

Symposium in remembrance and in honour of Jan Lokin, Palermo, 21-02-2024

Presentation by Tom van Bochove

(NE) BIS IN IDEM

New evidence from the *Basilica cum scholiis* relating to an already refuted hypothesis concerning C. 1,1-13

1. In the year 2011, the late Professor L. Waelkens published a study in which he came up with a hypothesis concerning the first thirteen titles of the first book of the Justinian Code. In this study he argued that these thirteen titles had never been part of the original text of the Justinian Code, but were later added to that text. Waelkens strongly focussed on the *Collectio Tripartita*, a Byzantine collection of excerpts stemming from Justinian law but dealing with religious and ecclesiastical affairs. The first part of the *Collectio Tripartita* – which was compiled between 577 and 619 – consists of thirteen titles containing imperial constitutions. Waelkens observed that these thirteen titles were put together after the promulgation of the *Codex repetitae praelectionis* in 534, and (later) placed in front of the text of the Code, without actually belonging to that text.¹ Waelkens' hypothesis was convincingly refuted by the Professors J.H.A. Lokin and B.H. Stolte. In his refutation, Stolte based himself i.a. on the *Basilica cum scholiis*, the text of which was compiled during the later ninth century, whereas the scholia were added to that text from the tenth century onward. However, the *Basilica cum scholiis* are largely based on material dating from the sixth century, and even from the reign of Justinian (527-565) himself.²

In view of both Lokin's and Stolte's refutation of Waelkens' hypothesis concerning C. 1,1-13, it is certainly not my intention to rekindle the dispute: *ne bis in idem*. So, why then this presentation? Simply because work on the *Basilica cum scholiis* has brought to light new evidence strongly supporting in particular Stolte's refutation. This evidence is too important not to reflect on it in detail: *bis in idem*.

¹ L. Waelkens, 'L'hérésie des premiers titres du Code de Justinien. Une hypothèse sur la rédaction tardive de C. 1,1-13', *TRG* 79 (2011), 253-296. *Collectio Tripartita*: N. van der Wal / B.H. Stolte (eds.), *Collectio Tripartita. Justinian on Religious and Ecclesiastical Affairs*, Groningen 1994, with extensive prolegomena.

² J.H.A. Lokin, 'The first constitution of the *Codex Justinianus*. Some remarks about the imperial legal sources in the *Codices Justiniani*', *SG IX* (2014), 343-382 passim; B.H. Stolte, 'A heretical hypothesis: on the beginning of the *Codex Justinianus*', *TRG* 81 (2013), 109-128; *Basilica cum scholiis*: pp. 119-125.

B. 1,1,21: τὸ ῥητόν

2. In his study, Stolte observed that in the Basilica text, pasages from C. 1,1-13 occur in among others B. 21,1. Moreover, many passages occur in the first book of the Basilica as well. The situation regarding B. 1 is rather complicated. The text of this Basilica book has come down to us in two strongly diverging versions, transmitted by Paris, Bibliothèque Nationale, codd. Coisl. gr. 151 and Paris. gr. 1352 resp. Despite the direct transmission in two manuscripts, the editors of the Groningen edition of the Basilica cum scholiis decided to reconstitute the text of B. 1 on the basis of indirect testimonies of that text. In doing so, they followed the line of reasoning put forward by Zachariä von Lingenthal.³ Both directly transmitted versions of B. 1 abound in text units stemming from C. 1,1-13. The same goes for the reconstituted version.⁴

One of the text units in the reconstituted version deserves close attention because it constitutes a first piece of evidence strongly corroborating Stolte's refutation of Waelkens' hypothesis. It concerns the reconstituted Basilica chapter B. 1,1,21, a Greek version of C. 1,5,5, which was originally promulgated on 30 May 428:

‘All heretics mentioned in the Latin text (ἐν τῷ ῥητῷ) shall have no place whatsoever for prayer or gathering, while in particular the Manichaeans shall be expelled from every city; and the laws that have repeatedly been introduced against them shall be in force. And nothing either donated or bequeathed to the places which they dare to call churches shall be valid, but the orthodox church shall claim those, unless the procurator of the place has given permission in violation of the intention of the owner: for in that case the procurator, if he is free-born, shall pay ten pounds of gold and be exiled, but if he is a slave, he is flogged and banished. And the heretic shall even cease to be an official in the imperial service, while no rescript issued contrary to the regulations shall have any validity’.⁵

³ Stolte, ‘A heretical hypothesis’, 122 with notes 34-36. Codd. Coisl. gr. 151 (Cb) and Paris. gr. 1352 (P): RHBR, I, Nos. 202 and 166 resp. Restitution of B. 1: H.J. Scheltema / N. van der Wal (edd.), *Basilicorum Libri LX*, Series A Volumen I: Textus librorum I – VIII, Groningen / Djakarta / 's-Gravenhage 1955, praefatio, p. xi.

⁴ Cf. BT 1/7-8/13.

⁵ B. 1,1,21 (rest.) = C. 1,5,5 (BT 4/11-20): Οἱ εἰρημένοι ἐν τῷ ῥητῷ πάντες αἰρετικοὶ μηδένα τόπον εἰς προσευχὴν ἢ εἰς σύνοδον ἐχέτωσαν τῶν Μανιχαίων ἐξαιρέτως καὶ πάσης ἐκβαλλομένων πόλεως· κρατεῖτωσαν δὲ καὶ οἱ διαφορῶς κατ’ αὐτῶν εἰσενεχθέντες νόμοι. Καὶ μηδὲν ἐρρώσθω τῶν ἢ δωρομένων ἢ καταλιμπανομένων τοῖς τόποις, οὓς ἐκκλησίας τολμῶσι καλεῖν, ἀλλὰ καὶ ἐκδικεῖτω τούτους ἢ ὀρθόδοξος ἐκκλησία, εἰ μὴ παρὰ γνώμην τοῦ δεσπότη τοῦ φροντίζοντος τοῦ τόπου συνεχώρησε· τότε γάρ, εἰ μὲν εὐγενής ἐστὶν ὁ φροντιστής, ἵ χυρσίου λίτρας καταθήσει ἐξοριζόμενος, εἰ δὲ οἰκέτης, μαστίζεται καὶ ἐξορίζεται. Πανέσθω δὲ καὶ τοῦ στρατιώτης εἶναι ὁ αἰρετικὸς μηδεμίας παρὰ τὰ διηγορευμένα κρατούσης ἀντιγραφῆς.

(NE) BIS IN IDEM

At first sight, there appears to be nothing special about this Basilica chapter: by and large, B. 1,1,21 seems to be a reasonably sufficient rendering of C. 1,5,5. Things change, however, if we take a close look at C. 1,5,5pr. This text fragment contains a veritable catalogue of heretics:

‘The Arians and Macedonians, Pneumatomachians and Apollinarians and Novatians or Sabbatians, Eunomians, Tetradites or Tessaescaedecatites, Valentinians, Papianists, Montanists or Priscillianists or Phrygians or Pepuzites, Marcianists, Borborians, Messallians, Eutychites or Enthusiasts, Donatists, Audians, Hydroparastates, Tascodrogites, Batrachites, Hermeiecians, Photinians, Paulians, Marcellians, Ophites, Encratites, Apotactites, Saccophors, and those who have descended to the basest criminal iniquity, the Manichaeans, shall have no right to gather and pray anywhere on Roman soil’.⁶

The Greek rendering of this text fragment in B. 1,1,21 is very succinct: Οἱ εἰρημένοι ἐν τῷ ῥητῷ πάντες αἰρετικοὶ μηδένα τόπον εἰς προσευχὴν ἢ εἰς σύνοδον ἐχέτωσαν. No trace whatsoever of a catalogue of heretics, only the statement ‘all heretics mentioned in the ῥητόν’. How are we to interpret this sentence?

3. In the text of the Basilica, τὸ ῥητόν occurs only in B. 1,1,21. In the Basilica scholia, the phrase τὸ ῥητόν occurs far more frequently, namely 77 occurrences of τὸ ῥητόν, 11 of τοῦ ῥητοῦ, and 40 of (ἐν) τῷ ῥητῷ.⁷ In by far most of these cases, τὸ ῥητόν has acquired a very specific meaning: the phrase refers to the Justinian codification in its original language.⁸ In this sense, the phrase was extensively used by the antecessores, Justinian’s professors of law.⁹ In view of this, it no more than logical to assume that the text of the

⁶ C. 1,5,5pr.: Ariani et Macedoniani, Pneumatomachi et Apollinariani et Novatiani sive Sabbatiani, Eunomiani, Tetraditae sive Tessaescaedecatitae, Valentiniani, Papianistae, Montanistae seu Priscillianistae vel Phryges vel Pepuzitae, Marcianistae, Borboriani, Messaliani, Eutychitae sive Enthusiastae, Donatistae, Audiani, Hydroparastatae, Tascodrogitae, Batrachitae, Hermeieciani, Photiniani, Pauliani, Marcelliani, Ophitae, Encratitae, Apotactitae, Saccophori et, qui ad imam usque scelerum nequitiam pervenerant, Manichaei nusquam in Romano solo conveniendi orandique habeant facultatem. Transl. in the main text by J.N. Dillon in B.W. Frier (ed.), *The Codex of Justinian. A New Annotated Translation, with Parallel Latin and Greek Text*. Based on a Translation by Justice Fred H. Blume. Volume I: Introductory Matter and Books I-III, Cambridge 2016, 193.

⁷ Thesaurus Linguae Graecae (<http://www.tlg.uci.edu/>), Canon of Greek Authors and Works, No. 5065.002 (Basilica scholia), s.vv. τὸ ῥητόν, τοῦ ῥητοῦ and τῷ ῥητῷ.

⁸ Cf. e.g. Sp. Troianos, *Die Quellen des byzantinischen Rechts*, (4. verbesserte und ergänzte Auflage. Übersetzt von D. Simon und S. Neye), Berlin / Boston 2017, 67, 70,71.

⁹ On the *antecessores* and their teaching, cf. in particular H.J. Scheltema, *L’enseignement de droit des antécédents*, (Byzantina neerlandica. Series B: Studia, I), Leiden 1970 (repr. in: H.J. Scheltema, *Opera minora ad iuris historiam pertinentia*, (collegerunt N. van der Wal, J.H.A. Lokin, B.H. Stolte, R. Meijering), Groningen 2004, 58-110).

Basilica chapter as it stands must originally have been a scholion – a comment – pertaining to C. 1,5,5. Moreover, the phrase ἐν τῷ ῥητῷ speaks volumes regarding the ultimate origin of the scholion, viz. the classroom of one of Justinian’s antecessores. The scholion must originally have been part of a Greek course on the Justinian Code. In his lecture on C. 1,5, the antecessor – sadly it can not be established with certainty who he may have been – provided his students with a Greek ἴνδιξ of C. 1,5,5, but felt no inclination or need to be more specific concerning all heretics mentioned in the principium of the constitution. For once, the antecessor assumed that his students ought to be capable of understanding the ῥητόν on this point without his help. As the principium of C. 1,5,5 contained a full listing of heretics indicated by their full names, the antecessor apparently thought that in his ἴνδιξ a mere reference to this listing in the ῥητόν would suffice for his students.

On the basis of the phrase ἐν τῷ ῥητῷ, B. 1,1,21 in the restituted version of the text of the first book of the Basilica is ultimately to be qualified as a scholion stemming from the legal teaching by the antecessores during the reign of Justinian. As a Greek ἴνδιξ, the scholion must originally have been part of a Greek lecture on the Latin text of C. 1,5,5, which obviously belongs to the first thirteen titles of the first book of the Justinian Code. In this way, the scholion proves short and sweet that C. 1,1-13 – or at the very least C. 1,5 – were taught by the antecessores, and that these thirteen titles were part and parcel of the original text of the Justinian Code from the very beginning. Thus, B. 1,1,21 strongly supports the refutation of the ‘heretical hypothesis’.

Scholia ad B. 21,1,45: Thalelaeus

4. B. 21,1,45 is transmitted directly by Paris, Bibliothèque Nationale, cod. Paris. gr. 1348 (**Pa**). One of the scholia pertaining to this Basilica chapter reads:

‘Look up book 1, title 1, chapter 20 and read the ancients, and you shall learn from them the heresies of the Manichaeans and the Donatists. Look also up the narratives of the heresies in book 1, title 1, chapter 21, and Thalelaeus’.¹⁰

The first part of this scholion consists of a reference to B. 1,1,20, followed by the exhortation to read ‘the ancients’: τοὺς παλαιούς. The latter phrase denotes ‘the ancient authors’, or ‘the ancient authors and their comments’: this interpretation is completely in line with the direct reference to the antecessor Thalelaeus at the very end of the scholion. The final sentence εἰς βιβ. α’ τιτ. α’ κεφ. κα’ καὶ τὸν Θαλέλαιον is particularly enlightening, because it appears to refer to a lost Basilica manuscript – consulted by the original author of sch. **Pa** 13, or perhaps

¹⁰ Sch. **Pa** 13 ad B. 21,1,45 = C. 1,5,21 (BS 1270/4-6): Ζήτει βιβ. α’ τιτ. α’ κεφ. κ’ καὶ ἀνάγνωθι τοὺς παλαιούς, καὶ μαθήσῃ ἐξ αὐτῶν τὰς αἱρέσεις τῶν Μανιχαίων καὶ τῶν Δονατιστῶν. Ζήτει καὶ τὰς ἱστορίας τῶν αἱρέσεων εἰς βιβ. α’ τιτ. α’ κεφ. κα’ καὶ τὸν Θαλέλαιον. On **Pa**, cf. RHBR, I, No. 161.

(NE) BIS IN IDEM

even the scribe of **Pa** himself – provided with scholia, in which B. 1,1,21 was accompanied by at least one comment originally written by the antecessor Thalelaeus. That we are here indeed dealing with a no longer extant Basilica manuscript handing down the first book of the Basilica provided with at least older scholia can hardly be questioned. First, the phrases ἀνάγνωθι τοὺς παλαιούς and καὶ τὸν Θαλέλαιον in sch. **Pa** 13 appear to indicate the presence of older scholia. Second, the phrases ζήτηι βιβ. α' τιτ. α' κεφ. κ' and ζήτηι (...) εἰς βιβ. α' τιτ. α' κεφ. κ' can only refer to book 1, title 1, chapters 20 and 21 of the Basilica text. In the Basilica scholia, the expression κεφ. standing for κεφάλαιον 'chapter' is the generic term to refer to the Basilica text, and certainly not to the various parts of the legislation of Justinian: it is the use of the term κεφάλαιον in the references in sch. **Pa** 13 that classifies this scholion as a younger Basilica scholion, as opposed to the so-called older scholia.¹¹ Moreover, heresies are only dealt with in the Justinian Code (especially in C. 1,1-13) and Novels. Given the mention of books, titles and chapters in sch. **Pa** 13, references to the Code (C. 1,1) might theoretically be a possibility, but are in actual fact impossible: C. 1,1 contains merely eight constitutions (διατάξεις) whereas B. 1,1 consists of 54 chapters (κεφάλαια).

5. Our second and final scholion is an old scholion, also occurring in **Pa** at B. 21,1,45 and directly attributable to the antecessor Thalelaeus on the basis of its heading. It reads:

‘Of Thalelaeus. The Montanists and the Tascodrogi accept the Old and the New Testament, while introducing another prophet, a certain Montanus, and boasting of Priscilla. But Montanus, naming himself Paraclete and having two harlots (as companions), the women Priscilla and Maximilla, called them prophetesses. His descendents punctured a boy, mixed his blood with wheatmeal, and participated therein as in a mystery’.¹²

What catches the eye in this scholion is the total lack of legal subject matter, which is somewhat curious in view of the author of the text: an antecessor teaching law to his students. The obvious way to explain this is to assume that sch. **Pa** 9, as a παραγραφή, contains Thalelaeus’s answer to a question put to him by a student as a result of the earlier lecture of the ῥητόν (C. 1,5,21) combined with the antecessor’s translation thereof. Apparently, the student wanted to know more about the Montanists and the Tascodrogi. And answering this question is exactly what Thalelaeus did, from the orthodox point of

¹¹ Generally speaking, the older scholia are essentially nothing more than extracts and text fragments originating from legal works written by the *antecessores* and σχολαστικοί in the sixth- and early seventh centuries. The older scholia refer directly to the various parts of the sixth century legislation of Justinian. The younger scholia are explanations and notes specifically written for the *Basilica* text. The younger scholia allude directly to the text of the Basilica which was compiled in the later ninth century.

¹² Sch. **Pa** 9 ad B. 21,1,45 = C. 1,5,21 (BS 1269/17-22): Θαλελαίου. Οἱ Μοντανισταὶ καὶ οἱ Τασκοδρουγίται παλαιὰν καὶ καινὴν διαθήκην δέχονται ἕτερον προφήτην εἰσάγοντες [Μοντανόν τινα] καὶ Πρίσκιλλαν αὐχοῦντες. Ὁ δὲ Μοντανὸς παρακλητικὸν ὀνομάζων ἑαυτὸν καὶ δύο πορνικὰς ἔχων γυναῖκας Πρίσκιλλαν καὶ Μαξιμίλλαν προφητίδας ταύτας ὠνόμαζεν. Οἱ δὲ ἀπ’ αὐτοῦ καταγόμενοι παῖδά τινα κατακεντοῦντες καὶ τὸ αἷμα αὐτοῦ φύροντες ἀλεύρω τούτου [ὡς μυστηρίου] μετελάμβανον.

view. First, he told his students that the Montanists and the Tascodrogi accepted both the Old- and the New Testament, introduced a prophet named Montanus, and boasted of Priscilla. Then, Thalelaeus's tone changed completely: he observed that Montanus called himself Paraclete – viz. the Inspirator, the Holy Ghost¹³ –, and was accompanied by two harlots, Priscilla and Maximilla, whom he called prophetesses. Finally, Thalelaeus remarked that Montanus's descendents punctured a boy, mixed his blood with flour, and took part therein as in a mystery – which can only be understood as the celebration of a mock Eucharist.

6. The addition *καὶ τὸν Θαλέλαιον* to the reference *εἰς βιβ. α' τιτ. α' κεφ. κα'* in the (younger) scholion **Pa** 13 indicates that Thalelaeus lectured on C. 1,5,5: it is this Codex constitution¹⁴ that ultimately underlies B. 1,1,21. The (older) scholion **Pa** 9 clearly shows that Thalelaeus also commented on C. 1,5,21, as this constitution is the underlying source of B. 21,1,45. Now, the antecessor Thalelaeus is one of the eight addressees of Justinian's const. *Omnem*, issued 16 December 533. He taught at the law school of Berytus, and lectured on both editions of the Justinian Code: the *Novus Codex* from 529, and the *Codex repetitae praelectionis* from 534. It is not exactly known when he passed away.¹⁵ More than anything else, the two scholia provide clear evidence that Thalelaeus lectured on C. 1,5. This Codex title evidently belongs to the first thirteen titles of the first book of the Codex, and thus present additional prove that C. 1,1-13 belonged to the text of the *Codex repetitae praelectionis* right from the start, viz. the emperor Justinian's early regnal years.

7. **Summary.** In 2011, the late Professor L. Waelkens argued in favour of a late editing of the first thirteen titles of the first book of the *Codex repetitae praelectionis*, issued in 534. He contended that these titles had never been part of the original text of the Justinian Code, but were added to that text after the first part of the *Collectio tripartita*, which saw the light of day between 577 and 619. In a more recent past, Waelkens' hypothesis was convincingly refuted by the Professors J.H.A. Lokin and B.H. Stolte. In his refutation, Stolte based

¹³ Cf. Montanus's self-indication *ἐγὼ εἰμι ὁ πατὴρ καὶ ὁ υἱὸς καὶ ὁ παράκλητος* in *Mont. fr.* ap. Didym. *Trin.* 3,41 (Migne, PG 39, 984B).

¹⁴ A Greek ἵνδιξ of this constitution containing the phrase *ἐν τῷ ῥητῷ* (BT 4/11) was used for the restitution of B. 1,1,21; cf. § 3 above. There, it has been argued that it can sadly not be established with certainty who the author of this Greek ἵνδιξ of C. 1,5,5 may have been. However, might it not be possible to identify Thalelaeus as the author of this ἵνδιξ on the basis of sch. **Pa** 13? Long ago, Van der Wal did not hesitate to attribute the Greek version of C. 1,5,5 to Thalelaeus anyway; cf. N. van der Wal, *Les commentaires grecs du Code de Justinien*, 's-Gravenhage 1953, 73.

¹⁵ See J.R. Martindale, *PLRE*, Vol. III B, Cambridge 1992, 1223, s.v. Thalelaeus. Scheltema regards 1 March 536 as the *terminus post quem* for the death of Thalelaeus; cf. H.J. Scheltema, 'Over de tijdsbepaling der vroeg-Byzantijnsche juristen', *Tijdschrift voor Geschiedenis* 74 (1956), 277-284 (= *Historische Avonden. Vierde bundel geschiedkundige opstellen, uitgegeven door het Historisch Genootschap te Groningen ter gelegenheid van zijn vijftenzeventig-jarig bestaan*, Groningen 1961, 5-12 (page 7 in this version) (repr. in Scheltema, *Opera minora*, 307-314 (309).

(NE) BIS IN IDEM

himself i.a. on the *Basilica cum scholiis*. As it is, work on the *Basilica cum scholiis* has uncovered new, additional evidence strongly corroborating Lokin's and Stolte's refutation.

First, the restituted version of B. 1,1,21 contains the phrase ἐν τῷ ῥητῷ. This implies that the text of the source underlying B. 1,1,21, a Greek ἴνδιξ of the Latin text of C. 1,5,5, is ultimately to be qualified as a scholion stemming from the legal teaching during the emperor Justinian's early regnal years. The antecessor in question must have produced his Greek ἴνδιξ as part of a Greek lecture on the Latin text of C. 1,5,5, which obviously belongs to the first thirteen titles of the first book of the Justinian Code.

Second, (at the very least) two scholia – a younger and an older one – pertaining to B. 21,1,45 present clear proof that the antecessor Thalelaeus lectured on C. 1,5. Thalelaeus did so in the fourth decade of the sixth century, probably shortly after the promulgation of the second edition of the Justinian Code in 534, but in any case in Justinian's early regnal years.

Thus, we can conclude that C. 1,5, and with it C. 1,1-13, was (were) part and parcel of the original text of the Justinian Code from the very beginning.