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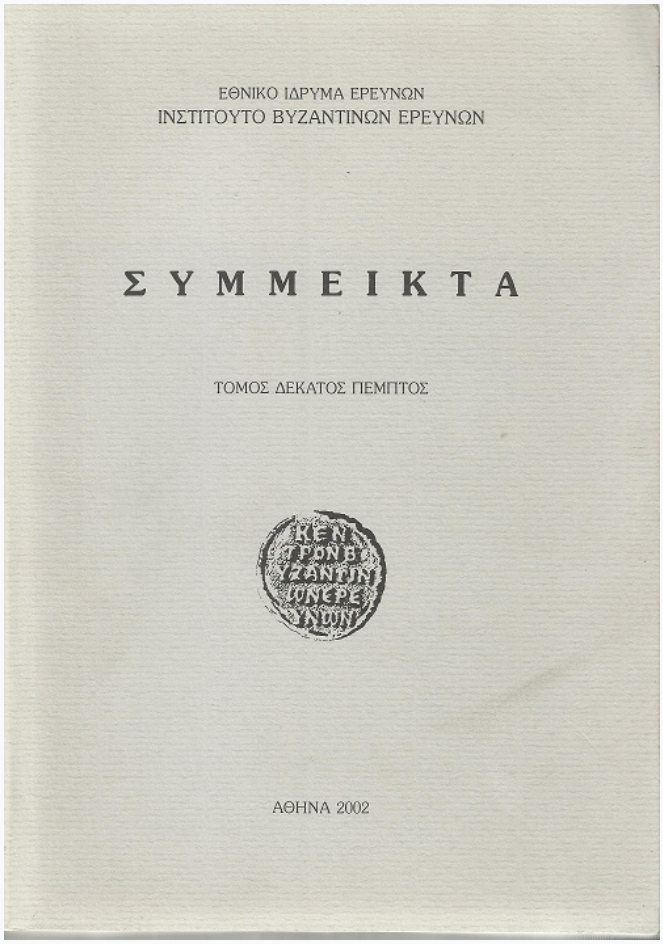

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JUSTINIAN AND THE SENATE OF ROME UNDER OSTROGOTHIC RULE

One of the practical reasons that persuaded Otto Seeck to leave out the period from 476 to 565 in his *Regesten der Kaiser und Päpste* is that "the subscriptions of the *Codex Iustinianus* are too heavily destroyed to allow a satisfactory continuation of the work"[1]. The same statement can be made also for the inscriptions of the *Codex*. For this codified collection of laws from 117 to 534 was copied in the Middle Age not as a literary achievement but only for its practical use in the courts; and for this practical use the information given by the inscriptions and the subscriptions –the name of the emperor, the name of the addressee and the date of the promulgation– was entirely superfluous. Thus the inscriptions and subscriptions were either copied carelessly or were omitted. Therefore we must read with great caution the inscriptions and subscriptions, as they have been established by the editors since the 16th century: From Gregor Haloander over Dionysius Gothofredus to Paul Krüger.

The constitution I want to discuss here is *Codex Iustinianus* VI 51 and has the title *De caducis tollendis*[2], or in S. P. Scott's translation "Concerning the abolition of the forfeitures of successions to the State"[3]. This law, summarizing all imperial legislation since Augustus's *lex Papia Poppaea* in the matter, deals with the way the imperial treasury confiscated the property of deceased persons when their legitimate heirs had for any reasons lost their right to the inherited property[4].

Although this law deals with a dry, technical matter, interesting only to the students of Roman civil law, especially testamentary law, it is also quite interesting

1. *Regesten der Kaiser und Päpste für die Jahre 311 bis 476 n. Chr.*, Stuttgart 1919, VII.

2. *Codex Justinianus*, ed. Paul Krueger, Berlin 1954 (repr. Hildesheim 1989), 280-282.

3. S. P. SCOTT, *The Civil Law*, Cincinnati 1932, 69-75.

4. M. KAPLAN, *Les propriétés de la couronne et de l'église dans l'empire byzantin (Ve-VIe siècles)*, Paris 1976, 41.

for the study of the law making procedure in the time of Justinian. It is not a constitution addressed to an imperial magistrate - the matter would require it to be addressed either to the *praefectus praetorio* or to the *comes rerum privatarum* - but it is technically an imperial letter-proposition sent to the Senate, whose members are frequently addressed as *patres conscripti.*

A further reminiscence of the epistolographical form of the constitution is preserved in the dative case *senatui*, in the inscription which allows us to supplement after the name of the Senate, to which I shall return, the word *salutem* or *salutem dixit.* More interesting, even if only fictitious, is the last sentence of the constitution: *Haec ommia ad vos, patres conscripti, duximus esse sancienda*, which is a reminiscence of the ancient procedure according to which the emperor sent his propositions to the Senate as the law-making body.

The date of the constitution is preserved in the subscription: *D. k. Iun. Constantinopoli dn. Iustiniano pp. A. IIII et Paulino vc. conss.*, that is 1 June 534. This date of the constitution, which there is no reason to suspect, is very interesting and explains in a way the fact that the law was addressed to the Senate. It falls in the time during which the committee of jurists under Tribonian was authorized to prepare the second, revised edition of the *Codex Justinianus.* This was to be published in November of the same year through the famous constitution *Cordi* addressed to the Senate of Constantinople again in the form of an imperial letter. This fact is additionally important for the question of the integrity of the text of our constitution, because it shows that it was on the committee's desk before it was included in the *Codex Justinianus.* Finally it is interesting to note, that, as Tony Honoré has proved on the basis of textual analysis, our constitution was drafted by Tribonian himself, who at the time held the office of *magister officiorum.* Honoré has found 46 marks of Tribonian's style in this constitution[5].

The inscription of the constitution deserves one further comment: In Krüger's *editio minor* it reads as following: *Imp. Justinianus A(ugustus) senatui urbis Constantinopolitanae et urbis Romae.* The addition of the Senate of old Rome –*et urbis Romae* – as a recipient of the constitution is a sensational one. Rome was at that time a city of the Ostrogothic kingdom and king Athalaric was recognized by Justinian as the legitimate ruler of Italy. Since 497, when emperor Anastasius authorized king Theoderic to rule over Italy in his name, as his *praeregnator,* or *anticesar*[6],

5. T. HONORÉ, *Tribonian*, London 1978, 110.

6. J. PROSTKO-PROSTYNSKI, *Utraeque res publicae. The Emperor Anastasius I Gothic Policy (491-518)*, Poznan 1994; D. KOHLHAS-MÜLLER, *Untersuchungen zur Rechtsstellung Theoderichs des Großen,*

only the Ostrogothic kings had the right to address the Senate of Rome. As a matter of fact, we possess 26 royal letters addressed to the Senate, preserved in Cassiodorus' *Variae*, which demonstrate the legal procedure to be followed, when the Senate was addressed and asked to cooperate with the king. The chronologically closest royal letter to our constitution of 534 is a letter addressed to the Senate by Athalaric in 533 concerning delayed payment of salaries to professors of Arts and Law in Rome[7]. On the other hand, the only one letter of an emperor ever addressed to the Senate in the period since 497, is a letter of Anastasius dated in 516. This letter deals with no legal matter but merely asks the Senate to cooperate with the pope and king Theoderic in favor of the church union. In this letter the emperor mentions emphatically *excelsum regem* (Theoderic), *cui regendi vos potestas vel sollicitudo commissa est*[8].

It was the historians of the Senate, Lecrivain and Sundwall, who first noticed the unprecedented address of our constitution to the Senate of Rome. They explained it as the emperor's attempt to subdue the Senate in the eve of Justinian's Gothic war in Italy. Sundwall goes so far as to characterize the address as a *Vasallitätsakt*[9]. Following this interpretation several historians of the Later Roman Empire have understood this information as evidence heralding the *reconquista*[10]. Thus Robert Browning refers to this matter as following: "It was during this period (i.e. after 533) when all cards seemed to be in his hand, that Justinian issued a curious edict. It was dated 1 June 534, and it dealt with a dry, technical matter, the disposal of property for which no owner could be found. But it was addressed to the Senates of Constantinople and Rome. This was a clear attempt to assert his sovereignty in

Frankfurt 1995. Cf. E. CHRYSOS, Die Amaler-Herrschaft in Italien. Der Vertragsentwurf des Jahres 535, *Byzantion* 51, 1981, 430-474, and ID., Antikaisar, in *Byzantium. Tribute to Andreas N. Stratos* I, Athens 1986, 73-82, with J. PROSTKO-PROSTYNSKI, Alimericus anticaesar w Historii Kosciola Pseudo-Zachariasza Retora, *Studia Zrodloznawcze* 34, 1993, 15-28. Cf. P. HEATHER, *The Goths*, Oxford 1996, 221-235, and several other articles by the same author with the effort to present Theoderic's attitude towards *Romanitas* in a more historical or 'pragmatic' way.

7. *Variae* IX 21 (533).

8. *Collectio Avellana*, ed. O. GUENTHER, Prague-Vienna-Leipzig 1895, *Epistula* 113, p. 507.

9. J. SUNDWALL, *Abhandlungen zur Geschichte des ausgehenden Römertums*, Helsingfors 1919, 278; cf. Ch. LÉCRIVAIN, *Le sénat romain depuis Dioclétien à Rome et à Constantinople*, Paris 1888, 205. He speaks already of «c'est peut-être là une marque des nouveaux rapports de vassalité établis entre la reine et Justinien».

10. E. STEIN, *Histoire du Bas-Empire* 2, Paris 1949, 341.

Italy. It apparently provoked no reaction from Ravenna. A precedent had been established"[11]. Furthermore Berthold Rubin comments on the phrase *in pacificis nostri imperii temporibus* in the constitution as Justinian's deliberate move to misguide the people in Italy[12].

It is surprising that no-one of the historians, who have commented on this matter has ever examined the text tradition of the inscription. As one can see in the apparatus criticus of Krüger's edition the words *et urbis romae* are given only in *S*, but they are omitted in *C* and *R*. If one bothers to look at Krüger's preface can realize that *C* and *R* are not just two of many manuscripts, but the most important ones, actually those used by Krüger as the basis for his text of the first nine books of the *Codex*. Krüger mentions other manuscripts of the text tradition of the *Codex*, only when they offer obvious corrections. This is even more clear in the *editio major* of the *Codex* which Krüger published also in 1897 –the *editio minor* is only a concise edition of the *major*. In the *major* the note in the *apparatus criticus* reads as follows: *et urbis rome S, om. libri*. As Krüger explains in the preface of the *editio major*, he uses the term *libri* for lections, which are unanimously preserved in all manuscripts of the *Codex*.

Inspite of the unanimous tradition, which does not mention the Senate of the City of Rome, Krüger decided to add *et urbis Romae* into the text of the inscription, because it is preserved in *S*. *S* is the *signum* for the so-called *Summa Perusina*, an epitome of the *Codex* preserved in one manuscript discovered by Niebuhr in Perugia and first edited by Heimbach[13]. It is a tenth century manuscript, but it has

11. R. BROWNING *Justinian and Theodora*, London 1971, 149. J. KARAYANNOPOULOS, *Ἱστορία Βυζαντινοῦ Κράτους* I, Thessaloniki 1992, 455, went a further step in generalizing the observation: *Ὁ Ἰουστινιανὸς ἤδη ἀπό τοῦ Ἰουνίου 534 ἤρχισε ν' ἀπευθύνῃ τὰ διατάγματά του οὐχί μόνον πρὸς τὴν Σύγκλητον τῆς Κωνσταντινουπόλεως, ἀλλὰ καὶ πρὸς τὴν τῆς Ρώμης, ὡς ἐὰν ἡ ἑνότης τοῦ κράτους εἶχεν ἤδη ὑπὸ τὸ σκῆπτρον του ἀποκατασταθῇ*. Cf. Z. V. UDAL'TSOVA, *Italia I Vizantiia v-vi veke*, Moscow 1959, 254.

12. B. RUBIN, *Das Zeitalter Justinians*, Berlin-New York 1960, 163: Die Urkunde ist zu wichtig, als dass man hier an einen zufälligen Griff in die rhetorische Rüstkammer glauben möchte. Eher hatte man im Jahre 534 noch Interesse daran, allen politischen Kreisen, und namentlich denen des gothischen Italiens, Sand in die Augen zu streuen. Pharisäische Gesetze und paradoxe Redensarten sollten die Welt in Sicherheit wiegen und das Gerede vom Frieden die Ausmerksamkeit von den Vorbereitungen zum nächsten Akt der blutigen Restauration ablenken". Rubin regards Justinian as a *fleischgewordenen Romgedanken*.

13. G. E. HEIMBACH, *Ἀνέκδοτα* II, Leipzig 1840 (repr. Aalen 1969). Cf. M. CONRAT, *Geschichte der Quellen und Litteratur des römischen Rechts im früheren Mittelalter* I, Leipzig 1891, 55-57 and 182-187.

been argued convincingly that the epitome was made in the seventh or the eighth century in Italy to be used by the Romans there.

In his *Kritik des justinianischen Codex* Krüger argued in favor of the authenticity of those inscriptions in the *Summa Perusina*, whose text is larger than that preserved in the *libri* suggesting that there is no reason why the *Epitomator* of the *Summa* should invent the larger inscriptions and if he had done so, they would not be so suitable[14]. So far I cannot take stand to the question of other enlarged inscriptions in the *Summa*. But I can see the reason why the *Epitomator* added the clause *et urbis Romae* in our inscription. Working in Byzantine Italy, most probably in Rome in the seventh or eighth century, he thought the constitution could or rather should have been addressed to the Senate of Rome as well. As for Krüger's argument that the enlarged inscriptions are so suitable –*treffend*– that they must be authentic, the answer is easy: If the two Senates were really addressed by Justinian, he would have mentioned first the Senate of Rome, the Senate of *Roma senior*. See for instance the title of *Codex Iustinianus* XI 19 (18), dated in 425: *De studiis liberalibus urbis Romae et urbis Constantinopolitanae*.

Accumulate evidence and statistics show that the clause *et urbis Romae* can not be authentic. In both Codes, the Theodosian and the Justinian, there are included 93 constitutions addressed to a Senate without any specification as to which Senate is meant. Six further laws are addressed explicitly to *the senatus urbis Romae* in the *Codex Iustinianus*, of course all of them dated before 476, and three in the *Codex Theodosianus*. On the other hand the *Codex Iustianianus* preserves three laws directed explicitly to the *senatus urbis Constantinopolitanae*; a further one is a pre-Justinianic novel of the year 439. However not even one singular law is preserved to have been addressed to both the Senates, of Rome and of Constantinople.

On the other hand, if Justinian had unprecedentedly decided to address the Senate of Rome in order to express his political aspirations in Italy, he could do it much better with the constitution *Corde,* inaugurating the *Codex Iustinianus* as a whole, which was issued in November of the same year. He could have easily done so, because, after all, it was the codified Roman Law, which never ceased to be valid in Italy, since the Ostrogothic kings ruled the Romans of their kingdom according to this law and they refrained from promulgating laws of his own.

14. *Kritik des justinianischen Codex*, Berlin 1867, 37.

In June 534 Justinian had no reason to provoke anyone in Italy with unprecedented, illegal and premature acts of interference. He was in best terms with Athalaric and the queen mother Amalasuentha, who, if we can trust Procopius, was even concidering to exchange the *regnum Italiae* for a comfort life in the Byzantine court[15]. The problems of Ostrogothic Italy with the empire started only after Athalaric's death and Amalasuentha's assassination (30 April 535).

But even if Justinian really wanted to interfere in Italy as early as in 534, he would not choose the legislation to experiment with. The constitution *de caducis tollendis* could never be the right occasion for this. Justinian never addressed the Senate of old Rome, not even after she had become part of his empire in 536. The two constitutions known to have been addressed to the Senate after 536, one in 539 and the other in 555 were both addressed to the Senate *urbis Constantinopolitanae*.

15. *De bello gothico* I 4.