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Not in the Code, nor in the Basilica
C. 1.1.8 and its translation in the Basilica

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ABSTRACT

The text we read as C. 1,1,8 is a *corpus alienum* in the *Codex Justinianus*. It is not an imperial constitution, but a letter of pope John II, and it is most unlikely that it should have been part of the original Code of 529. Yet its presence is also testified in the Byzantine tradition and a full Greek translation has been preserved in one version of the first book of the Basilica, in ms. Coislinianus gr. 151. This paper confirms the view that it did not occur in the original version of Basilica. It investigates that translation and puts it into context.

PAROLE CHIAVE

Codex Justinianus, Basilica, Taleleo, manoscritto Coislinianus gr. 151, Collectio Avellana.

1. *Introduction.*

The complexity of the manuscript tradition of the Justinianic Code is well known. In our western manuscripts, numerous Greek constitutions have been long remained unknown and not until the discoveries of the Humanists did it become possible to restore their text or at least to represent them with a summary preserved by the Byzantine tradition. In the first 13 titles of Book One, these Greek constitutions are to be found in relatively greater number. Medieval Latin manuscripts tend to omit Greek texts, often just mentioning a “*graeca constitutio*”. In the oldest manuscripts, other, Latin, constitutions have been omitted, too; one can imagine that the effect of all this is a lacunose text, especially at the beginning of the Code. For the resulting textual problems, Laurent Waelkens recently has offered¹ the most radical solution proposed thus far: according to him, the Code originally opened with our present title 14 *De legibus et constitutionibus principum et edictis*, the first 13 titles being a later addition. Thus the critical effort of the last five centuries would have been misguided insofar as a restitution of the Justinianic text has been its aim. I propose to go into his arguments in greater detail elsewhere, but at least in one respect we are able to agree.

As it happened, I had already suggested in a paper given at a conference about the *Collectio Avellana* that the present eighth constitution of the first title of the *Codex Iustinianus* was in all probability a later addition, as it hardly could have been an authentic part of the original *Codex repetitae praelectionis* of 534.² My arguments will be given in the published version of that paper in greater detail, but may be summarized here as follows: neither is it an imperial constitution, nor has it gone through the hands of the editorial committee responsible for the compilation of the Code: it is a letter of Pope John II, and has the characteristics of an unedited copy from a

¹ L. WAELKENS, ‘L’hérésie des premiers titres du Code de Justinien. Une hypothèse sur la rédaction tardive de C. 1,1-13’, *Tijdschrift voor Rechtsgeschiedenis* 79 (2011), 253-296.

² ‘Emperors, Bishops, Senators: The Significance of the *Collectio Avellana* 367-553 AD’, Rome, 1-2 April 2011. The *Collectio Avellana* comprises the same document (ed. Günther, ep. 84). Cf. also Waelkens, ‘L’hérésie’, 256.

(papal?) archive, which seems to have been added at the end of the title by an overzealous functionary or perhaps a partisan of papal interests. The *Collectio Avellana* has drawn for its text not on the Code, but on an archive of documents in their full, original form. However that may be, the Byzantine sources all treat it as part of the Code, as is shown, e.g., by the *Collectio Tripartita*.³ It also figures in the Basilica, or rather, to be more precise, in one version of the Basilica, represented by a manuscript in the *Bibliothèque Nationale* in Paris, Coislinanus gr. 151. In this paper I would like to offer some observations on the text in that manuscript and on the Greek version of C. 1,1,8 that it transmits.

2. Bas. I.

The preliminaries and the beginning of the Basilica present their editor with a number of thorny problems. In the past, the authenticity of its preface has been doubted, but also confirmed.⁴ On the “indices” valuable work has been done.⁵ All this need not concern us here just now. My present concern is the problem of the text of the first book. It has been transmitted in two manuscripts, both now in Paris in the *Bibliothèque Nationale*: the codex Coislinanus gr. 151 (further indicated as Cb, the siglum it carries in the Basilica edition) and the Parisinus gr. 1352 (further: P).⁶

³ See N. van der WAL—B.H. STOLTE (eds), *Collectio Tripartita. Justinian on Religious and Ecclesiastical Affairs*, Groningen 1994, I,1,8 (p. 14) and cf. Preface, p. xxvi.

⁴ E.g., H.J. SCHELTEMA, ‘À propos de la prétendue Préface des Basiliques’, in: *Droits de l’Antiquité et sociologie juridique. Mélanges Henri Lévy-Bruhl*, Paris 1959 = *Idem, Opera minora ad iuris historiam pertinentia*, Groningen 2004, 356-358; A. SCHMINCK, *Studien zu mittelbyzantinischen Rechtsbüchern*, Frankfurt 1986, ch. 2 (pp. 17-54).

⁵ Most recently Th.E. van BOCHOVE, ‘Index Titulorum, II. IPc, the partial index of the Basilica in cod. Paris. gr. 1349 and IPc, Subseciva Groningana VIII (2009), 35-104; *Idem*, ‘Scholia and Index Titulorum. On the relation between the apparatus of scholia in cod. Paris. gr. 1349 and IPc’, *ibid.* 105-126; *Idem*, ‘Rubrics, testimonies and indices. Arguing pro and contra C. 1,13 as constituent part of the text of the Basilica’, *Tijdschrift voor Rechtsgeschiedenis* 78 (2010), 351-380.

⁶ See for Cb, L. BURGMANN, M.Th. FÖGEN, A. SCHMINCK, D. SIMON, *Repertorium der Handschriften des byzantinischen Rechts I* (Frankfurt 1995), no. 202 (p. 229) and for P, *ibid.* no. 166 (p. 195), with the older literature on both manuscripts.

Students of the Basilica may have noted that Scheltema, Holwerda and Van der Wal have based their edition on the assumption that Book One had been lost and therefore have produced a *textus restitutus*. In this they followed Zachariä von Lingenthal, who “[f]ormam enim qua datur hic liber in codicibus Cb et P non genuinam esse demonstravit [...], cuius argumenta hic repetere non opus est”, as Scheltema wrote.⁷ Since most readers will not be immediately familiar with Zachariä’s arguments, a brief exposition will be in order.

In a paper of 1877, Zachariä gave a number of suggestions for an improved edition of the Basilica. In particular he insisted on the value of indirect witnesses of the text.⁸ By way of an example he pointed to Bas. 1,1, the first book consisting of just one title. In 1833, Heimbach had edited its text from the Coislinianus gr. 151, but Zachariä had noticed that testimonia of that title all suggested a different text. As the format of the text preserved by the indirect witnesses was similar to that usually found in the rest of the Basilica, Zachariä proposed for Bas. 1,1 a text different from that of Heimbach, to be reconstructed from the testimonia he had found.⁹ In this he has been followed by Scheltema c.s.

The difference between Cb and the version reconstructed from these testimonia is confined to the fragments that go back to the Code¹⁰ and is twofold.

First, the testimonia are summaries of the text of the Code, while Cb has either a Greek translation of the full Latin text, or the same Greek text as the Code. Here, of course, the danger of a *circulus vitiosus* looms large, as our information about Greek passages in the Code is in large part dependent on Byzantine sources such as the

⁷ Vol. A I, Praefatio, p. xi.

⁸ K.E. ZACHARIÄ VON LINGENTHAL, ‘Beiträge zur Kritik und Restitution der Basiliken’, Mémoires de l’Académie Impériale de St. Pétersbourg, Sér. 7, tom. xxxiii, no. 6, 1877 = Idem, Kleine Schriften zur römischen und byzantinischen Rechtsgeschichte I (Leipzig 1973), 575-613.

⁹ ZACHARIÄ, ‘Beiträge’, 5-15 = Kleine Schriften I, 579-589.

¹⁰ Bas. 1,1 contains no Digest fragments; as for the Novels, here as well as elsewhere we often find either their full text or the summarizing version of Theodorus of Hermopolis. For the treatment of the Novels in Bas. 1,1, see Th.E. van Bochove, ‘The Basilica between Quellenforschung and Textual Criticism’ (forthcoming).

Basilica, of which Cb is a witness.

Second, Cb inserts C. 1,1,5-8 and C. 1,3,29, immediately after the first four chapters with C. 1,1,1-4. Thus the first title of the Code is represented in full in the opening title of the Basilica. Zachariä attributed the interpolation of a full version of C. 1,1 and the addition of C. 1,3,29 to the zeal of a scribe who had been interested in being as complete as possible on the subject of the title, ‘the Highest Trinity and the catholic faith etc.’, a scribe belonging to clerical circles.¹¹ This fuller version of Cb, according to Zachariä, is also found in the other Parisian manuscript P, but with omissions and abridgments.¹² The genuine text, Zachariä argues, had been lost, but could be reconstructed from testimonia.¹³

In short, according to Zachariä and Scheltema, the authentic text of the Basilica was much more concise than the version preserved in Cb and printed by Heimbach. The Greek texts to be found in Cb may be genuine Byzantine versions of constitutions, but do not stem from the textual tradition of the Basilica and must have been copied from other sources.

At the time of writing Scheltema intended later to publish Prolegomena and Appendices; the former were to provide more extensive descriptions of the manuscripts,¹⁴ the latter were to contain, *inter alia*, a separate edition of the spurious, or at least interpolated, text of Book One. Since neither the Prolegomena, nor the Appendices have appeared, we are left with Zachariä’s arguments, Scheltema’s edition, and Heimbach’s text of Book One, largely based on Cb.

As has been said, in the footsteps of Zachariä,¹⁵ Scheltema c.s. have reconstructed the text of Bas. 1,1 from indirect evidence, i.e., witnesses such as the Tipucitus, the Ecloga Basilicorum, the Synopsis Basilicorum, Attaliates, Balsamon and Blastares. In the critical apparatus references to Cb and P are only found at the end of the

¹¹ ZACHARIÄ, ‘Beiträge’, 16 = Kleine Schriften I, 590.

¹² On P in general, cf. Scheltema, vol. A I, Praefatio, p. v: “Initio textus valde compendiatu est multis capitibus aut omissis aut astrictius comprehensis.”

¹³ Zachariä sets out his arguments at pp. 15-17 = Kleine Schriften I, 589-591.

¹⁴ A I, Praefatio, p. v: “Editione nostra perfecta in Prolegomenis accuratiores daturi sumus codicum descriptiones ...” [1955].

¹⁵ Scheltema c.s. disagree with Zachariä on the reconstruction of Bas. 1,1,49: see their apparatus ad BT 8,22 and Zachariä, ‘Beiträge’, 14 (= *Kleine Schriften* I, 588) n. 1.

title, where the Novels 131, 42, 109, 144, 146, and 132 occur.

3. *The Greek translation of C. 1,1,8 in Coislinianus gr. 151.*

So far the reconstruction of the *titulus unicus* of book I of the Basilica. The arguments of Zachariä and, in his traces, Scheltema c.s. are convincing. The latter's edition contains the text as reconstructed from testimonia, while the text handed down in Cb and P is a spurious, interpolated version, which has been edited by Heimbach in the belief that it was the authentic text.

All this is not to say that the Greek version of C. 1,1,8 which has been preserved in Cb is spurious. Just as the Latin text we read in our editions of the Code is a genuine papal letter but — in my view — a spurious passage in the Code, this Greek version is undoubtedly a genuine full translation of the Latin text, albeit an interpolation in the Basilica. Be all this as it may, as a Greek version it deserves our attention.

Heimbach seems to have considered the Greek text of his edition of Bas. 1,1,8 to have been written by Thalelaeus. Seems, since he does not say so explicitly: Thalelaeus is understood to have been the source of a Basilica passage unless indicated otherwise.¹⁶ According to established opinion that would imply that Thalelaeus had either translated it *kata poda* or paraphrased it as an *index*, the two ways of access to understanding the Latin text provided by Thalelaeus' teaching of the Code.¹⁷ The impression the text makes does not fully conform to either: it is in fact a full translation, but does not always follow painstakingly the word order of the Latin, as is the character of a version *kata poda*.¹⁸

Not only does the translation lack the characteristics of Thalelaeus, there are other reasons to doubt that it has anything to do

¹⁶ HEIMBACH, *Basilicorum Libri LX*, vol vi (Leipzig 1870): [Prolegomena and] *Manuale Basilicorum*, 338 with n. a. Krüger seems to endorse this attribution of our text in the critical apparatus of the Code in that he quotes Greek passages indicating Thalelaeus as their source.

¹⁷ SCHELTEMA, *Antécédents* 32 ff. = *Opera minora* 81 ff.

¹⁸ There are, however, also some mistakes that are easiest explained in a translation that follows the Latin words in their original order more or less mechanically.

with antecessorial teaching at all. As said above, it is highly improbable that what is now C. 1,1,8 has been an authentic part of that title at the moment of promulgation. But even if we accept that it may have been added informally at an early stage, there is, as far as I can see, no evidence that the first title of the Code has been taught at all. Nor can we argue from its occurrence in the Coislinianus gr. 151 that it was part of the Basilica: we have already seen that the version we read in this manuscript is a special case in their transmission. We should therefore abandon inferences from the standard pattern of composition of the Basilica: rather the compiler of this version seems to have been looking for texts that had been passed over or for alternative, fuller versions of those that constituted summaries.

The primary reason to think of a different origin, however, is one of intellectual economy. It is inconceivable that this text, the significance of which far exceeds the legal sphere and which is indeed rather of theological than legal interest, should not have been translated from Latin into Greek immediately for wider circulation. In other words, insofar as a translation was needed, it would not have depended on its possible inclusion in the legal curriculum, nor would it have required the services of a professor of Roman law, and if in fact Thalelaeus was going to mention it in his teaching, he would have been able to refer his students to an existing translation.

One aspect does not fit entirely into this picture: the *Collectio Tripartita* does not contain the full text of C. 1,1,8. It suffices with the briefest of summaries: “Letter of the Pope to Justinian approving (ἀποδεχομένη) what was written by him (τὰ παρ’αὐτοῦ γραφέντα) about the orthodox faith, which has been appended to (ὑποτέτακται) the letter”. This is all the more striking, since it then adds the full texts of constitutions 5, 6 and 7, silently omitting 8. The addition of these full texts is in all probability an interpolation, but the omission of const. 8 remains curious, if the hypothesis of a ready availability of a Greek version be correct.

4. The translation compared with the Latin text.

It is not my intention to offer a minute comparison of the two texts.

Rather I would like to point out some striking discrepancies, which would repay further study. Some of these inevitably give rise to

the question of the true reading of the text. Discussion of this aspect will be restricted to a minimum, since it would also require a collation of the Coislinianus and a fresh look at the transmission of the Greek text, for which there has been no opportunity thus far. For the moment I have accepted Heimbach's text as it stands. Where reference is made to Krüger's edition of the Code, I have used the editio maior unless specified otherwise.

No.	C. §	Hb line	Codex Justinianus / Coislinianus gr. 151 (ed. Heimbach)
1		1	[inscriptio] / see also Heimbach's note <i>m</i> .
2	1	15	impletum fore / πεπλήρωται. The Code speaks of the future, the Greek represents it as already accomplished.
3	2	19-23	nihil est quod ita nequeat occasui subiacere, quam vera religio. nam cum auctorem vitae vel luminis utraque respiciant recte et tenebras respuunt ¹⁹ et nesciunt subiacere defectui / οὐδέν ἐστι τὸ οὕτως δυνάμενον ²⁰ τὴν δύσιν ὑποτάξαι ἢπερ ἀληθῆς θρησκεία σὺν ἀθηντία πολλῇ καὶ τῆς ἀληθείας τὰ ἐκότερα ὀρθῶς ἐπισκοπεύσασα καὶ τὸ σκότος ἀποπτύουσα καὶ οὐκ εἰδυῖα ὑποτετάχθαι τῇ προσπαθείᾳ: since both <i>recta fides in principe</i> and <i>vera religio</i> concern the <i>auctor</i> of life and light, i.e., God, they drive out darkness and cannot be subject to defeat. The Greek translation closely follows the Latin, except where <i>nam cum auctorem vitae vel luminis</i> is concerned. <i>Cum</i> seems to have led to σὺν, upon which ἀθηντία for <i>auctore(m)</i> is not unexpected, but I am unable to explain πολλῇ καὶ τῆς

¹⁹ Krüger's note in app. crit. ad ed. mai. p. 14, l. 19 mistakenly represents the Coll. Avell. with *respiciunt* instead of *respuunt*.

²⁰ Heimbach's note *qq* suggests that we should read <μη> δυνάμενον departing from a Codex text which has *subiicere* instead of *subiacere*. (Or is *subiicere* a misprint? Krüger's text has *subiacere*, as also the Coll. Avell.) We may note that δυνάμενον reigns ὑποτάξαι, *subicere*. But here *nequeat occasui subicere* does not make sense, nor does <μη> δυνάμενον ὑποτάξαι. The meaning clearly is that "[there is nothing that] is so well able to subjugate death", or "cannot possibly be subject to death". In other words, the conjecture <μη> δυνάμενον is in any case mistaken.

			ἀληθείας, which has been translated by Heimbach as <i>cum magna veritatis auctoritate</i> .
4	4	33	quod vestra regna conservat / ὅπερ ἡ ὑμετέρα βασιλεία φυλάττει: leg. τὴν ὑμετέραν βασιλείαν Heimbach (note <i>r</i>).
5	4	34-35	auctorem facti / τὸ κράτος σου. Note the more direct rendering in the second person singular.
6	5	38	insertis maculis / ἐγκεκεντρισμένοις νόμοις; cf. Heimbach's perplexity in note <i>rr</i> . <i>Maculis</i> fits the meaning of the sentence and νόμοις is undoubtedly wrong, but I am unable to offer an explanation.
7	6	50-51	textus talis est: Victor ... patriarchae / <i>deficit</i> .
8	10	63-64	quae hic commota sunt / τοὺς ταῦτα ἀνακινήσαντας: The difference between the Code/Coll. Avell. on the one hand and the Greek translation on the other is that, in the Latin, Justinian is made to say that <i>quae (hic) commota sunt</i> and, in Greek, that those who " <i>commoverunt</i> " should be brought to the attention of the Pope.
9	13	94-95	dicentes eum filium dei et alium dicentes deum verbum et alium Christum / λέγοντες αὐτὸν θεὸν καὶ ἄλλον τὸν θεὸν λόγον καὶ ἄλλον τὸν Χριστόν: note the difference between <i>filium dei</i> and θεὸν, but we have to suspect the Coislinianus (see Heimbach's note <i>w</i>).
10	14	98	statum / τὸν ὄρον: I am not sure how the translator has interpreted <i>statum</i> . In a theological context, ὄρος usually is used to indicate what has been defined or decided, such as the creed as adopted by a council. <i>Status</i> does not normally carry that meaning, but see § 33, where <i>statuta</i> has been translated as ὀρισθέντα.
11	15	112	deum verbum / θεὸν ἀληθινόν, i.e., deum verum (cf. Heimbach, note <i>x</i>).
12	16	117-119	in una enim subsistentia / μίαν γὰρ καθ'ὑπόστασιν and see what follows, where <i>quod dicunt</i> Graeci τὴν καθ'ὑπόστασιν ἕνασιν ὁμολογοῦμεν

			has been translated as ὅπερ λέγουσιν Ἕλληνες καθ' ὑπόστασιν ἕνωσιν. The (Byzantine?) translator has either not identified with the Hellenes, or simply translated literally.
13	22	154	per eosdem / κατὰ τὰ αὐτὰ: Justinian is speaking about the same intermediaries Hypatius and Demetrius, whereas the translator seems to understand this as “in the same sense”.
14	23	162	quae ad vos est unitas / τὰ περὶ ὑμᾶς καὶ ἡ ἕνωσις: see Heimbach, note z, who considers this a <i>locus corruptus</i> (in the Coislinianus); one can see, however, that it is a perfect <i>kata poda</i> translation of <i>quae ad vos est unitas</i> . The Latin is not very clear, either.
15	23	163-166	quando per vos didicerint omnes beatissimi episcopi eorum quae ad vos relata sunt sinceram vestrae sanctitatis doctrinam / ὅτι δι' ὑμῶν μάθωσι πάντες οἱ μακαριώτατοι ἐπίσκοποι αὐτῶν τὰ πρὸς ὑμᾶς ἀνενεχθέντα τὴν εἰλικρινῆ τῆς ὑμετέρας ἀγωσύνης διδασκαλίαν: as Heimbach points out in note a, the difficulty lies in eorum / αὐτῶν. <i>Eorum</i> anticipates <i>quae ad vos ... doctrinam</i> , whereas αὐτῶν seems to be a simple personal pronoun relating to ἐκκλησιῶν. On the other hand, this is what may happen in a <i>kata poda</i> translation.
16	24	168	et alia manu / <i>deficit</i> : but alia manu does, of course, not belong to the text of the letter.
17	24/25	169/170	[subscriptio] / <i>deficit</i> , but with a heading which indicates that Pope John is speaking (again).
18			scripsistis ... publicastis / γράφειν ... δημοσιεύειν: note the tenses.
19	25/26	179	omnibus / πᾶσιν: <i>omnibus</i> concludes the preceding sentence, whereas πᾶσιν is the first word of the following one.
20	27	182	fideles / τῶν πιστῶν: see Krüger's apparatus.
21	28	188	πρὸς seems to be superfluous, as suggested by Heimbach in note d.
22	28	189	magisterio / ἀρχῆθεν: the difference is

			obvious and remains to be explained.
23	28	192	patrum atque doctorum sententiis adunatam / <i>deficit</i> : homioarchon?
24	30	209	alienum a sancta communione / <i>deficit</i> : homioarchon?
25	31	212	quos / καὶ: see Krüger's apparatus.
26	32	220	ut scriptum est / <i>deficit</i> .
27	33	225	quantocius / <i>deficit</i> .
28	35	231	numquam / οὐπω.
29	37	243-244	praeterea / διὰ τοῦτο.
30	38	249	potuisset iis / ἠδυνήθητε: Krüger follows Mommsen's conjecture; see critical apparatus, but cf. also Heimbach's note <i>b</i> .
31	39	252	et alia manu / <i>deficit</i> : see above, at no. 16.
32	39	255	item subscriptio / <i>deficit</i> : see above, at no. 16.
33	39	257	Datum ... cons. / <i>deficit</i> .

From this comparison a few provisional conclusions may be drawn. The Greek version in the Coislinianus gr. 151 is a literal translation of the Latin text of the letter of Pope John II. Sometimes it resembles a *kata poda* translation, but not consistently enough to remove any doubt as to its origin. The formal elements of *inscriptio* and *subscriptio* are lacking, both in John's text and in the inserted quotation of Justinian's letter, and so are the traces of archival provenance. In a few cases the translator seems to have misunderstood the Latin, and in some other cases I am inclined to think he must have had a different text. The cases where *homioarchon* or *homioarchon* in the Latin may have caused the translator to have missed a couple of words can be explained in two ways: either he used a Latin text where the passage was already lacking for the same reason, or he may have made the mistake himself. In my view, Thalelaeus is innocent of this text.

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