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PUNISHMENT? POETRY!

A curious little poem embedded in the *Basilica scholia*

1. Codex Parisinus graecus 1350 in the Bibliothèque nationale in Paris is a Greek legal manuscript, dating from the twelfth century.¹ The manuscript hands down book 60 of the *Basilica cum scholiis*,² which deals with penal law. In the Parisinus, the text of B. 60 is accompanied by an extensive apparatus of scholia. In the first two lines of the upper margin of f. 229^v, Pe hands down a curious little poem, as part of the scholia pertaining to book 60, title 51, chapter 15 of the *Basilica*. The text of the poem, in common iambic trimetres and written in a younger hand, reads as follows:

Κακῶν τετρακτὸς τῷ νόμῳ κολαστέα:
φάκτον, γραφή, λόγος τε καὶ συμβουλία.
Φάκτον, τρόπος, πρόσωπον, αἰτία, χρόνος,
ποιὸν ποσόν τε τῶν νόμων περιστάσεις.³

‘A quaternary of evils is punishable by law:
fact, writing, word and counsel.
Fact, manner, person, cause, time,
quality and quantity are circumstances scrutinized by law’.

2. At first sight, the poem appears to be slightly incomprehensible, if only because there is a clear watershed between the ll. 1-2 and 3-4: φάκτον in l. 2 evidently belongs to an altogether different sphere than φάκτον in l. 3. At its first occurrence, φάκτον features as one of the four categories of evil punishable by law, whereas in l. 3 φάκτον belongs to the *περιστάσεις τῶν νόμων*, the circumstances of the laws, or rather the circumstances taken into account or scrutinized by law. However, the picture becomes clearer when the scholion is considered in direct connection with the text it comments. In Pe, the entire poem is linked to the phrase νόμος in B. 60,51,15pr. = D. 48,19,16pr. by means of a sign

¹ Cf. L. Burgmann / M.Th. Fögen / A. Schminck / D. Simon, *Repertorium der Handschriften des byzantinischen Rechts*. Teil I: Die Handschriften des weltlichen Rechts (Nr. 1 - 327), (Forschungen zur byzantinischen Rechtsgeschichte, Band 20), Frankfurt/M. 1995, No. 163. In the *Basilica* edition cited in the following note, cod. Paris. gr. 1350 is referred to with the *siglum* Pe.

² H.J. Scheltema / N. van der Wal / D. Holwerda (edd.), *Basilicorum Libri LX*. Series A: Textus librorum I – LX, 8 vols., Groningen/Djakarta/s-Gravenhage 1955-1988 (partial repr. 2003); Series B: Scholia in libros I – LX, 9 vols, Groningen/Djakarta/s-Gravenhage 1953-1985 (partial repr. 2003). Both the series A (= BT, Basilicorum Textus) and the series B (= BS, Basilicorum Scholia) are quoted after page and line.

³ Sch. Pe 19* ad B. 60,51,15 = D. 48,19,16 (BS 3888/23-26).

of reference consisting of four dots placed in the shape of a diamond.⁴ And indeed, in B. 60,51,15pr. we come across the four categories of evil mentioned in the ll. 1-2 of the poem, with some examples added: *Claudi*. Ἡ τὸ πραχθὲν ὁ νόμος τιμωρεῖται, (...), ἢ τὸ λεχθὲν, (...), ἢ τὴν γραφήν, (...), ἢ τὴν συμβουλήν, (...).⁵ The *περιστάσεις τῶν νόμων* from l. 4 appear somewhat further down in the *Basilica* text, in B. 60,51,15,1 = D. 48,19,16,1: Ἐξετάζεται δὲ ταῦτα κατὰ τρόπους ἑπτὰ ἀπὸ αἰτίας, ἀπὸ προσώπου, ἀπὸ τόπου, ἀπὸ καιροῦ, ἀπὸ ποιότητος, ἀπὸ ποσότητος, ἀπὸ τῆς ἐκβάσεως,⁶ with some further explanation in §§ 2-8. Evidently, the ll. 3-4 of the poem pertain to this fragment of the *Basilica* text, even though a sign of reference is missing. Thus, the poem combines two comments relating to two different text fragments. This appears to be corroborated by the fact that the ll. 3-4 of the poem also occur as a separate scholion in its own right, written by the main scribe of Pe in the right margin of f. 230^r, and relating to the phrase *ποιότητα* in B. 60,51,15,6.⁷

3. Line 3 of the poem presents two peculiarities. The first is the occurrence of the phrase *φάκτον*, which is somewhat confusing, as the term occurs in l. 2 as well, albeit in a clearly different context. However, close reading reveals that *φάκτον* in l. 3 is used as the metrical substitute of *ἔκβασις* in B. 60,51,15,1 (quoted above) or its equivalent *ἀποτέλεσμα* in B. 60,51,15,8 (BT 3076/10).⁸ *Φάκτον* is simply used in order to meet the requirement of the iambic metre.

The second peculiarity is the use of the phrase *τρόπος*. Even though *τρόπος* is metrically sound, we are here evidently dealing with a scribal error, as *τρόπος* ‘way’ or ‘manner’ is not listed among the seven perspectives from which the four categories of criminal offences are examined, in accordance with B. 60,51,15,1. However, *τόπος* ‘place’, ‘location’ is: in BT 3076/1-2 we read *ἐξετάζεται (...) ἀπὸ τόπου*, and somewhat further down in the text *Καὶ ὁ τόπος (...)*.⁹ Finally, *τόπος* also occurs in sch. 7.¹⁰ On the basis of BT 3076/2 *ἀπὸ τόπου*, 3076/4 *καὶ ὁ τόπος*, and BS 3887/19 *τόπος*, the phrase *τρόπος* in l. 3 of the poem ought to be read as *τόπος*. The reading *τρόπος* may well have been inspired by the phrase *ἐξετάζεται ταῦτα κατὰ τρόπους ἑπτὰ* in BT 3076/1.

⁴ Cf. also BT 3075 app. schol. ad l. 13 *νόμος*.

⁵ BT 3075/13-15. Transl.: ‘Claudianus (Claudius Saturninus Dig.). The law punishes what has been done, (...), or what has been said, (...), or the writing, (...), or the counsel, (...)’.

⁶ BT 3076/1-3. Transl.: ‘These (categories) are examined in seven ways: from the perspectives of cause, person, place, time, quality, quantity, event’.

⁷ Sch. Pe 7 ad B. 60,51,15 = D. 48,19,16 (BS 3887/19-20); BT 3076 app. schol. ad l. 7 *ποιότητα*.

⁸ In the *Digest* text (D. 48,19,16), the source of the *Basilica* text, we come across the phrase *eventus*, underlying both Greek terms.

⁹ B. 60,51,15,4 (BT 3076/4).

¹⁰ See note 7 above.

3. As the poem bears no heading, and contains no reference to either the sixth-century legislation of Justinian or the ninth-century *Basilica* text, there is no way to determine with any certainty when it was originally written.¹¹ However, the purpose of the poem may be indicative in this respect. For, the iambic metre of the poem appears to qualify it as some sort of mnemonic aid serving law students to memorize both the four categories of criminal offences and the seven perspectives from which these offences were to be investigated. If this holds true, then there are two distinct possibilities as to when the poem may have originated. First, it may have been composed during the reign of the emperor Justinian (527-565), as a mnemonic aid for students in their home study of the Latin text of the *Digest*, as part of the legal curriculum established by the emperor.¹² Second, the poem may have originated towards the mid-eleventh century (or slightly later), when the emperor Constantine IX Monomachos (1042-1055) founded a law school in Constantinople, under the direction of the νομοφύλαξ John Xiphilinos:¹³ the poem may then have had the same purpose, this time serving a student of the *Basilica* text. On balance, however, there is no certainty: both possibilities are equally possible.

4. So why my choice for this particular poem as a contribution to the *Liber amicorum* for Annette Harder? Together with her serving in the executive committee of the *Societas Graeca et Latina* for a period of nine years was certainly no punishment. Moreover, during that period we certainly did not commit a criminal offence in any of the four categories of fact, writing, word, and counsel. Quite the contrary: collaborating with Annette Harder has proved to be not unlike poetry, and all circumstances – cause, person, place, time, quality, quantity, and event – are ripe to continue that collaboration for many years to come.

Thomas Ernst van Bochove

¹¹ For dating criteria of the *Basilica* scholia, cf. H. de Jong, 'Using the Basilica', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, romanistische Abteilung* 133 (2016), 286-321, esp. 305-313.

¹² On this curriculum, cf. e.g. H.J. Scheltema, *L'enseignement de droit des antécédents*, (*Byzantina neerlandica*. Series B: Studia, I), Leiden 1970 (= H.J. Scheltema, *Opera minora ad iuris historiam pertinentia*, (collegerunt N. van der Wal, J.H.A. Lokin, B.H. Stolte, Roos Meijering), Groningen 2004, 58-110). Book 48 of the *Digest* – the source of B. 60,51,15 – was not dealt with by the *antecessores* (the professors of law) in their lectures: students had to study this book by themselves.

¹³ For this law school, cf. most recently Z. Chitwood, *Byzantine Legal Culture and the Roman Legal Tradition, 867-1056*, Cambridge 2017, 150-183.