

THE USE OF GREEK IN THE THEODOSIAN CODE*

Byzantine law, it is well known, started life as Roman law and at some point dressed itself in the Greek language. While we may differ on the question when we may first speak of Byzantine law, there can be no doubt about the reality of a process of transformation from Roman into Byzantine law, which may, or may not, have coincided with a transition from a Latin to a Greek legal culture in the Later Roman Empire in the East. One may separate between the two; one may hold that Roman law remained Roman long after the legal culture had in fact become Greek, or then again, one may consider that the Latin language was an indispensable element of Roman law and that the final stage of the transition from Latin into Greek marked the birth of Byzantine law. Personally, I prefer to have Byzantine law begin with the teaching of Justinian's codification and the promulgation of that emperor's Novels.

Be this as it may, there is good evidence of the use of Greek in the practice of the law already long before the Justinianic age. We find ourselves, then, in Late Antiquity. Papyri and inscriptions, but also legal literature transmitted directly and indirectly, i.e. through Justinian's Digest, provide abundant evidence. More doubtful, however, is the use of Greek in Roman legislation before the late fifth century. One of the prominent landmarks along the road from Roman to Byzantine law is the *Codex Theodosianus*, compiled in Constantinople, issued in 438, and entirely in Latin, or so it is generally held. The established opinion seems to be that legislation in Greek did not start until a later date.¹ The result, it is generally held, is the occurrence in the predominantly Latin *Codex Justinianus* of a number of Greek constitutions, the majority of them to be found in the first 13 titles of the first book, several of which unfortunately have been lost in the transmission of the Code and are now represented in our editions by summaries copied from other Byzantine sources such as the *Collectio Tripartita*, the *Nomocanon* and the *Basilica*.

On the Theodosian empire, a splendid book was recently published by Fergus Millar, significantly entitled *A Greek Roman Empire*.² One of the corner-stones of Millar's argument is the notion that all 'laws' – always between quotation-marks – in the Theodosianus are in fact letters to magistrates, meant to be posted – in Greek translation – for the benefit of the subjects. Perhaps we might also say that the legislator used Latin, and

* Earlier versions of (part of) this paper were presented to the 60th conference of the *Société "Fernand de Visscher" pour l'Histoire des Droits de l'Antiquité* in Komitini, 26-30 September 2006; in a seminar on *Late Antiquity and Law* in Oxford, Trinity term 2007; and in a colloquium on *The normative texts of Roman law in the early Middle Ages*, University College London, 10 September 2007. I am grateful to the participants for their remarks. Substantially the present text has appeared in A.J.B. Sirks (ed.), *Aspects of Late Antiquity. Dedicated to A.M. Honoré on the Occasion of the Sixtieth Year of His Teaching in Oxford*, in a limited edition especially for the celebration on 9 May 2008, pp. 77-94.

¹ But see below, p. 155 with n. 26.

² F. Millar, *A Greek Roman Empire. Power and Belief under Theodosius II (408-450)*, Berkeley 2006.

legal practice employed Greek. In other words, the Codex Theodosianus, as a collection of 'official' legislation, could not be other than Latin. I should like to begin with two footnotes to this statement, dealing with two cases of Greek in the Theodosian Code, one obvious (but not well known), the other buried in the obscurity of the critical notes to our editions. The first of these footnotes immediately illustrates another corner-stone of Millar's argument, the enormous wealth of documentary material transmitted in the acts of the oecumenical councils.

1. In Mommsen's edition of the Codex Theodosianus, CTh 9,45,4 is a constitution of Theodosius II and Valentinian of 431, which occurs in both Latin and Greek. The Greek version is the only Greek constitution in Mommsen's edition and therefore obviously an exceptional case. One of the most important witnesses of the text of books IX-XVI of the Theodosianus, ms Vat. Reg. lat. 886,³ is unique in containing both the Latin and the Greek versions; other witnesses have just the Latin text. We are further in the fairly exceptional position of also possessing the much fuller, perhaps even 'authentic', Greek version of this constitution, since that has been transmitted in the Greek acts of the Third Oecumenical Council, of Ephese in 431.⁴ A comparison of the two tells us that the Greek version in the Theodosianus has been edited for that purpose and corresponds with the Latin version: for example, it lacks the long introduction we read in the acts of the council. I will return to the nature and quality of the Greek summarized version, but there seems to be no reason for doubt as to whether it really belongs in the Theodosianus at this point.

The isolated occurrence of one Greek constitution in an ocean of Latin does not seem to have attracted much curiosity. Why is it that precisely this constitution, on church asylum, and this constitution only, should have been included twice, once in Latin and once in Greek? That a Greek text of this constitution is found in the Greek acts of an oecumenical council is not at all surprising; Latin texts were translated into Greek and vice versa for the benefit of the bishops, the majority of whom came from the Greek-speaking East in any case. The Greek version may have been available already or made for the purpose. Some significance should be attached to the fact that the council and the

³ For a first orientation, see E.A. Lowe, *Codices Latini Antiquiores*. A palaeographical guide to Latin manuscripts prior to the ninth century. I: The Vatican City, Oxford 1934, p. 110. If Lowe is right, this is a case of a 'Greek' manuscript written in France, 'probably at Lyons' in the sixth century: 'Greek' in quire numerals, in the 'pen cut for writing Greek, which lends a strange appearance to some Latin letters, but the Greek uncial found on foll. 75-76v shows pure Greek forms'. See further, below, pp. 149-150.

⁴ The edition of Mommsen, and Krüger's edition of the Codex Justinianus, refer to Mansi (*Sacrorum conciliorum nova et amplissima collectio* V, 437) for the acts of the council, of course long replaced by E. Schwartz, *Acta Conciliorum Oecumenicorum*, I,4 (Berlin-Leipzig 1928), pp. 61-65 (= Collectio Vaticana no. 137). The translation of the acts by A.J. Festugière, *Ephèse et Chalcédoine. Actes des Conciles*, Paris 1982, omits this text in the mistaken belief that it dates to 448, misled by the date of the two documents which follow it, Coll. Vat. 138 and 139 (Avant-propos, p. [11]).

promulgation of the constitution took place in the same year 431.⁵ But the occurrence of the Greek text in the Codex Theodosianus?

But this is not all. Our constitution is also found in the Codex Justinianus, as CJ 1,12,3. Here, somewhat to our surprise, we find the Greek version only, not, of course, transmitted through our western manuscripts, which just say ‘graeca constitutio’, but supplemented in our editions from the Theodosian Code.⁶ This is pure conjecture, since it assumes that Justinian’s compilers adopted the Theodosian version unchanged, which is a very rash assumption indeed; the only word we may be sure of is the first, ἀνεψύχθωσαν or -ησαν.⁷ If the Latin text was also available in the Theodosianus and therefore to Justinian’s commissioners, why did they prefer the Greek version?⁸ Surely this suggests that the Greek version was all they had?

If we did not have the rather curious occurrence of this constitution in Greek in the Justinianic Code, we might try to get rid of the problem by assuming an idiosyncrasy on the part of the scribe of this particular manuscript of the Theodosian Code, which shares palaeographical peculiarities with a group of other legal manuscripts. E.A. Lowe was the first to attract our attention to ‘Greek symptoms’ in Latin manuscripts, to be precise, in a sixth-century manuscript of St. Augustine and in a group of Latin legal manuscripts. These Greek symptoms meant by Lowe are palaeographical features normally found in Greek manuscripts. For the group as a whole, which also comprises the famous *codex Florentinus* of the Digest, Lowe suggests Constantinople as the most likely place of origin.

In Late Antiquity the production of Latin legal manuscripts in Greek-speaking centres is only what we may expect. At first sight, there is no reason why our Theodosian manuscript Vat. Reg. lat. 886 should not originate in Constantinople, too. Generally speaking, in that case the occurrence of a Greek constitution in an otherwise Latin

⁵ *Data* March 23rd, according to the Theodosian Code; posted April 7th, according to the acts of the council, which give this date in part according to the Egyptian calendar. This suggests that this particular copy may stem from a dossier brought by Egyptian bishops (I am grateful to Dr Benet Salway for this observation).

⁶ Krüger had, of course, to change the inscription: the Idem AA. of the Theodosian Code did not fit the position in the Justinian Code. See app. crit. ad loc. and below, p. 154.

⁷ Krüger is right in rejecting the possibility that the Justinianic Code, too, contained both a Latin and a Greek version, a possibility suggested by Voel and Justel’s edition (1661) of the *Collectio Tripartita* (see Krüger’s editio maior, app. ad p. 97 l. 16). The manuscripts of the *Collectio Tripartita* do not record the Latin ‘pateant’ as the first word of this constitution in the paratitla ad tit. I,3, but only the Greek ἀνεψύχθωσαν: βιβ. α’ τίτ. ιβ’ διατ. γ’ ἡς ἡ ἀρχὴ ΑΝΕΨΥΘΗΣΑΝ (CollTrip I,3, parat. 31, ed. N. van der Wal/B.H. Stolte, *Collectio Tripartita. Justinian on Religious and Ecclesiastical Affairs*, Groningen 1994, p. 52). We may note that the summary in its proper place at CollTrip I,12,3 (p. 92) is different, and that yet another is found in Bas. 5,1,11, but the latter two do not inform us about the opening word of the constitution. See below, Appendix I.

⁸ For the sake of completeness we may note that the Acta of the Council of Ephesus contain two further Greek documents, the first of which certainly goes back to a Latin original: a more complete version of CJust 1,1,3, which is a Theodosian constitution of February 17th, 448, and an edict posted with that law, of April 18th of the same year (ACO I,4, Coll. Vaticana no. 138 and 139).

manuscript would be nothing special in itself, since these Latin manuscripts then originate in a Greek environment: perhaps we may go so far as to say that in a manuscript with so many ‘Greek’ features as Vat. Reg. lat. 886, it is the Latin text that is the anomaly, not the Greek constitution.

At this point, though, one remarkable aspect should be mentioned. For two manuscripts, the one with St Augustine and our Theodosian manuscript Vat. Reg. lat. 886, Lowe mentions a Lyonesse connection. The presence in Lyons of the St Augustine can be proved, and for the Theodosian Code Lowe even conjectures a Lyonesse origin, something not impossible in view of ‘ancient connections [of Lyons] with Asia Minor, since Irenaeus was one of its first bishops’.⁹ I cannot say that I am convinced, nor am I sure that this is a necessary explanation as to why a manuscript of the Theodosian Code should have been written in Lyons: why should it not? Let us instead ask the question whether there is evidence of knowledge of Greek on the part of the scribe.

Mommsen, who also was unable to decide where the Reginensis 886 came from and thought France and Italy probable candidates, was convinced that ‘it was evident that the Greek constitution had not been written by a person who had been educated in Greek’.¹⁰ A glance at the critical apparatus, which I have been able to verify from autopsy, confirms this. Yet the ‘Greek symptoms’ as identified by Lowe are unmistakable. But, more important here, should it not suffice to infer from the extremely poor quality of the Greek of this manuscript that it was not written in Constantinople? And should we not conclude, then, that its scribe found the Greek constitution in his exemplar and tried to copy it to the best of his ability? In fact, a number of his mistakes may be explained as the result of confusion of uncial letters.¹¹ I leave it to the palaeographers to explain why the hand of a Lyonesse scribe who is not conversant with Greek should show ‘Greek symptoms’.

As an *imponderabile* one might add that the Greek constitution was passed over by the annotator who wrote the *Summaria antiqua*, edited by Boudewijn Sirks in 1996; in my review I asked the rhetorical question ‘but would not the reader in Gaul have welcomed some guidance as to the content of these passages with Greek?’¹² In sober fact, there is no evidence that the author or the scribe of the *summaria* understood Greek at all.

⁹ E.A. Lowe, ‘Greek Symptoms in a Sixth-Century Manuscript of St. Augustine and in a Group of Latin Legal Manuscripts’, in: S. Prete [ed.], *Didascaliae. Studies in Honor of Anselm M. Albareda*, New York 1961, pp. 279-289 (repr. in: L. Bieler [ed.], *E.A. Lowe. Palaeographical Papers 1907 – 1965*, II, Oxford 1972, pp. 466-474, esp. 474).

¹⁰ Th. Mommsen, *Theodosiani libri XVI cum constitutionibus Sirmondianis ... adsumpto apparatu P. Kruegeri*, in: Th. Mommsen/P.M. Meyer [edd.], *Theodosiani libri XVI cum constitutionibus Sirmondianis et Leges Novellae ad Theodosianum pertinentes*, Vol. I, 1-2, Berolini 1905 (repr. 1954, 1962, 1971), , p. xlv.

¹¹ E.g., N for H, A for Λ, Π for Γ, E for Θ, mistakes which may have occurred already in his exemplar.

¹² B.H. Stolte, review of A.B.J. Sirks, *Summaria antiqua Codicis Theodosiani: réédition, avec les gloses publiées dans Codicis Theodosiani fragmenta Taurinensia* (ed. P. Krüger), Amsterdam 1996, in: *TRG* 67 (1999), pp. 139-141 (141).

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Let us move to our second, far more complicated, case, for which we have to start at the Codex Justinianus.

2. CJ 8,11,3 goes back to a Greek constitution of the emperor Julian the Apostate (361-363). The western manuscripts attest the presence of a Greek constitution, and the inscription of the next one in Latin, h.t. 4 (*Idem*), proves that it had been issued by the same emperor; the consulate in the subscription dates it to Julian's reign, to the year 362. The Justinianic Greek text has been lost and instead we are given a summary which stems from the Basilica.¹³

In parenthesis, there is a difference between Krüger's *editio maior* and the older *editiones stereotypae* on the one hand and the later *stereotypae* on the other, due to the fact that in 1877 Krüger had to base himself on the fifth volume of Heimbach's Basilica edition of 1850, when the pertinent passage of the Basilica, B. 58,12,3, had not yet been discovered; when a palimpsest manuscript turned up and was published in 1897, Krüger inserted the result in his stereotypa. The restitution of 1877 and the later one do not show great differences; suffice it to say that the older one stems from a secondary source, whereas the younger one is a genuine Basilica fragment.¹⁴

So far, there is nothing remarkable. The mystery begins when we turn to the Codex Theodosianus. Two parts of this same constitution occur as CTh 15,1,8 and 9. Both are in Latin. Const. 8 has been incorporated in the Codex Justinianus as CJ 8,11,4, thus made to follow our lost Greek one, h.t. 3. It shows the usual small differences and the Theodosian Code has an extra sentence, which has been omitted in the Codex Justinianus. Const. 9 has not as such been received into the Justinianic Code, but, as already noted by Krüger, our lost Greek constitution CJ 8,11,3 'corresponds with CTh 15,1,9 (...) to such an extent, that it is a probable conjecture that the same constitution had been issued in Greek and in

¹³ See below, Appendix I.

¹⁴ Heimbach (C.G.E. Heimbach [ed.], *Basilicorum libri LX*. Post Annibalis Fabroti curas ope codicum manuscriptorum a Gustavo Ernesto Heimbachio aliisque collatorum integriores cum scholiis edidit, editos denuo recensuit, deperditos restituit, translationem latinam et adnotationem criticam adiecit... Tomus V: libros XLIX – LX continens, Lipsiae 1850, p. 213, note f) referred to the Tipucitus; with the discovery of the so-called *Florilegium Ambrosianum* in the lower layer of ms Ambros. F 106 sup. by Mercati and Ferrini and its publication as a *Supplementum* to Heimbach's edition (C. Ferrini/J. Mercati [edd.], *Basilicorum libri LX, Volumen VII. Editionis Basilicorum Heimbachianae supplementum alterum. Reliquias librorum ineditorum ex libro rescripto Ambrosiano*, Lipsiae 1897) the true Basilica text could be restored. Another discovery by Mercati, published by Ferrini, and confirming the text, was the palimpsest manuscript Vatican Library, Pii Secundi gr. 15, which contained a full version of Bas. LVIII-LX (C. Ferrini, 'Di un nuovo palinsesto dei Basilici', *BZ* 11 (1902), pp. 905-908, esp. 908; repr. in: V. Arangio-Ruiz [cur.], *Opere di Contardo Ferrini*. I: Studi di diritto romano bizantino, [Fondazione Guglielmo Castelli, 5], Milano 1929, pp. 359-363). See H.J. Scheltema/N. van der Wal [edd.], *Basilicorum Libri LX*. Series A Volumen VII: Textus librorum LIII – LIX, Groningen/s-Gravenhage 1974, Praefatio; Bas. 58,12,3 with app. crit. (BT 2671/9-11) and cf. BS 3024/4-7; N. van der Wal, 'Probleme bei der Restitution verlorengegangener Basilikenbücher', *SG* III (1989), pp. 143-154, esp. 148-150.

Latin, and that, after both versions had been incorporated in the Theodosianus (as has been done for CTh 9,45,4 [my first example, B.S.]), the Justinianic commissioners had selected a part of the Greek version [= CJ 8,11,3] and a part of the Latin one, which had already been separated from the other Latin part ([CTh] 15,1,9); see above, 1,12,3 [= the Justinianic twin of CTh 9,45,4].¹⁵

Krüger apparently accepted that Julian's constitution, posted December 2nd, 362, had been issued in both Latin and Greek, just as the constitution of March 23, 431, and that in these two cases both versions had been included in de Codex Theodosianus. In the latter case the Theodosianus has reached us in this form; in the former it is just the Latin version which has been preserved, whereas the commissioners of the Codex Justinianus must still have read both versions and acted as Krüger suggests. But why should they have proceeded in this extraordinary way?

To recapitulate: at the end of the year 362, the emperor Julian had addressed a constitution to Ecdicius, the prefect of Egypt;¹⁶ it was posted in Antioch (!)¹⁷ on December 2nd. Our text of the Theodosianus contains two Latin fragments, CTh 15,1,8 and 9, of which 8, truncated and with minor variations, returns in the Codex Justinianus as CJ 8,11,4. The fragment represented by CTh const. 9 is not found in the Justinianic Code, as is the last part of const. 8, but in its stead a Greek equivalent, which we do not find in our Theodosianus, is attested in the Justinianic Code as CJ 8,11,3: it is true that we do not have the Justinianic Greek text that originally must have been included at that point, but at least we possess a Greek summary in the Basilica informing us of its content. The order of the two fragments of the same constitution in the Codex Theodosianus is the reverse of that in the Justinianus. Apparently there were versions of the constitution in Latin as well as in Greek. May we presume that the genuine Greek version of CJ 8,11,3 was made on the basis of Julian's Greek version, or at least of an 'official' translation?

Both Krüger and Mommsen admit the possibility that the now lost Greek constitution CJ 8,11,4 also figured in the Theodosian Code; indeed, Krüger is positive on that point. Mommsen sees no other explanation, but declares himself at a loss as to why it then should have disappeared from the Theodosianus without leaving a trace, and why it should

¹⁵ Ed. stereot. ad loc. and see below, Appendix II.

¹⁶ Mommsen refers to the 'prologi Athanasiani', the chronological list in Syriac preceding the Festal Letters of Athanasius (see J. Quasten, *Patrology*. III: The Golden Age of Greek Patristic literature, from the Council of Nicaea to the Council of Chalcedon, Utrecht/Antwerpen 1960, pp. 52-54), to point out alternative candidates for the occupation of the Egyptian prefecture at this time, for which, however, Ecdicius remains the most probable one; cf. A.H.M. Jones/J.R. Martindale/J. Morris, *The Prosopography of the Later Roman Empire*. I: A.D. 260-395, Cambridge 1971, p. 647: Ecdicius Olympus 3.

¹⁷ Why would a constitution addressed to the prefect of Egypt be posted in Antioch? The *proposita* might be wrong for *data* and the name of the city or the addressee may be wrong. Mommsen registered some doubt in his index III. *Tempora et loci*, p. ccxxxv ad a. 362 (see also previous note).

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have changed places with 8,11,3 in the Codex Justinianus.¹⁸ And, I hasten to add, I am as perplexed as Mommsen.

The occurrence of the constitution of 431 in both Greek and Latin in the Codex Theodosianus in Vat. Reg. lat. 886 and in the Greek acts of the Third Oecumenical Council held in the same year offers excellent material for comparison. To recapitulate, we have the full Greek version in the Acts and the edited one in the Theodosian Code. The full Latin version has been lost to us. The edited Greek version runs parallel with the edited Latin version; a comparison of the two yields some interesting results.

1. Full Greek version in the Acts/Edited Greek version in CTh 9,45,4

Mommsen's edition draws attention to the differences between the full and the summarized version in a separate column headed 'exemplum integrum'. In a note at the end, on p. 525, we are told that a fresh collation of the main witness of the Mansi edition of the Acts of the Council, ms Paris. Coislinianus 32, had been made for Mommsen by Léon Dorez. Herein Mommsen followed the so-called *Collectio Segueriana*, while Schwartz preferred for his edition a different witness, the so-called *Collectio Vaticana*, represented by ms Vat. gr. 830.¹⁹ Schwartz's critical apparatus gives the variant readings of this document, which do not substantially affect Mommsen's edition.

The constitution has been drastically reduced to about one sixth of its original size. This has been effected by the omission of the prooimion, in Schwartz's edition comprising 40 lines out of a total of 145, as well as a number of further omissions and adaptations. It must be admitted that the editors made sensible cuts in order to restrict the summary to its disposition; one understands Mommsen's decision, when rendering the fuller version, to have refrained on two occasions from printing what he calls *plura ad rem non facientia*. At the end there is again a longer omission which is partly a peroration, partly an instruction to post the constitution.²⁰

2. Latin and Greek versions in CTh 9,45,4

From a comparison of the two versions one gets the impression that they are independent: it seems improbable that either is a direct translation of the other. On the other hand, the two run parallel in the sense that they apparently omit the same passages of the full version: as to substance, neither has more than the other, and since we can compare the two Greek versions, we must assume that a comparison of the two Latin versions, had it

¹⁸ Mommsen, ad CTh 15,1,9.

¹⁹ Cf. also above, p. 148 n. 4.

²⁰ Cf. other examples of the editing process in J.F. Matthews, *Laying down the Law: a Study of the Theodosian Code*, New Haven 2000, pp. 129ff. and generally ch. 8, pp. 200ff. See now also A.J.B. Sirks, *The Theodosian Code. A Study*, [Studia Amstelodamensia, vol. 39], Friedrichsdorf 2007.

been possible, would have yielded the same result. To a certain extent, one is reminded of the introductory constitutions *Tanta* and *Δέδωκεν* to Justinian's Digest: they are the same yet different, and so far attempts to decide which one is the original have not found universal acceptance.²¹

Before presenting some of the differences in tabular form, it is interesting to note the two inscriptions. The inscription of the Latin version is exactly as we would expect it to be: since the emperors are not the same as in the previous constitution, they are here with their names. The Greek version begins with IDEM, which only makes sense if referring to its Latin twin. I consider this an indication that the insertion of the Greek constitution took place in the editing process in the preparation of the Codex Theodosianus rather than as an initiative of the scribe of (the exemplar of) this manuscript.

Here are some examples of differences between the two versions:

| Latin | Greek |
|--|--|
| inscr.: IMPP. THEOD(OSIUS) ET VAL(ENTINIANUS) AA. ANTIOCHO PRAEFECTI PRAETORIO | inscr.: IDEM AA. Ἀντιόχῳ μεγαλοπρεπεστάτῳ ἐπάρχῳ καὶ ὑπάτῳ |
| 520/4-5 quas oratum gestiens populus primus ingreditur | om. [but present in ACO 63/5-6] |
| om. | 521/19 εἰσδύντας |
| om. | 523/3 ὡς τὰ λοιπά |
| 522/5-6 quae in ecclesiasticis saeptis eorum tuitioni sufficiant | 523/14-17 ἐν τοῖς ἐκκλησιαστικοῖς περιβάλοις διὰ τὴν τῶν προσφύγων ἀσφάλειαν καὶ ἡσυχίαν ἀφορισθέντα |
| 522/6-7 conentur invadere | 523/18-19 προπετῶς ἐπιόντων |
| 522/7 neque consentit | om. [but present in ACO 64/25] |
| 522/8 turbanda | 523/23 χωριζέσθω [cum v.l. in ACO 64/26 διωκέτω, conj. διωκέσθω] |
| 522/11 fiducia | 523/33-34 ἐλπίδος καὶ ὕρκου |
| 524/1-2 iam clementiae nostrae aput deum et episcoporum causa purgata armatis, si ita res exegerit | 525/2-5 ἐξευμενισθείσης τῆς θρησκείας παρὰ τε τῆς ἡμετέρας γαληνότητος καὶ τῶν ἐπισκόπων τῷ θεῷ τῆς ἀπολογίας δοθείσης ἐνόπλων |
| 524/5 abstrahi | 525/13 παραδίδοσθαι |
| om. | 525/14 κατὰ τῶν ἀθλίων |
| om. | 525/16 καὶ ταραχῇ [om. ACO 65/17] |

²¹ See T. Wallinga, *Tanta/Δέδωκεν. Two Introductory Constitutions to Justinian's Digest*, Groningen 1989.

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From a study of these two examples in the Theodosian Code various general questions follow, related to both the legislative process in the Later Empire and the genesis of the Theodosian and Justinianic Codes. Since I do not have all the answers, I had best just enumerate the questions, accompanied by a few footnotes.

For example, what was, or were, the source(s) of Justinian's commissioners for the Greek constitutions older than 438? If they have based themselves on the Codices Gregorianus, Hermogenianus and Theodosianus exclusively, as is suggested by the preliminary constitutions *Haec* of 528 and *Summa* of 529,²² then the occurrence of certain Greek constitutions in the Codex Justinianus means that more Greek constitutions must have figured in the Theodosianus and its predecessors than the single one our present editions contain. If not, where did they come from, and were the Justinianic commissioners the first to abbreviate them? To give an idea of the extent of the mystery, in addition to the two examples already mentioned, there are at least three more Greek constitutions in the Codex Justinianus for which the problem of their source poses itself, and with it the problem of the possible relation of the Codex Justinianus with the Codex Theodosianus and older Codices. The reader is alerted to the problem by the fact that, between two Latin constitutions, there is a lost Greek one, its existence attested by Byzantine witnesses and its chronology established by its position between two dated ones – in the case of the first constitution of a title, before a dated one – in the Justinianic Code. They are CJ 1,9,2 (between 213 and 315), CJ 9,36,1 (before 365)²³ and CJ 10,16,1 (before 260).²⁴ Incidentally, the text we all read in CJ 10,16,1 probably does not belong there and should be moved to CJ 1,26,6, but that is another story.²⁵ If Justinian's commissioners used other sources as well, their working procedure is in need of clarification on this point.

With the problem of the commissioners' sources other questions are bound up, questions to which these Greek constitutions give rise in any case: Even if Latin remained the working language of the law, were constitutions perhaps issued in both languages, or at least 'officially' translated from the Latin and published in both languages? When was the first Greek constitution issued? We may remember here that Greek rescripts were issued as early as the second century.²⁶

At this point I should like to mention three Viennese papyri, none of them published in full until their recent treatment by Fritz Mitthof. One, P.Vindob. L 75, a Latin

²² Recently again stressed by Matthews, *Laying down the Law*, p. 90.

²³ Also confirmed by 'const. greca' in ms Casinas 49 (ed. maior, app. crit. ad loc.).

²⁴ See Appendix III.

²⁵ See Krüger, ed. stereotypa 9a (1905) in *Addenda*, p. 514, ad 1,26,6; cf. also Scheltema and Van der Wal, app. crit. ad Bas. 56,8,1 (BT 2569/5-12). One may note the consequences for the chronology: the constitution should then be dated in or after 405 instead of before 260!

²⁶ Examples just from the Digest: Hadrian D. 5,1,37; Antoninus Pius D. 48,3,3; D. 49,1,1,1; D. 27,1,6,2. See also J.H. Oliver, *Greek Constitutions of Early Roman Emperors from Inscriptions and Papyri*, [Memoirs of the American Philosophical Society, vol. 178], Philadelphia 1989; V.I. Anastasiadis/G.A. Souris, *An Index to Roman Imperial Constitutions from Greek Inscriptions and Papyri, 27 BC to 284 AD*, Berlin/New York 2000.

constitution, is a general pardon as traditionally issued on Easter Day, in this case by the emperor Leo I, datable to AD 465-467, of the type we know from CTh 9,38.²⁷ The other two are more unusual and therefore more interesting.²⁸ One is in Latin, the other in Greek. The first, P.Vindob. L 81, is a Latin abstract from the Theodosian Code ('ex codice Theodosiano') with a constitution of Arcadius and Honorius which has not been preserved in the transmitted parts of the Theodosianus. The second, P.Vindob. L 164, contains Greek summaries of the Theodosian Code, a genre we would suspect to have existed, but of which so far no example had been published. The text has been identified by Mitthof as the meagre remains of *summae* of CTh 9,32,1-9,35,1. It is worth noting that the papyrus combines Latin rubricae with Greek summaries. Although we cannot be more precise about its date than the period between 438 and 529, the papyrus is witness to a Greco-Latin legal culture of which the sixth century has yielded evidence in abundance.

And finally: we are not particularly well informed about the early stages of the textual transmission of the Codex Justinianus; as touched upon already before, most of the Greek we read is pure reconstruction from testimonies outside the Code's textual tradition, since there is only one early manuscript which actually transmits Greek passages, but which is unfortunately palimpsest and incomplete, the Veronensis LXII (60).²⁹

If it is at all possible to sum up in this stage of an investigation which is very much work in progress, it should perhaps be this: historians of Roman law all too easily assume a Latin legal culture. No doubt this is true as far as the West is concerned; in the East on the contrary, there is more Greek at various levels,³⁰ and perhaps even at the level where the law was laid down. It is not all what it seems.

²⁷ F. Mitthof, 'Osterindulgenz: eine neue spätantike Kaiserkonstitution auf Papyrus', in: F. Beutler/W. Hameter [Hgs.], "*Eine ganz normale Inschrift*" ... und Ähnliches zum Geburtstag von Ekkehard Weber. *Festschrift zum 30. April 2005*, [Althistorisch-epigraphische Studien, 5], Wien 2005, pp. 449-460.

²⁸ F. Mitthof, 'Neue Evidenz zur Verbreitung juristischer Fachliteratur im spätantiken Ägypten. Zwei Bearbeitungen des Codex Theodosianus', in: H.-A. Rupprecht [Hg.], *Symposion 2003. Vorträge zur griechischen und hellenistischen Rechtsgeschichte*, (Rauischholzhausen, 30. September – 3. Oktober 2003), [Akten der Gesellschaft für griechische und hellenistische Rechtsgeschichte, Band 17], Wien 2006, pp. 415-422.

²⁹ and which has Greek scholia, edited by Zachariä von Lingenthal and studied by H.J. Scheltema, 'Subseciva. I. Die Veronensischen Kodexscholien', *TRG* 30 (1962), pp. 252-253 (repr. in: N. van der Wal/J.H.A. Lokin/B.H. Stolte/R. Meijering, [collegerunt], *H.J. Scheltema Opera minora ad iuris historiam pertinentia*, Groningen 2004, pp. 111-112).

³⁰ See e.g., P.E. Pieler, 'Byzantinische Rechtsliteratur', in: H. Hunger, *Die hochsprachliche profane Literatur der Byzantiner*, II, [Handbuch der Altertumswissenschaft, XII,5,2], München 1978, pp. 341-480, esp. 390ff.

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Appendix I

Greek testimonies and abstracts of CJ 1,12,3

1. Collectio Tripartita I,12,3

Οὐ δεῖ τοὺς προσφεύγοντας ἔχειν οἰαδὴποτε ὅπλα, οὔτε μὴν ἐντὸς τοῦ ναοῦ ἐσθίειν ἢ καθεύδειν· ἀσφαλῶς γὰρ διαύγουσιν ἐντὸς τῶν προθύρων ἐν αὐλαῖς καὶ στοαῖς καὶ λουτροῖς καὶ κήποις. Εἰ δὲ παρὰ τῶν κληρικῶν προτραπέντες καὶ ὄρκον ἐπὶ τῇ ἀσφαλείᾳ λαβόντες μὴ ἀποθῶνται τὰ ὅπλα, δι' ἐνόπλων ἀποσπῶνται· τοῦτο δὲ ποιεῖν οὐκ ἔξεστι παρὰ κέλευσιν τῶν ἐπισκόπων καὶ τῶν ἐκδίκων.

2. Collectio Tripartita I,3, parat. 31

Βιβ. α' τιτ. ιβ' διατ. γ' ἥς ἡ ἀρχὴ ANEΩΧΘΗΣΑΝ. Τοὺς ἐνόπλους πρόσφυγας ἀποθέσθαι τὰ ὅπλα μὴ πεισθέντας μήτε εἴξαντας τῇ παραινέσει τοῦ ἐπισκόπου καὶ τῶν κληρικῶν καὶ τῇ ἐπαγγελθείσῃ ἀσφαλείᾳ μεθ' ὅρκου δόσεως οὐδὲ οὕτως ἄνευ τῆς τοῦ ἐπισκόπου γνώμης ἀποσπᾶσαι.

3. Bas. 5,1,11 (BT 126/13-18)

Μέχρι τῶν πρὸ τῆς δημοσίας ἀγορᾶς τῆς ἐκκλησίας ὄρων τὸ ἀσφαλὲς ἐχέτωσαν οἱ πρόσφυγόντες, τοῖς ἐνδοτέροις λουτροῖς ἢ κήποις ἢ οἰκήμασιν ἢ αὐλαῖς ἢ στοαῖς χρώμενοι, καὶ κωλυέσθωσαν ἐντὸς τοῦ ναοῦ ὑπνοῦν ἢ ἐσθίειν. Ὅπλοις δὲ ἑαυτοὺς μὴ ἀσφαλιζέτωσαν, ἀλλ' ἀποτιθέτωσαν ταῦτα παρὰ τοῖς ἐπισκόποις ἢ πειθόμενοι πρῶτον ἢ μετὰ ταῦτα ἐμβαλλόμενοι κατὰ κέλευσιν τοῦ ἐπισκόπου καὶ τῶν δικαστῶν.

Appendix II

Latin and Greek versions of part of the same constitution?

| CTh 15,1,9 | CJ 8,11,3 |
|---|---|
| Idem A. Ecdicio p(rae)f(ecto) Aegypti. Post alia: Conperimus super ergasteria publica, quae ad ius pertinent civitatis plerosque sibi domos struxisse. Praecipimus ergo eas inconcusso iure qui aedificaverunt, possidere. P(ro)p(osita) III Non. Decemb. Antiochiae Mamertino et Nevitta cons. [= Dec. 2, 362] | [Αὐτοκράτωρ Ῥουλιανὸς Α.] Ὁ εἰς τόπον τῆς πόλεως κτίσας οἰκείους ἀναλώμασιν, ἐν ᾧ μὴ βλάβη τὴν πόλιν, ἴδιον αὐτοῦ ἐχέτω τὸ κτισθὲν καὶ μᾶλλον εὐχαριστεῖσθω ὡς τὴν πόλιν κοσμῶν. |

Appendix III

Greek constitutions: additional notes

1. CJ 1,9,2 is a constitution issued between 213 and 315, the years of constt. 1 and 3 respectively. It is represented in Krüger's editions in the form of a Greek fragment taken from the extended version of the Nomocanon XIV Titulorum ('Bestes') in ms Dublin, Trinity College 494; a different summary occurs in *Collectio Tripartita* I,9,2.

2. CJ 1,26,6 'constitutio graeca' [see ed. maior, app. ad loc.], *post* 405. See below, ad 4.

3. CJ 9,36,1 precedes eod. 2, which is an edict of Valentinian and Valens of 365. Attested in ms Casinas 49 by 'const. greca'. Greek summary from Bas. 60,63,1.

4. CJ 10,16,1 is a case similar to the previous one: it predates const. 2 of 260. Yet not all is as it seems. The summary printed by Krüger is taken from B. 56,8,1: in other words, the source of Krüger's restitution is the text of the Basilica.

But is B. 56,8,1 really a summary of CJ 10,16,1? The 56th book of the Basilica has been lost and its text in our edition is itself the outcome of a process of restitution. Since Fabrot's edition, at this point a text occurs which stems from Cuiacius, who 'e Basilicorum Codice deperdito restituit', as Heimbach comments in a footnote [Vol. V, p. 163 n. *t*]. Normally one would expect a series of fragments corresponding to a similar series in, in this case, the Codex Justinianus, and since fragments Bas. 56,8,2 sqq. all correspond with CJ 10,16,2 sqq., one might infer that Bas. 56,8,1 represents the lost Greek constitution CJ 10,16,1; that in fact a lost (Greek) constitution must have occurred here is confirmed by the numbers cited in *Collectio Tripartita* I,2 parat. 27, in the *Epitome* of the *Novellae* by Theodorus 17,15 and 128,1 and 4, and in BS 1583/13 = Bas. 23,1,45 sch. 1 (references in Krüger ed. maior app. ad loc., p. 889/15).³¹ Bas. 56,8,1, however, is not CJ 10,16,1 but in fact CJ 1,26,6, as has been noted by Zachariä and referred to by Krüger, in the ed. stereot. 9a of 1905 in *Addenda*, p. 514: '1,26,6: de annonis praefectorum egisse Zachariae recte collegit ex rubrica B 56, 8 (περὶ ἀννόνων καὶ τελεσμάτων), in quem titulum teste indice Basilicorum Coisliniano recepta est, cf. B. vol. V p. 163 n. 5' [n. 5 *lege*: n. s (B.S.)]. So, too, the Basilica edition of Scheltema c.s.; they print the same text, but

³¹ The best witness is *Collectio Tripartita* I,2 parat. 27, since it quotes our CJ 10,16,12 as beginning with ILLUD (variant for ID) and undoubtedly referring to the twelfth constitution. BS 1583/13, which seems to refer to CJ 10,16,2, is problematic: Heimbach has β', Scheltema α' and adds '(2)' by way of correction. The manuscript in question, Parisinus gr. 1348 fol. 137v undoubtedly has α', but α and β as numbers are in that script very similar. After the number follows ἡτοι with an incomplete reference to the Basilica, omitted by Scheltema and slightly misrepresented by Heimbach: it actually reads βτβ. νς' τττ. η' κερ. – [no number supplied]. Krüger of course had to rely on Heimbach; it seems best to disregard this part of the evidence.

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comment that ‘c. 1 e C. 1,26,6 haustum fuisse docet ICb; iniuria haec verba Cuiacius et Krueger constitutioni C. 10,16,1 perperam restitutae tribuunt’ [app. crit. ad BT 2569/5]. Here Scheltema c.s. refer to the older editions of Krüger; apparently they overlooked the *addendum* of 1905.

Therefore, if we accept the evidence of the Index Coislinianus as in fact we must, this text could simply be transferred to CJ 1,26,6, where the manuscript tradition attests the presence of a Greek constitution, now lost (see above, no. 2). Whether or not the restored passage is the genuine text of Basilica 56,8,1 – to complicate matters, the Tipucitus refers explicitly also to chapter 6, i.e. the Basilica version of CJ 10,16,6 – it remains probable that CJ 10,16,1 is a lost Greek constitution, dating *ante* A.D. 260. In that case, it seems we must exclude the possibility of a *lex gemina*, since, on the grounds of its position in the title, CJ 1,26,6 must date *post* 405, which is obviously incompatible with *ante* 260: therefore, our editions should show a series of dots at CJ 10,16,1.

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