistically reported. Rather, it may have been a natural consequence of the shortage of Digest manuscripts; the rarity of access to their study; and the fact that, given the extent and difficulty of working with the Digest, there was no practical need or suitable conditions to study them.[28] The last direct quotation from the Digest for a long time is in a letter by Pope Gregory the Great in 603, who decided to settle the disputes of Bishop Januarius of Malaga. To this end, he entrusted their investigation and

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25 Lange, *Römisches Recht im Mittelalter*, Band I, die Glossatoren, 14.

26 Grenzmer, *Die iustinianische Kodifikation und die Glossatoren*, 361.

27 Černý, *Počátky školy glosátorů a znovuobjevení Digest*, 55; Miroslav Černý, "Středověcí glosátoři – nejdůležitější představitelé a metoda jejich práce," *Acta Iuridica Olomucensia*, 2014, vol. 9, Supplementum no. 3, 35–36; Lange, *Römisches Recht im Mittelalter*, Band I, die Glossatoren, 11.

28 Conrat, *Geschichte der Quellen und Literatur des römischen Rechts in früheren Mittelalter*, Erster Band, 67.

decision to his deputy, the defensor John, whom he instructed in the letter on the appropriate course of action:[29]

> ...as it reads in the 48 book of the title on Iulius law of insulting majesty in the seventh fragment: Modestinus, 12 book of Pandects. After a few words: this accusation, however, should not be taken by the judges as an opportunity to show respect for the imperial majesty, but as a matter of fact. For it is necessary to consider the character of the person concerned, whether he could have done it, and whether he had considered anything beforehand.[30]

In the letter, he quoted approximately the first half of the provision of D. 48.4.7.3 (Modestinus *12 pand.*) from the title *Ad legem Iuliam maiestatis* (*On Iulius' Law of Insulting Majesty*), which concerns the crime of insulting the majesty, and indeed applied the Digest in the context of the problem.

It must be admitted that the Digest was occasionally mentioned even in texts written after 603, but such cases are rare. Moreover, they are characterised by the fact that their authors did not necessarily have the Digest in their hands or understand its contents; they may simply have taken information that came to them from another source. The authors in no way demonstrate a general knowledge of the Digest nor its practical use.[31] We can mention the copy of the introduction of the Digest after the text of the *Institutes* in a 9th century Berlin manuscript, or the entry in a Lombard-Tuscan writing from the late 9th and early 10th centuries. The note in the *Historia Langobardorum*, written by Paulus Diaconus, a grammar teacher at the court of the Frankish and Lombard king Charlemagne, is interesting. The text probably dates from the period between the end of his time at the court in 787 and his death in the Italian monastery of Montecassino in 797. He describes in some detail all three parts of the Justinianic codification, including the *Novellae*, and among them he also lists the Digest, with the information that it includes extracts from the works of Roman jurists, and that the collection is divided into fifty books:

> The laws of the Romans, which amounted to great extent and impracticable contradictions, he corrected with admirable brevity. For he reduced all the imperial constitu-

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29 Friedrich Carl von Savigny, *Geschichte des Römischen Rechts im Mittelalter*, Band 2, Zweite Ausgabe (Mohr, 1850), 276.

30 *Gregorii Magni epistulae*, liber XIII, epist. 50. Source: Ludovicus Mauritius Hartmann, ed., *Gregorii I papae registrum epistolarum. Monumenta Germaniae historica.* Tomus II. Libri VIII–XIV cum indicibus et praefatione (apud Weidmannos, 1899), 417. *"...sicut legitur libro XLVIII titulo ad legem Iuliam maiestatis, digesto septimo: "Modestinus, libro XII Pandectarum". Post pauca: Hoc tamen crimen iudicibus non occasione ob principalis maiestatis venerationem habendum est, sed in veritate. Nam et persona spectandam esse, an potuerit facere et an ante quid fecerit et an cogitaverit."*

31 Grenzmer, *Die iustinianische Kodifikation und die Glossatoren*, 356–357.

> tions, which certainly occupied many volumes, into twelve books, and ordered this volume to be called the Codex of Justinian. And, in like manner, the individual laws of the magistrates or judges, which had hitherto occupied as many as nearly two thousand books, he condensed to the number of fifty books, and called the collection of them by the words Digest or Pandects. The four books of the Institutes, in which the text of all the laws is then briefly expounded, he newly compiled. And the new laws which he himself had appointed, published in one volume, he ordered to be called the collection of Novels.[32]

It seems probable that Paulus Diaconus did not describe his own experience; he did not see the Digest in person, nor did he have it at his disposal while at the royal court. It may have been merely mediated information from a sixth-century Italian chronicle.[33]

A renewed interest in the Digest can be traced back to the 10th century. The *placitum* of Marturi, a Lombard court document of March 1076, is considered to be the first real use of the Digest for a long time.[34] It concerns a proceeding in which the monastery of St. Michael at Marturi, near Siena, sued Sigizo of Florence for the delivery of lands, denying the possibility of their possession.[35] The deed states, among other things: *After the above had been completed, Nordillus, the agent of the said lady Beatrix, after taking into account the law of the Digest books, through which the praetor promises to restore to its original state if no magistrate is at hand, restored the church and convent of St. Michael…*[36] In the context of the restitution of damages, the document explicitly mentions the Digest and paraphrases a section of D. 4.6.26.4 (Ulpianus *12 ad ed.*) of the title *Ex quibus causis maiores viginti quinque annis in integrum restituuntur* (*For what*

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32 Paulus Diaconus, *Historia Langobardorum*, liber I, c. 25. Source: Ludwig Konrad Bethmann and Georg Waitz, eds., "Pauli Historia Langobardorum," in: *Monumenta Germaniae historica, Scriptores rerum Langobardicarum et Italicarum saec. VI–IX* (impensis Bibliopolii Hahniani, 1878), 63. "*Leges quoque Romanorum, quarum prolixitas nimia erat et inutilis dissonantia, mirabili brevitate correxit. Nam omnes constitutiones principum, quae utique multis in voluminibus habebantur, intra duodecim libros coartavit eodemque volumen codicem Iustinianum appellari praecepit. Rursumque singulorum magistratuum sive iudicum leges, quae usque ad duo milia pene libros erant extensae, intra quinquaginta librorum numerum redegit, eumque codicem digestorum sive pandectarum vocabulo nuncupavit. Quattuor etiam institutionum libros, in quibus breviter universarum legum textus conprehenditur, noviter composuit. Novas quoque leges, quas ipse statuerat, in unum volumen redactas, eundem codicem novellam nuncupari sancivit.*"

33 Lange, *Römisches Recht im Mittelalter*, Band I, die Glossatoren, 11.

34 Grenzmer, *Die iustinianische Kodifikation und die Glossatoren*, 368.

35 Hermann Ulrich Kantorowicz, "Über die Entstehung der Digestenvulgata," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*, Bd. 31, 1910, 32; Hermann Fitting, *Die Anfänge der Rechtsschule zu Bologna* (Verlag von J. Guttentag, 1888), 81-87.

36 Fitting, *Die Anfänge der Rechtsschule zu Bologna*, 84. "*His peractis supradictus Nordillus, predicte domine Beatricis missus, lege Digestorum libris inserta considerata, per quam copiam magistratus non habentibus restitutionem in integrum pretor pollicetur, restituit in integrum ecclesiam et monasterium sancti Michaelis…*"

reasons persons over twenty-five years of age are restored to their former state), namely: *But if no magistrate is on hand, Labeo said the restitution claim should be granted*.[37] Certainly this is not an example of a very detailed handling of the Digest, nor can the mistaken substitution of the lawyer Labeo for the praetor be overlooked, but it marks a conscious handling of the contents of the Digest. It should also be noted that it includes a reference to Pepo, doctor of law, which sparked a prolonged debate about whether this refers to Irnerius's renowned predecessor, Pepo of Bologna.[38] Another[39] example of the awareness of the existence of the Digest can be traced to a lawsuit in Ravenna in the 1180s, probably from 1084, and is preserved in a 16th century Hanoverian manuscript.[40] Its author, Petrus Crassus, was apparently aware of the Digest, but mistakenly referred to the constitution C. 9.46.10 of the Codex of Justinian, so the Digest was probably not available to him. Excerpts from the Digest dating from the first quarter of the 11th century then appeared in a British canon law collection.

The awakening of interest in Roman law is also related to the activities of the law school in Pavia, the original capital of the Lombard Empire, which retained its importance even after its conquest by the Holy Roman Empire.[41] The school was founded there in the 9th century and gathered specialists in Lombard law. In the 11th century, some elements of teaching, such as the debates held there and, above all, the literary output produced there, attest to a high degree of development in legal scholarship and theory. The *Liber Papiensis* is a collection of 11th century Lombard law, written more as a practical manual than as teaching material. It was based on an earlier collection of the laws of the Lombard kings from 643 to 755, *Edictum regum Longobardarum*, and the collection of the laws of their Frankish successors after 774, *Capitulare Italicum*. Then, at the turn of the 11th and 12th centuries, a commentary on this collection, known as the *Expositio Liber Papiensis*, was written, which evidently refers to the Digest at least thirteen times. While this is a much smaller number than in the case of other parts of the *Corpus iuris civilis* and does not indicate extensive use of the Digest, at least elementary knowledge of it is assumed. Working with the sources of Roman law was important for the jurists of the time because it constituted the general basis of legal thought, which served to interpret the Lombard law or even to supplement it. At the end of the 11th century, a second collection of Lombard law, known as the *Lombarda*, was also produced in Pavia or the surrounding towns.

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37 "*Sed et si magistratus copia non fuit, labeo ait restitutionem faciendam.*"
38 Grenzmer, *Die iustinianische Kodifikation und die Glossatoren*, 368.
39 Grenzmer, *Die iustinianische Kodifikation und die Glossatoren*, 368.
40 Conrat, *Geschichte der Quellen und Literatur des römischen Rechts in früheren Mittelalter*, Erster Band, 606–607.
41 Lange, *Römisches Recht im Mittelalter*, Band I, die Glossatoren, 11–12, 23–26, 90.

If interest in the Justinianic codification grew, and was most evident in connection with the Digest, the 11th century must have been a period of widespread awareness of its contents. This could only have happened through the improved availability of Digest manuscripts. From today's perspective, two variants of the full text seem to be at the origin of this interest.[42] The first variant is represented by a manuscript known as the *Littera florentina* or *pisana*, dating no later than the turn of the 6th and 7th centuries. It has been speculated that it could be one of the official copies of the Digest that the emperor Justinian had sent to Italy, but this is not confirmed, and it seems more likely to have come from southern Italy. Two different names of the code originate from its troubled history. It was first found in the southern Italian city of Amalfi, from where it was taken as spoils of war by warriors originally from Pisa in 1155. At the time of the Bolognese glossators, it was deposited in Pisa and was known by that city. When Pisa was occupied by the Florentines, they captured this precious relic and from 1406 to the present day it has been kept in Florence. The second version of the Digest is preserved in the form of hundreds of manuscripts that circulated among lawyers in the Middle Ages, since the beginning of the school of glossators. The legal humanists, focused on the critical analysis of the text, used the term vulgar manuscripts; the term *Littera bononiensis* also appears. It is probable that all vulgar manuscripts derive from a common version, which was based on a specimen of the *Littera florentina* but was corrected according to a now unknown manuscript. Medieval authors used the vulgate almost exclusively, as the text of the Florentine manuscript only became widespread during the 19th century. One of the first jurists to try to systematically reconcile the differences between the Florentine and vulgate manuscripts was the commentator Ludovicus Bologninus, who did not succeed.[43] The same idea was then developed by the aforementioned legal humanists, who were introduced to the subject of textual criticism and the detailed examination of the sources of Roman law.

Of the differences between the Florentine and vulgate manuscripts, the first thing that catches the eye is their different systematics.[44] While the *Littera florentina* divided the Digest into two parts, the *Littera bononiensis* divided the Digest into three, namely the *Digestum vetus* from D. 1.1 to D. 24.2, the *Infortiatum* from D. 24.3 to D. 38.17, and the *Digestum novum* from D. 39.1 to D. 50.17. The section beginning in the middle of the clause sentence of D. 35.2.82 and extending to the end of the *Infortiatum* then bore the additional special des-

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42 Lange, *Römisches Recht im Mittelalter*, Band I, die Glossatoren, 61–67.

43 See Bologninus, Ludovicus.

44 Helmut Coing, ed., *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, Erster Band, Mittelalter (Beck, 1973), 158.

ignation *Tres partes*. Since glossators and commentators worked with vulgar manuscripts, it is not surprising that, at least in the Middle Ages, the division of the Digest into three parts became fully established. In the perception of the glossators and commentators, this structured arrangement of the Digest introduced the collection of Justinianic codification, also known as the *libri legales*.[45] According to the traditional ordering, they were followed by the Codex of Justinian, which, however, included only the first nine in the original twelve books promulgated by Justinian. Next, the *libri legales* included the *Volumen parvum*, containing the last three books of the Codex under the designation *Tres libri codicis*, the *Institutes* of Justinian, and the *Authenticum*.

The latter part – *Authenticum* – was how a part of the *novellae* entered into the edition of the Justinianic codification. It contained 134 of them, either in the original Latin text or in translation from Greek. This collection probably originated in Italy; it is not known when, but there are no manuscript records going back before the 11th century. The *Authenticum* was evidently first handled by the glossators, who regarded it as the collection officially published by Justinian. They, therefore, preferred it to the older set of shortened *novellae,* the *Epitome Iuliani*, which they used only as an interpretive aid. Regardless of their belief in the official nature of the *Authenticum*, the glossators gradually removed the *novellae* they deemed uninteresting. This process resulted in a collection of 97 selected novellae, which were organised into nine collations, modelled after the nine books of the Codex as understood at the time. The 37 superfluous *novellae* were sometimes divided into three further collations analogous to the *Tres libri codicis*, but more often the practice of Hugolino de Presbyteris was followed, who included the *Libri feudorum* or *Consuetudines feudorum* as the tenth collation in the *Authenticum*.[46] This was a private collection of the most important sources of Italian medieval feudal law, compiled between 1150 and 1250. It consists of two books and covers the laws of the Holy Roman emperors Conrad II, Lothar II, Frederick I, Henry VI, and Frederick II. As additions or *extravagantes* to the *Libri feudorum*, the text of the Peace of Constance between emperor Frederick I Barbarossa and the Lombard cities of June 15, 1183, by which the emperor conceded to the cities and granted them the right to have their own jurisdiction and to be governed according to their own legal customs,[47] and the *Constitutio de statutis et consuetudinibus contra libertatem ecclesiae editis* of emperor Frederick II of 1220, used to be attached to the *libri legales*. The aforementioned *Lombarda* was never counted among

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45 Coing, *Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte*, Erster Band, Mittelalter, 156, 162–163.

46 Lange, *Römisches Recht im Mittelalter*, Band I, die Glossatoren, 86–90.

47 Miroslav Černý, "Ius commune a ius proprium ve středověku," in *Metamorfózy práva ve střední Evropě IV. Žijeme v nejlepším z možných právních světů?*, ed. František Cvrček and Helena Jermanová (Aleš Čeněk, 2014), 372.

the *libri legales*, yet some glossators, especially Roffredus, paid attention to it in their texts.[48] Excerpts from the *Lombarda* occasionally appeared in the *Glossa ordinaria* of Accursius. The aforementioned history can be summarised by reference to the introduction to the *Summa Decretalium* of the mid-13th century canonist Hostiensius, who attempted to briefly describe the sources of secular law: *And, as I briefly understand, the wisdom of secular law lies in the 50 books of the Pandects, 4 books of the Institutes, 12 books of the Codex, the 9 collections of the Authenticum, the Novels, the Lombarda, and the Libri feudorum*.[49] What is surprising about this construction from today's perspective is how organically he linked ancient and medieval law, as he unembarrassedly attached documents from the 12th century to the statements of classical Roman jurists. But perhaps this was just another manifestation of the medieval perception of the continuity of the Roman empire, which was to retain its essence until then despite formal changes.

It was the increased interest in the study of *libri legales* and especially the Digest in Italy in the second half of the 11th century that began the process known as the reception of Roman law, which continues to this day. Reception presupposes the knowledge of Roman law, especially in the form captured by the Justinianic codification, the exegesis of these regulations, i.e., a complex interpretation, similar in its complexity to the interpretation of the text of the Bible, but ultimately also the adoption of institutes and principles into the current law, the inspiration of the Roman law system for the contemporary legal order. Without the adoption of Roman law norms and their application to contemporary life, one cannot speak of reception, but only of the study of history. Without their revival, Roman law remains a dead relic. Today, Roman private law lives on in the civil codes of countries belonging to the continental system of law, including the Czech Civil Code. Today's knowledge is a manifestation of the long process of elaboration of the *Corpus iuris civilis*, which has undergone various stages of development over thousands of years. The focus was first on understanding the text and finding all the contexts in the extensive Justinianic codification, then on textual criticism, and finally on creating a way to translate it into the modern world and its system of law. The first two phases of reception, falling in the Middle Ages, are named after schools of glossators and commentators.

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48 Lange, *Römisches Recht im Mittelalter*, Band I, die Glossatoren, 90–92.

49 Savigny, *Geschichte des Römischen Rechts im Mittelalter*, Band 2, 421. "*Et, ut breviter comprehendam, in 50 libris Pandectarum, 4 Institutionum, 12 Codicis, 9 collationibus Authenticorum, Novella, Lombarda, et Constitutionibus feudorum, consistit legalis sapiential.*"

2. GLOSSATORS

2.1 LEGAL SCHOOL

Glossators are defined as the jurists who were at the beginning of the increased interest in the sources of Roman law in the period from the second half of the 11th century to the middle of the 13th century. It is possible to consider preconditions for this development, including economic growth, the formulation of a scholastic approach to the treatment of philosophical and theological topics, or the development of the study of Lombard law in Pavia. It appears, however, that there was one more key precondition added to the above – the creation of a suitable place for study. The University of Bologna became such a place, therefore the process of reception of Roman law begins there. It was the first university in the modern sense of the word, and it is therefore not surprising that it was not established by a decision of power or on an established institutional framework, but from below, in a spontaneous way. It is therefore impossible to determine the exact date of its foundation, since it received formal recognition only retrospectively, at a time when it was already functioning.[50] The official date of its foundation is then given as 1088. It was also only in the course of time that the regulations governing the course of study and the prerequisites for the exercise of legal professions linked to the university were introduced.[51] The first originated in 1219 and the second in 1158. In the same year, the emperor Frederick I issued the *Authentica habita*, which definitively confirmed the functioning of the University of Bologna and guaranteed protection for its students and professors when they were in Bologna and travelling. From the 1320s onwards, we can trace the metaphorical wave of other universities that, inspired by Bologna and modelled on it, included civil law studies.

Unfortunately, providing any biographical information about medieval jurists is always a precarious endeavour because historical facts are hidden behind a barrier of legends. It would be naive to expect their lives to have been described in detail by independent chroniclers who undertook the task of preserving important information for future legal historians. We can

50 Falada, *Recepce římského práva*, 92.
51 Falada, *Recepce římského práva*, 96–97.

therefore do no better than accept that most of the little information that has survived is provided by the lawyers themselves. It is typical that their texts are not composed exclusively of technical explanations, but are often supplemented with their own experiences and accounts of events in their lives. The discovery of any new biographical information inserted into a professional text is therefore always accompanied by uncertainty as to how much the author has embellished the past and whether, years later, he remembered the events of his life correctly.

Glossator Odofredus, whose work is characterised by numerous references to the origins of this school of law, is an especially useful source of information.[52] Unfortunately, even here a certain degree of uncertainty must be considered, since Odofredus lived in the first half of the 13th century and was therefore already distant from the events described. His mention of Pepo of Bologna, who should have been the first to take a significant interest in Justinianic codification, raises doubts in this regard. Odofredus writes of him *nullius nominis fuit*, thus expressing literally that Pepo had no name. This can be understood in different ways. It is often inferred from these words that Pepo's contribution was so negligible it was not even worth mentioning, but perhaps they merely express the fact that Pepo was not in pursuit of glory and preferred the quiet, but all the more meritorious, study of the sources of law.[53] This is contrasted with the words of Sigismundus Titius, who, in a text on the history of Siena from the first half of the 16th century, quoted a poem supposedly composed by Bishop Gialfredus of Siena at the turn of the 11th and 12th centuries. With the words *Pepone claro Bononiensium lumine*, he did not place Pepo in the shadow of history but instead referred to him as the bright light of Bologna.[54] Nor can other sources of information about Pepo be considered reliable. His name was quite widespread in his time, in contrast to today, and it is therefore impossible to distinguish which reference in contemporary documents identifies precisely him. Scholarly literature then hesitates between the choice of words, whether to label Pepo as the founder of the school of glossators or as a mere predecessor of it. He may have been a well-known lawyer, he may have been present in Bologna, he may have taught law, and he may have been engaged in literary work. However, while the sources mention his knowledge of the Codex and the *Institutes*, there is no evidence that he was involved in the study of the Digest.[55] This imaginary defining characteristic of glossators is therefore probably missing, and it can be concluded that Pepo

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52 Černý, *Počátky školy glosátorů a znovuobjevení Digest*, 56.
53 Calasso, *Medio evo del diritto*, I – Le fonti, 505.
54 Lange, *Römisches Recht im Mittelalter*, Band I, die Glossatoren, 151–153.
55 Lange, *Römisches Recht im Mittelalter*, Band I, die Glossatoren, 151–153.

belongs to the set of conditions favourable to the creation and rediscovery of the Digest rather than to the school of glossators itself.

Irnerius is considered the founder of the school of glossators, or rather the first of them.[56] He was probably born between 1055 and 1060, and according to the prevailing opinion he came from Germany. However, he moved to Bologna, where he studied Justinianic law and subsequently began teaching civil law at the local university. He probably also became a citizen of Bologna and is therefore often referred to by the surname Irnerius of Bologna. Odofredus claims that Irnerius earned a master's degree in liberal arts before studying law, which he also taught. This hypothesis is realistic, since *artes liberales* were taught in Bologna. References to Irnerius occur in two documents from 1112 and 1113, and striking are the nine mentions from 1116 in which he is identified as a Bolognese jurist, and which indicate that he accompanied the emperor Henry V on his tour of Italy. In 1117, he arrived with the emperor in Rome, where he was instrumental in the election of the defiant pope Gregory VIII, for which Irnerius was excommunicated along with Henry V in 1119 at the Council of Reims at the instigation of Pope Calixtus II. He thus stood at the end of the disputes over investiture between ecclesiastical and secular power, in which the popes and emperors of the Holy Roman Empire clashed over influence in the appointment of ecclesiastical dignitaries. For him, however, the excommunication must have meant at least a brief interruption of his teaching of law in Bologna. The sources, which are silent about his further activity until 1125, rather confirm this assumption.

In historical documents Irnerius appears under the designation *causidicus* or *iudex*, but both terms must be construed according to their contemporary understanding. Advocates and legal advisers were called *causidici*, while *iudices* were not only judges in the modern sense, but all officials who were in some way connected with the judiciary. His work at the court of the margrave Matilda of Tuscany, also known as Matilda of Canossa, to whom Irnerius was legal adviser, and who was to entrust Irnerius with the task of studying and reviving Justinianic law, is documented. The provost of Ursberg, Burchard of Biberach, explicitly recorded this event in his chronicle with the words "*...libros legum (...) ad petitionem Mathilde comitisse renovavit...*,"[57] but their interpretation must be approached with caution. It does not seem to have been a formal act of the founding of the Bolognese law school, an official assignment for academic activity, or the first impulse that should have led Irnerius

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56 Ennio Cortese, "Irnerio," in *Dizionario biografico degli Italiani* LXII. Iacobiti-Labriola. 1a ristampa, (Istituto della Enciclopedia italiana, 2004), 600–605; Lange, *Römisches Recht im Mittelalter*, Band I, die Glossatoren, 154–162.
Variants of the name include Warnerius, Vuarnerius, Garnerius, Guarnerius, Guernerius, Gwernerius, Yrnerius, Hirnerius, Irnerius teutonicus, Irnerius bononiensis.

57 "He revived the law books (...) at the request of Countess Mathilda."

Vážení čtenáři, právě jste dočetli ukázku z knihy ***Glossators and Commentators at the Strahov Library*.**
Pokud se Vám ukázka líbila, na našem webu si můžete zakoupit celou knihu.