BYZANTINE LEGAL CULTURE UNDER THE MACEDONIAN DYNASTY, 867-1056

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Abstract

Building upon the pioneering work of legal historians as well as recent scholarship on the Middle Byzantine administration, “Byzantine Legal Culture under the Macedonian Dynasty, 867-1056” is a study which seeks to situate Byzantine law within its broader historical and societal context. This dissertation is an examination of Byzantine Legal Culture, which can be loosely defined as the interaction between laws, jurisprudence and ideas about justice as well as their implementation. The period under examination, from roughly the middle of the ninth to the middle of the eleventh century, was characterized by a “Recleansing of the Ancient Laws”, in which the emperors of the Macedonian dynasty made a concerted effort to reassert the empire’s Roman legal heritage. This epoch represented the last great efflorescence of Byzantine secular law, as from the twelfth century onward the importance of Byzantine canon law gradually came to encompass and supplant secular law.

Underneath an imperially-sanctioned façade of legal continuity, law and legal culture underwent momentous transformations during this period: models and paradigms outside of Roman law considerably influenced judges and jurisprudence; the mores and customs of the élite were legitimated through the legal system; and private law collections seemed to challenge the monopoly of authority held by Roman law. By examining the interplay between Byzantine law and Byzantine culture, this dissertation represents a dynamic new way of examining one of the world’s richest legal traditions.
To the Memory of My Father, Gregory Bryant Chitwood (1954-2010)

“Βιωφελές τι χρήμα και σπουδαιότατον οὐ μόνον βασιλεύσιν ἄλλα καὶ ἰδιώταις ἢ παίδευσις, καὶ γὰρ τούς κεκτημένους αὐτὴν καὶ κατὰ ψυχήν καὶ κατὰ σῶμα τὰ μέγιστα ὀφελεῖ, τὸ μὲν διὰ τῆς μελέτης τῶν σπουδαίων λόγων, τὸ δὲ διὰ τῆς γυμνασίας τῶν κοσμίων ἔργων.”

“Education is something useful and most excellent not only for emperors but even for private citizens. For those who have acquired it benefit to the greatest extent in both body and soul; the latter because of the study of weighty ideas, and the former because of the exercise of worldly affairs.”

–The Emperor Basil I (r. 867-886) to his son Leo VI (r. 886-912) [§1 of the Βασιλείου κεφάλαια παραινετικά]
### List of Abbreviations and Frequently-Cited Sources


**Bas. Schol.** = *Basilika (Scholia)* contained in Series B (vols. 9-17) of the Groningen edition; also edited by D. Holwerda.


**BMGS** = *Byzantine and Modern Greek Studies*.


**BS** = *Byzantinoslavica*.

**BZ** = *Byzantinische Zeitschrift*.

**CFHB** = *Corpus Fontium Historiae Byzantinae*.

**CSHB** = *Corpus scriptorum historiae byzantinae*.


**Cod.** = *Codex Justinianus. CIC*, vol. 2.

**Dig.** = *Digest. CIC*, vol. 1, part 2.

**DOP** = *Dumbarton Oaks papers*.

**FM** = *Fontes Minores*.


**EEBS** = Επετηρίς της Εταιρείας Βυζαντινών Σπουδών.


JÖB = Jahrbuch der österreichischen Byzantinistik.

MGH = Monumenta Germaniae historia.


Nov. = Novels of Justinian. CIC, vol. 3.


REB = Revue des études byzantines.

RJ = Rechtshistorisches Journal.


$SG = \textit{Subseciva Groningana}.$


$Tijdschrift = \textit{Tijdschrift voor rechtsgeschiedenis}.$

$TM = \textit{Travaux et mémoires/Centre de recherche d’histoire et civilisation de Byzance}.$
Note on Naming, Translation and Transliteration

The spelling of names in this study follows the Oxford Dictionary of Byzantium. Transliteration from Medieval Greek to the Roman alphabet is done according to the method prescribed by the Library of Congress (http://www.loc.gov/catdir/cpso/romanization/greek.pdf). Likewise, Old Church Slavonic (http://www.loc.gov/catdir/cpso/romanization/churchsl.pdf) and Classical Armenian (http://www.loc.gov/catdir/cpso/romanization/armenian.pdf) are also romanized according to the Library of Congress guidelines. Transliterations from Arabic follow the romanization schemes in the works cited. As in the Oxford Dictionary of Byzantium, names with a well-established anglicization are presented in their anglicized rather than transliterated form, so Constantine instead of Κonstantinos, John instead of Ḫohannēs, etc. There some exceptions for names in the secondary literature which are almost never anglicized, thus the antecessor Stephanos/Stephanus is not rendered Stephan. Additionally, the names of some juridical works are not strictly transliterated in order to correspond to the way they are written in most of the secondary literature (so Eisagoge and not Eisagōgē). Some less-commonly known names of persons with their own entries in the Oxford Dictionary of Byzantium are spelled the same as their entries there, therefore in this study the name of the most prominent Middle Byzantine jurist is written Eustathios Rhomaios instead of Eustathios Rhōmaiōs.

Given that in the Middle Byzantine administration as well as in Middle Byzantine law there were a great many terms borrowed from Latin, at some points in this study it has proved simpler to use the original Latin term rather than the Greek equivalent, not least of all because these Hellenisms often varied considerably, as the bilingual Greek-Latin lexica from the period demonstrate.

The bibliography and footnotes in this dissertation have been written according to “Chicago Style” guidelines. It should be noted that edited texts are formatted to reflect two categories of edited texts: edited volumes of articles or essays appear with the names of the editors followed by the title of the volume, while critical editions in monographs by contrast appear with the name of the work followed by the names of the editors. When writing the place of publication for works cited, the names of these locations are written with their English equivalents (e.g. Wien = Vienna, Ἐν Ἀθήναις = Athens, etc.).

By and large I have attempted to keep quotations in Greek and other ancient and medieval languages confined to footnotes. Almost all Greek words in the main text are transliterated for the benefit of the non-specialist, excepting a few longer phrases. All translations in the text are my own unless otherwise noted.

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It is both a pleasure and a relief to acknowledge everyone who has facilitated the writing of this dissertation. My formation as a historian was made possible by a succession of tremendous teachers and mentors. The path that led me to study Byzantine history started at Churchill County High School in Fallon, Nevada, in the classroom of John Billett, my U.S. history teacher, who introduced me to the study of history and whose enthusiasm and love for his subject impressed all of his students. As an undergraduate at Ripon College I was blessed to have two mentors who took a profound interest in my development as a person and a scholar. I owe an incalculable debt to Diane Mockridge, who encouraged and supported my decision to become a historian in every possible way. I might have never learned a word of Greek or Latin had I not quite accidently taken Attic Greek as a freshman with Eddie Lowry. Over the next four years he went out of his way to patiently read texts with me.

During my time as a graduate student at Princeton University, I have been privileged to interact with a number of brilliant and inspirational scholars. I owe a special debt to my advisor, John Haldon. Over the past six years he has profoundly shaped the way I look at and write history by teaching me the importance of having a sound theoretical framework and introducing me to the historical materialist approach of examining the past. Prof. William Chester Jordan served as a role-model with his razor-sharp command of the facts, incisive questions and dedicated teaching. Emmanuel Papoutsakis introduced me to the world of Eastern Christianity and taught me Classical Armenian and Syriac. Maria Mavroudi improved my Byzantine Greek immensely. It was a pleasure to teach under Molly Greene. Peter Brown proved incredibly encouraging and helpful. Dimitri Gondicas was supportive as well and made Hellenic Studies a wonderful venue for the exchange of ideas. On the institutional side of things, I would like to thank the Group for the Study of Late Antiquity, Hellenic Studies and the History Department at Princeton for their financial support.

I have many causes to thank those outside of Princeton whom I have met in the course of writing this dissertation. During a brief sojourn at Stanford University Amalia Kessler’s class on legal history had a profound impact on this project by introducing me to different ways of thinking about law and history within the American legal academy. Panagiotis Agapetos, who happened to be at Stanford at the same time, taught me to better appreciate Byzantine literature and particularly Byzantine poetry. During a summer in Athens Alexander Alexakis and Stratis Papaioannou shared their impressive knowledge of a whole range of Byzantine authors and genres and their masterful command of Byzantine Greek.

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Byzanzforschung allowed me to experience first-hand the very rich tradition of Byzantine Studies in Austria.

I benefited immensely from a stay at the Max-Planck-Institut für europäische Rechtsgeschichte in Frankfurt. While there I was overwhelmed with the generosity of its researchers, particularly Andreas Schminck, who was kind enough to share his encyclopedic grasp of Byzantine legal history with me, and Wolfram Brandes, who did much to facilitate my stay. It was an honor as well to meet the other members of the Byzantinist cohort there, Ludwig Burgmann and Lars Hoffmann. Readers of this dissertation will immediately note how much it is indebted to the numerous publications of the Byzantinists in Frankfurt working within the research project “Edition und Bearbeitung byzantinischer Rechtsquellen.” In addition, I would like to thank Caroline Humfress and Emmanuel Bourbouhakis for kindly agreeing to serve on my defense of dissertation committee.

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Introduction Part I

Background, Goals, Parameters and Sources of the Study

I. Background to the Study: “Do We Need a New History of Byzantine Law?”

This dissertation situates Byzantine law within its broader historical and societal context during a crucial period both in the history of the Byzantine Empire as well as the history of the Roman legal tradition in continental Europe, the so-called *ius commune*. As such it demonstrates how the Roman legal tradition in the Byzantine Empire during the roughly two hundred-year period of Macedonian rule (867-1056) was molded and shaped by Byzantine culture. This era is crucial for our understanding of the history of Roman law and indeed of European history in general because it illuminates a polity in which Roman law in its Justinianic iteration, at least in principle, had never gone into abeyance, unlike the empire’s former territories in western Europe as well as the eastern Mediterranean. Moreover, it was largely this “Macedonian” synthesis of Roman law which became a permanent feature of Byzantium’s cultural legacy in the Balkans, Eastern Europe and the Middle East. This is in contrast to the *ius commune* of continental Europe, which embraced the Roman legal tradition via the “rediscovery” of Justinianic law, a process which began in northern Italy at the end of the eleventh century.

The impetus for the present study was a provocative article published in 1989 by the Byzantine historian Alexander Kazhdan. Kazhdan began his critique of the state of the field of Byzantine law by noting that the classic text on the subject, Karl Eduard Zacharià von

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Lingenthal’s *Geschichte des griechisch-römischen Rechts*, first published in 1846, had 150 years later not been equaled or exceeded by any other work. In the course of the article, Kazhdan went on to bemoan the fact that legal historians had concerned themselves exclusively with the history of Byzantine normative legal sources, such as imperial novels, law-books and legal treatises. He concluded by advocating that the study of Byzantine law should both include non-normative legal sources, like histories, saints’ lives and romances, and that “[i]t [Byzantine law] must become a history of institutions, not only of legal science, and it must reveal the reality of human status, of rights and transactions, of the work of judiciary courts and not only Greek images of Roman jurisprudence, interesting in themselves but often quite distant from daily reality.”

To contextualize Kazhdan’s critique, a brief excursus on the history of Byzantine law is necessary. Although modern scholarship on Byzantine law can be said to have started in the nineteenth century, it is important to note that Byzantine law even in the early modern period had a utilitarian function, as a lawyer could draw on it in contemporary cases. An interest in Byzantine law coincided with codifications of Roman law which served as the basis for modern European nation-states, such as the *Allgemeines Landrecht* for Prussia (1794), the *Code civil* (1804) for France and *Das Allgemeine bürgerliche Gesetzbuch für das Kaisertum Österreich* (1811) for the Habsburg dominions. The first Byzantine legal historians were trained as lawyers, such as the French jurist Jean Anselme Bernard Montreuil and the foremost figure in the study of

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3 Kazhdan, “Do We Need a New History of Byzantine Law?”, p. 28.
Byzantine legal history, Karl Eduard Zachariä von Lingenthal. Writing from his country estate at Grosskmehlen, Zachariä von Lingenthal’s writings spanned the second half of the nineteenth century, among which his survey of Byzantine legal sources, numerous editions of texts and history of Byzantine law did much give the incipient field a firm foundation. To the present day the primary activity of nineteenth-century Byzantine legal scholarship, namely the criticism and description of normative legal texts, has continued: indeed, there is still much work to be done in this area. A definitive modern edition of the most important law-code of the Middle Byzantine period, the Basilika, was lacking until a mere twenty-five years ago.

Even when Kazhdan first presented the incipient ideas of “Do We Need a New History of Byzantine Law” at a conference in Frankfurt in 1981, it received considerable criticism from legal historians there working under the aegis of Dieter Simon at the Max-Planck-Institut für europäische Rechtsgeschichte. Responses to Kazhdan’s proposal in the ensuing years were written by Ludwig Burgmann and Dieter Simon. Among Burgmann’s points was that Kazhdan’s dichotomy between law and reality caricatured legal historical scholarship as legal positivism. Kazhdan’s proposed Institutionengeschichte, modeled on the work of Max Kaser and Leopold Wenger, would likely not allow the inclusion of the non-normative legal sources. Additionally, the emphasis on normative legal sources by legal historians, given their expertise,

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7 For instance, even the chronology of many of the primary legal collections compiled during the Macedonian dynasty is still hotly debated. See Andreas Schminck, *Studien zur mittelbyzantinischen Rechtsbüchern*, Forschungen zur byzantinischen Rechtsgeschichte 13 (Frankfurt am Main: Löwenklau, 1986), as well as the response of Th. E. van Bochove, *To date and not to date: on the date and status of Byzantine law books* (Groningen: E. Forsten, 1996). See now as well Juan Signes Codoñer and Francisco Javier Andrés Santos, *La introducción al derecho (eisagoge) del patriarca Focio*, Nueva Roma 28 (Madrid: Consejo Superior des Investigaciones Científicas, 2007).
was of course understandable: “[w]o nicht über Recht gesprochen wird, da hat der Rechtshistoriker sein Recht verloren.”

Another response to Kazhdan’s challenge was penned by Bernard Stolte, working within the great tradition of Dutch legal historians of Byzantine law at the University of Groningen, which along with the Max-Planck-Institut für europäische Rechtsgeschichte in Frankfurt represented the two great centers of scholarship on Byzantine legal history in the second half of the twentieth and beginning of the twenty-first century. Stolte stressed that the disjuncture between Byzantine “social” historians of Kazhdan’s sort and Byzantine legal historians was due to the way which Byzantine legal history had initially developed as a discipline, that is, as an ancillary means by which Roman legal historians could better research their subject. The disconnect between law and reality perpetuated by Byzantine legal sources is not a unique problem, and is in fact representative of codified legal systems, such as France after the introduction of the Code Napoléon.

Some progress towards realizing Kazhdan’s proposal has certainly been made in recent years. The edited volume Law and Society in Byzantium, which featured contributions from art, legal and social historians of Byzantium, was a good start. The work of Ruth Macrides, which is centered on the later phases of Byzantine history, has served as an excellent model for historians writing about Byzantine law. Although the present study, “Byzantine Legal Culture

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14 Stolte, pp. 266-9.
15 Stolte, pp. 269-72.
under the Macedonian Dynasty, 867-1056”, is not the *New History of Byzantine Law* which Alexander Kazhdan envisioned, it will quickly become apparent to the reader that in its conception and execution it is conditioned by the debate started by the eminent Russian Byzantinist thirty years ago when he first presented his proposal for a new history of Byzantine law in 1981. Notwithstanding his mischaracterizations of legal history and legal historians, Kazhdan’s point that future work on Byzantine legal history should include the full spectrum of available sources, and not just normative legal sources, is one which has been consciously implemented here.

At the same time, it will likewise immediately be apparent to the reader that this dissertation is hugely indebted to scholars from the other side of the debate, the Byzantine legal historians. Thus while in terms of breadth of source material the present study is marked by Alexander Kazhdan’s vision of what future works on Byzantine law would look like, it is also profoundly influenced above all by Dieter Simon’s *Rechtsfindung am byzantinischen Reichsgericht*. For it was *Rechtsfindung*, a study of the jurisprudence of the eleventh-century jurist Eustathios Rhomaios, which demonstrated the importance of non-legal paradigms in Byzantine legal thought. Indeed, Simon’s analysis underlined some of the principal components of Byzantine Legal Culture (though Simon himself did not identify it as such): the tenets of Orthodox Christianity, the eclectic way in which legal texts were employed and the role of social class. The examination of these paradigms and the way in which they interacted with normative legal regime is termed in this study “Byzantine Legal Culture.”

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II. Methodology: The Term *Legal Culture* and Its Applicability to Middle Byzantine Law

*Legal culture* is a somewhat amorphous concept which is used primarily in the fields of legal anthropology and the sociology of the law. One basic definition runs “[i]t presupposes and invites us to explore the existence of systematic variations in patterns in ‘law in the books,’ in ‘law in action,’ and above all, in the relation between them.”\(^{19}\) The idea of legal culture can be traced back to the early days of the field of legal anthropology and is based on the notion that law cannot be understood apart from its wider cultural and societal context.\(^{20}\) Initially, legal anthropology was developed as a way of analyzing oral cultures which did not possess a written legal tradition.\(^{21}\) Lawrence Friedman introduced the term legal culture into the field of the sociology of the law as the amalgamation of a society’s legal ideology, practices, and social pressures. He distinguished between *inner* and *external legal culture*. Within Friedman’s schema, *inner legal culture* encompassed legal professionals, while *external legal culture* referred to the rest of society; the influence of the former, according to Friedman, is often exaggerated by legal scholars.\(^{22}\) Recently, legal culture has been used with reference to the modern nation-state, to describe for instance the cultural factors which account for differing rates of litigation among various contemporary European countries.\(^{23}\)

Despite the usefulness of legal culture as a heuristic tool of historical analysis, its use has been criticized for its vagueness: “[a]ll too often, legal culture is a term used to account for that which cannot be accounted for in any other way—that is, culture becomes the beneficiary of the

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\(^{22}\) Nelken, “Culture, Legal.”

residual term in explanatory equations.”24 In this study as well, the term Byzantine Legal Culture is employed in a general way as referring to any aspect of the interaction between the normative legal regime and various phenomena—be they ideas about justice, customs and practices of a particular social group, or the influence of non-normative legal texts—of Middle Byzantine society. The principal objection of the sociologist of law in defining Byzantine Legal Culture in such an open-ended way—that such a definition impairs quantification—is in this case unfounded, since quantification of legal cultural phenomena (e.g., the percentage of the population which was regularly involved in civil suits) is impossible because of the paucity of the sources.

It should be noted that this study is not the first to use the term Byzantine Legal Culture. It has been used, among others, by the Russian Byzantinist I.P. Medvedev, who uses the term quite differently in his monograph *The Legal Culture of the Byzantine Empire.*25 Although he did not call it “legal culture”, the eminent historian E.P. Thompson’s observation of the role of the law in Early Modern England perhaps best approximates the way legal culture is used in this dissertation, as an omnipresent, multi-faceted nexus of ideas about the law which pervades a particular society:

I found that law did not keep politely to a “level,” but was at *every* bloody level; it was imbricated within the mode of production and productive relations themselves (as property-rights, definitions of agrarian practice) and it was

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25 I.P. Medvedev, Правовая культура Византийской империи (St. Petersburg: Aleteía, 2001). Medvedev’s book covers the entire existence of the Byzantine state and would be classified as a study of inner legal culture in Friedman’s dichotomy, as much of it consists of an examination of the “notariat” (pp. 255-402). Some of the book is also of a more theoretical nature, such as whether the Byzantine Empire had a constitution (pp. 29-42). Unfortunately, as is the case with most of work of Russian Byzantinists, Alexander Kazhdan’s observation that “Russica sunt, non leguntur” is probably even more true today than when there was a robust presence of Byzantine Studies in the Soviet Union. Thus the work of Russian Byzantinists like Lipshts and Medvedev, who write about Byzantine law and were trained in this tradition, has not had as great an impact as one might expect.
simultaneously present in the philosophy of Locke; it intruded brusquely within alien categories, reappearing bewigged and gowned in the guise of ideology; it danced a cotillion with religion, moralizing over the theater of the Tyburn; it was an arm of politics and politics was one of its arms; it was an academic discipline, subjected to the rigor of its own autonomous logic; it contributed to the definition of the self-identity both of rulers and of ruled; above all, it afforded an arena for class struggle, within which alternative notions of law were fought out.²⁶

III. Parameters of the Study

This dissertation is an analysis of Byzantine Legal Culture during the period of the Macedonian dynasty (867-1056). The rule of the Macedonian dynasty frames this study of Byzantine Legal Culture because while there are certain features of Byzantine Legal Culture which are diachronic, there are particular synchronic features of Byzantine Legal Culture under the Macedonian dynasty which distinguish it from other epochs of Byzantine history.²⁷ First, law, like art and literature of the period, is distinguished by a so-called “classicizing” tendency.²⁸ Some scholars have referred this phenomenon as the “Macedonian Renaissance” or, to use Paul Lemerle’s term, “encyclopedism.”²⁹ The “classical” past that the artists, jurists and writers of the Macedonian period evoked was often Late Roman, particularly the reigns of Constantine I and

²⁷ Various periodizations of Byzantine law exist, and they are discussed in great detail by Dieter Simon, “Die Epochen der byzantinischen Rechtsgeschichte”, *Ius commune* 15 (1988): pp. 73-106. Simon notes that Byzantine legal history can be periodized according to “inner” and “outer” legal history. In Simon’s schema, “outer” legal history corresponds to legal sources (*Quellengeschichte*), while “inner” legal history is a history of legal institutions (*Institutionengeschichte*). If one accepts 1453 as an endpoint for the history of Byzantine law (which is itself debatable, but space does not permit a discussion of this here), then the history of Byzantine legal sources can be divided, like Gaul, relatively unproblematically, into three parts: Early (330-842), Middle (842-1261) and Late (1261-1453) Byzantine (*ibid.*, pp. 93-4). Periodization is trickier for “inner” legal history, but Simon notes that it can utilize the same periodization as “outer” legal history if one adopts the Middle Byzantine period as a starting point (*ibid.*, p. 105). This tripartite schema is the one used in this study.
Justinian I. However, the “Macedonian Renaissance” was also marked by a rapprochement with the pagan heritage of antiquity. This classicizing tendency in law is reflected in the recapitulation of Late Roman law, by which Byzantine law was purged via a “recleansing” (Gr. anakatharsis) of post-Justinianic legislation. Second, the Macedonian emperors, more so than any other Byzantine rulers after Justinian, chose to legitimate their rule by presenting themselves as guardians, patrons and protectors of the law. One can apply Alexis de Tocqueville’s oft-cited observation about American politics in the early nineteenth century, that “[t]here is hardly a political question in the United States which does not sooner or later turn into a judicial one,” to the way in which the Macedonian dynasty conducted its social policies. Indeed, the Macedonian dynasty’s principal attempt at internal reform, the protection of “poor” peasants against the “powerful”, predatory large landowners, was construed as a legal question. Nor was the resolution of this legal question a one-way dynamic: the “powerful” managed to combat these regulations by interpolations in imperial novels. The Macedonian dynasty’s policies on “military lands” (stratiōtika ktēmata) can also be seen as the implementation of social policy via legislation and the legal system. Third, the legal reforms of the Macedonian emperors coincided with the last great flowering of Byzantine secular law. As this dissertation is a study of

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31 This has been maintained by Svoronos for a novel of Basil II issued to combat predatory land practices by the “powerful.” The novel was originally promulgated in January of 996 but was reworked at the end of the eleventh century. The second version of the novel in Svoronos’ view evidences interpolations by redactors sympathetic to the “powerful”; see ibid., pp. 190-8 as well as idem, “Remarques sur la tradition du texte de la nouvelle de Basile II concernant les puissants”, Zbornik Radova Vizantološkog Instituta 8 (1964): pp. 427-34.
32 See the various publications of Danuta M. Górecki on this subject; eadem, “Constantine VII’s Peri ton stratioton”, Greek, Roman and Byzantine Studies 49.1 (2009): pp. 135-54; eadem, “Fiscal control of unproductive land in tenth century Byzantium: Policies and politics”, FM 10 (1998): pp. 239-60. Górecki tends to overstate the continuity of Roman/Byzantine state policy, e.g. especially the survival of Republican Roman tendencies in the Middle Byzantine period (Górecki, “Fiscal control”, p. 260): “This provision reveals that Constantine’s perception of revitalizing the productivity of adoreia was not merely limited to the restoration of the tax revenue attached to this land. His idea of allotting a piece of adoreia to a destitute peasant, together with promoting the peasant to the prestigious status of stratiotes, directly relates to the Roman Republican tradition in which public land had to serve the common good by maintenance of soldiers and prevention of social degradation of landless peasants.”
secular or civil law, it must be noted that for this period, a clear distinction between canon and civil law is not always possible. From the time of Justinian, canon law had been granted the force of secular law, and canonists throughout the Byzantine period drew upon secular law, particularly the *CIC*. Nonetheless, during this period both the prominent jurists, such as Eustathios Rhomaios, Michael Attaleiates and Michael Psellos, and legal achievements, such as the completion of the *Basilika*, the writing of secular legal treatises particularly in the eleventh century, and the foundation of a “law school” during the reign of Constantine IX Monomachos (r. 1042-55), were secular. The following centuries, particularly in the twelfth and again in the fourteenth century, would be marked by a golden age of Byzantine canonists and canon law.

**IV. Sources**

Why then is the concept of legal culture particularly suited to the study of law in the Middle Byzantine period? This approach was chosen, in part, because it can be employed with the types and quantities of sources, particularly legal sources, which are available to the historian for this period, about which more shall be said later in the introduction, but which can be broadly characterized as follows: an abundance of law-books, imperial novels, and legal textbooks (which will be referred to as *normative legal sources*), but relatively few records of cases or examples of what legal historians like to call “the law in action.” This imbalance has impinged upon the type of work which most Byzantine legal historians have undertaken in the past, which is primarily *Quellenkritik*.

Although it is worth going into greater detail as to the normative legal sources which this study utilizes, it should be noted that there exist numerous and much more exhaustive studies of
Byzantine normative legal sources. Here, normative legal sources include the following: law-books, imperial novels, legal textbooks, scholia and commentaries on other legal sources and legal treatises. Among law-books a distinction is to be made between official or imperially-sanctioned collections of law and so-called private collections. The former were compiled and sanctioned by the imperial regime and represented the official law of the land. The chronology and content of the major imperially-sanctioned law-books of this period, which include the Prochiron, Eisagoge, Leo VI’s Sixty Books/Basilika, and the Epitome are explored in detail in Chapter One. It is important to note that the most important of these codifications, that of the Basilika, has not survived in its entirety; 16 of its 60 books are not directly transmitted. Private collections of law, such as the Farmer’s Law, Mosaic Law, and Rhodian Sea-Law for the most part have unclear origins and were not imperially-sanctioned, although sometimes forged histories of imperial promulgation were appended to these texts. The chronology and content of these private laws is presented in Chapter Five. There are relatively few imperial novels issued after Justinian which have survived. The major collection of post-Justinianic imperial novels, that of Leo VI, is examined in Chapter One.


34 An exhaustive discussion of the history (from around the year 1500 to the present day) of the editions of imperial novels issued from the time of Justinian onward can be found in Ludwig Burgmann, “Die Gesetze der byzantinischen Kaiser”, *FM* 11(2005): pp. 77-132. As Burgmann points it, only a small portion of these novels (around one-fifth) are in editions which meet contemporary standards of textual criticism (*ibid.*, pp. 126-7). Regarding the novels issued by emperors of the Macedonian dynasty after Leo VI, see Andreas Schminck, “Zur Einzelgesetzgebung der ‘makedonischen’ Kaiser”, *FM* 11 (2005): pp. 269-323.

This dissertation makes major use of legal textbooks from this period, particularly the so-called *Peira*, an anonymously-compiled casebook consisting of the judgments and verdicts of Eustathios Rhomaios, a jurist whose activity as a judge spanned the last quarter of the tenth and the first two quarters of the eleventh century. Of the 200 to 300 decisions (*hypomnēmata*) which Eustathios wrote and which were used along with his shorter pronouncements of a verdict (*sēmeiōmata*) as the basis for the *Peira*, only six decisions have survived in their entirety. Very 

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37 Four of these decisions are edited in Andreas Schminck, “Vier ehrerechtliche Entscheidungen aus dem 11. Jahrhundert”, *FM* 3 (1979): pp. 221-322. The other two were for many years ascribed to the Patriarch Alexios
soon after the composition of the *Peira* in the middle of the eleventh century it was used as a legal textbook, as a school text stemming from the first half of the twelfth century testifies.\(^3^8\) Eustathios also wrote a legal treatise on the bride-gift (*hypobolon*), referred to in the secondary literature as the *De hypobolo* (“On the bride-gift”).\(^3^9\) Finally, later tradition identifies Eustathios as the author of a text on the property acquired or delegated to family members who did not have the *patria potestas*, a *peculium* (Gr. *pekoulion*).\(^4^0\)

The *Peira* is one of the few sources which allows historians to see how the law was applied and interpreted by Byzantine jurists at the higher Constantinopolitan courts of the Hippodrome and Velum. In analyzing the *Peira*, one must be careful to distinguish, where it is possible, between the work’s anonymous redactor, who added the references to the *Basilika*, and the oeuvre of Eustathios himself.\(^4^1\) Despite its obvious importance, the *Peira* remains in many ways a source which is underutilized by Middle Byzantine historians. A number of reasons have contributed to this state of affairs. Zachariä’s edition is imperfect, although given that the entire *Peira* survives only in one manuscript, it is not to be assumed that a new edition would correct all of the ambiguities of the current edition. The lack of a translation or commentary in any

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\(^{38}\) M. Treu, “Ein byzantinisches Schulgespräch”, *BZ* 2 (1893): pp. 96-105. Treu dated this text to the end of the eleventh century on the basis of a mention of the *Tipoukeitos*, but, as Schminck observed, it was more likely composed in the first half of the twelfth century; see Schminck, “Vier ehrerechtliche Entscheidungen”, p. 221, note 2.


\(^{41}\) A very good point recently made by Boudewijn Sirks; see *idem*, “Peira 45.11, a presumed succession pact, and the Peira as legal source” in Christian Gastgeber (ed.), *Quellen zur byzantinischen Rechtspraxis: Aspekte der Textüberlieferung, Paläographie und Diplomatik, Akten des internationalen Symposiums, Wien, 5.-7.11.2007*, Veröffentlichungen zur Byzanzforschung 25 (Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 2010), pp. 189-99, here pp. 198-9. In general when the jurisprudence of Eustathios can be discerned, then it conforms to Justinianic law, see *idem*, “The Peira: Roman Law in Greek Setting” in *Studi in onore di Remo Martini III*, Università di Siena-Facoltà di Giurisprudenza e di Scienze Politiche, Collana di Studi “Pietro Rossi”, Nuova Serie 23 (Milan: Giuffrè Editore, 2009), pp. 583-591, p. 590: “The conclusion is that in the early 11th century the law on the legitimate portion as collected in Peira 41 did not differ much or at all from the law in the 6th century and was applied in a way, basically consistent with 6th century law.”
modern language hinders access to the text for non-specialists. The new edition, German translation and commentary currently being undertaken by Ludwig Burgmann will render many of these obstacles obsolete when it is completed.⁴²

This dissertation also makes use of scholia, particularly the scholia to the Basilika.⁴³ These scholia are agreed to exist in two main divisions: “old” scholia dating from the sixth century and “new” scholia dating mainly from the eleventh and twelfth centuries.⁴⁴ Oftentimes a name at beginning of the scholion indicates the author. Unfortunately, not all of the scholia to the Basilika can be dated: many are anonymous and dating them by other means, such as vocabulary, is a very tricky proposition. Additionally, some scholars have bemoaned, quite rightly, the practice of categorizing scholia into “new” and “old” in general, as oftentimes the scholia themselves are written in much more complex fashion. For instance, a sixth-century scholion to the Justinianic corpus was sometimes continually reworked by later scholiasts: in such a case does one classify the scholion as “new” or “old”?⁴⁵

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There are differing views as to whether when these scholia, particularly the “old” scholia, were attached to the text of the *Basilika* itself, and whether these scholia constituted a catena-style commentary.⁴⁶ According to one view, the surviving manuscripts indicate that there never existed any archetypal or standard collection of scholia; it appears as though scholia were selected and written *sui generis* for each manuscript.⁴⁷ According to another view, a catena-style commentary to the *Basilika*, consisting of both “old” as was many “new” scholia, was completed in the middle of the eleventh-century, probably during the reign of Constantine IX Monomachos.⁴⁸

Last but not least among normative legal sources, there are a number of legal treatises on special subjects, especially from the eleventh century. Chief among them are the *Meditatio de nudis pactis* (“Treatise on open pacts”) and the *Tractatus de peculiis* (“On the property of minors”). These Middle Byzantine legal treatises are discussed in detail in Chapter Four.

For the purposes of this study, non-normative legal sources include the various types of documents found in surviving monastic acts, such as wills, deeds of sale, gifts and agreements. These sources are given little or no coverage in most surveys of Byzantine law. Most of the surviving monastic acts from the time of the Macedonian dynasty stem from the various Athonite monasteries, although a few documents from elsewhere in the Balkans as well as Asia Minor and Southern Italy survive from this period as well.

As mentioned above, this dissertation also makes extensive use of sources which are not generally the preserve of Byzantine legal historians, including chronicles, epistolary collections,

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⁴⁶ For a concise summary of these issues, see Trōianos, *Οι πηγές*, p. 281ff.
histories and orations. Two categories of sources which are excluded from this dissertation for different reasons are lead seals and saints’ lives. Lead seals, although incredibly useful for administrative and prosopographic studies, are less informative regarding Byzantine Legal Culture. Hagiographic sources, by contrast, would have greatly enriched this study, but given their vastness and the special problems they present the legal historian they were excluded from types of sources used by this dissertation: indeed, they merit a study of legal culture in and of themselves.49

V. Plan of Study

With its five chapters this dissertation illuminates five of the most crucial aspects of Byzantine Legal Culture. Chapter One, “Anakatharsis tōn palaiōn nomōn: The ‘Recleansing of the Ancient Laws’ under Basil I and Leo VI”, is an examination of the legal reforms of the first two Macedonian emperors, Basil I (r. 867-886) and Leo VI (r. 886-912) and demonstrates the dynastic and political factors which prompted them. Chapter Two, “Paradigms of Justice and Jurisprudence within Byzantine Legal Culture”, explores the factors which influenced Byzantine jurisprudence. This chapter is largely a response to Simon’s Rechtsfindung, but it employs many sources beyond the Peira and differs from his interpretation of Middle Byzantine jurisprudence in many respects, including his portrayal of Byzantine legal reasoning as essentially rhetorical. Chapter Three, “‘Golden, they say, are your hands, your tongue and your justice’: How Gift-Giving and Patronage Networks were Legitimated within Byzantine Legal Culture”, argues that the practices of gift-giving and patronage should be examined from a legal anthropological point

of view and not be simply condemned as “bribery” and “corruption”, as has been the case in the past. Examining these practices in this way demonstrates that these practices were endemic and an extremely important part of Byzantine Legal Culture. Chapter Four, “Legal Education and the ‘Law School’ of Constantinople”, demonstrates that officials with judiciary powers in the Middle Byzantine Empire, as in the Later Roman Empire, often had little or no legal training. They were administrators first and judges second. The second part of the chapter is a corrective to scholarship on the so-called “law school” founded by Constantine IX Monomachos, proving that the founding of the school was for the most part politically-motivated and coincided with rather than sparked a revival in civil law. Chapter Five, “Challenges to the Basilika? The Function of ‘Private’ Law Collections in the Byzantine Empire and Neighboring Cultures”, attempts to answer one of the most vexing questions confronting Byzantine legal historians: what was the function of the numerous private law collections stemming from the Middle Byzantine period? It is shown in this chapter that although they were not included in the official collections of laws, these private collections were probably used by officials with little or no legal training, and that the spurious imperial approval given to them in forged introductions facilitated their use.
Introduction Part II

The Legal System of the Byzantine Empire under the Macedonian Dynasty

I. The Economic and Political Context

Byzantine historians often characterize the two hundred-year period from around 850 CE until around 1050 CE, roughly the time during which the Macedonian dynasty ruled, not only as a time of cultural, economic and political revival, but indeed as the empire’s post-Justinianic apogee.¹ After the massive territorial losses of the seventh century and the conflict over Iconoclasm which dominated much of the eighth and first half of the ninth century, the subsequent period was marked by demographic and economic expansion, military successes, territorial growth, administrative reform and a revival of scholarship. The reasons for this stunning reversal of fortune are still disputed, though some credit is surely due to the much-maligned but effective rulers of the Isaurian dynasty, Leo III (r. 717-41) and Constantine V (r. 741-75), who stabilized the empire’s borders after the catastrophic losses of the seventh century.² The Macedonian period of Middle Byzantine history was at one time a favorite of Byzantine historians, but it had suffered a brief period of neglect until about twenty years ago.³ Recently a number of younger Byzantine historians, such as Catherine Holmes, Leonora Neville, Paul

Stephenson and Shaun Tougher have written studies on this era. Since the founder of the Macedonian dynasty, Basil I (r. 867-886), was a Thracian peasant of Armenian origin, the term “Macedonian dynasty” is something of a misnomer, but it is used so ubiquitously in secondary scholarship and in the sources themselves as well that it is pointless to attempt to replace it with something else.

Territorially, this period is marked by a number of important conquests and military victories. The Paulicians, heretics in eastern Asia Minor who set up their own army and state, were defeated during Basil I’s reign. The Kingdom of Bulgaria, which had for several centuries been Byzantium’s most dangerous rival, was conquered fleetingly during the reign of John Tzimiskes (r. 969-76) and finally during the reign of Basil II (r. 976-1025). At sea, despite the sacking of Thessaloniki during the reign of Leo VI, the Byzantines managed to retake Crete (961) and Cyprus (965) later in the century. Expansion into eastern Asia Minor and Northern Syria also occurred: Antioch was taken in 969, Vaspurakan in 1021/2, Ani in 1045. By the end of Basil II’s reign the empire had reached its greatest territorial extent since the time of Justinian.

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5 The ethnic origin of Basil’s family is comprehensively treated by Norman Tobias, Basil I, founder of the Macedonian Dynasty: a study of the political and military history of the Byzantine Empire in the Ninth century (Lewiston, New York: The Edwin Mellen Press, 2007), pp. 1-24. Tobias proves convincingly that Basil was of Armenian birth and humble origin. Claims that Basil was of Slavic origin, as adamantly maintained by Arab historians, rest on a conflation of “Macedonian”/”Thracian”/”Slav.” Andreas Schminck has more recently rejected the Armenian origin of Basil I: see Andreas Schminck, “The beginnings and origins of the ‘Macedonian’ dynasty” in John Burke and Roger Scott (eds.), Byzantine Macedonia, Identity Image and History, Papers from the Melbourne Conference July 1995, Byzantina Australiensia 13 (Melbourne: National Centre for Hellenic Studies & Research, La Trobe University, 2001), pp. 61-8. Schminck’s argument is based on the report, found in the Vita Ignatii, that Photios fabricated the elaborate Arsacid lineage of the first Macedonian emperor. The fact that Basil fabricated his connection with an Armenian noble house (something he almost certainly did), however, does not necessarily mean that he was ethnically Greek; this fabrication addressed more his lack of social status rather than his ethnic origin.
The only major territorial loss during the period of Macedonian rule was the gradual erosion of Byzantine authority in southern Italy over the course of the eleventh century.

Economic expansion accompanied these territorial gains. From an economic standpoint, the start of the Macedonian dynasty coincides with the beginning of a long period of growth in population, land under cultivation and trade extending to the end of the eleventh century. The stabilization of the Balkans facilitated the emergence of powerful new monasteries with substantial landholdings, particularly on and around Mt. Athos. The interior of Asia Minor was freed from the prospect of annual raids for the first time in centuries, allowing the formation of huge aristocratic estates.

II. The Legal-Administrative System

In briefly sketching the Byzantine legal-administrative system of the ninth to eleventh centuries, it is heuristically useful to at all times to distinguish between the imperial capital, Constantinople, and the provinces. Particularly with regard to the way the legal system was organized, the capital was in many respects sui generis and it is difficult to disentangle the numerous overlapping jurisdictions of its administrators, in contrast to the relatively simple way the administration of justice in the provinces appears to have been structured.

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Beginning then in the provinces, the administrative system during the period of Macedonian rule was the so-called theme system. Although scholars have long debated the origin of the theme system, a consensus now holds that the theme system was the result of organic administrative developments, as imperial armies moved east to combat Persian and then Arab invaders in the seventh century, rather than a onetime administrative innovation, as once held by Ostrogorsky. From the time of Leo III, the commands of these provincial armies, or stratēgides, began to be associated with the districts from which they were supplied.

Although the development of the theme system in some respects took several centuries, the reign of Nikephoros I (r. 802-11), with its numerous administrative and fiscal reforms, represents a major turning point. This was the time in which the main features of the theme system came into being, including the actual use of the term themata to refer to territorial units as well as the armies they supported. In fact, one can even go as far as to call Nikephoros I the founder of the theme system. In their recent book on Byzantium during the Iconoclast Era,
Brubaker and Haldon list five characteristics of a theme in the early ninth century: 1) It was a territory where an army was based and where poorer soldiers were supported by local taxpayers; 2) It was a fiscally-distinct unit managed by a protonotarios; 3) Officials within the theme maintained the military registers and the tax-assessments of the soldiers’ families on those registers; 4) Its judicial administration was headed by a praitōr (later called a krites); 5) The governor of a theme was a stratēgos, who was aided by a clerical department under a kagkellarios.

As outlined above, each theme was governed by a stratēgos or military governor. In Ostrogorsky’s conception of the theme system, in the first centuries of its existence the stratēgos had absolute civil and military powers within his theme. Newer research on the Byzantine administration has completely overturned this notion, and it is unlikely that the stratēgos ever possessed any sort of comprehensive civil authority before the reign of Leo VI (r. 886-912). From the standpoint of judicial administration officials called anthypatoi, who had been diocesan officials in the administration during Late Antiquity, appear to have retained their judicial powers throughout the eighth century and into the early ninth century. If one accepts the newly proposed dating of c. 811-3 for the earliest Middle Byzantine list of precedence for dignitaries and functionaries, the so-called Taktikon Uspenskij, then new officials charged with judicial administration appear for the first time at the beginning of the ninth century.

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12 Brubaker and Haldon, pp. 752-3.
13 Glykatzi-Ahrweiler, pp. 36-52.
15 Brubaker and Haldon, pp. 671-9.
16 Taktikon Uspenskij in Nicholas Oikonomidès (ed.and trans.), Les listes de préséance byzantines des IXe et Xe siècles. Le monde byzantine (Paris: Éditions du Centre national de la recherche scientifique, 1972), pp. 41-63; “οἱ πράιτόρες τῶν θεμάτων” at p. 53, line 3. The Taktikon Uspenskij has been dated to 842-3 almost exclusively on the basis of a title which is found in the manuscript, which was probably added later. Tabor Živković, “Uspenskij’s
It is only during a roughly one hundred-year period, from c. 850 to c. 950, that a
stratēgos corresponded to an Ostrogorski generalissimo with ultimate military and civil
powers within his theme. It should be emphasized here that the primary duty of a stratēgos was
his role as a military commander; his ability and/or propensity to involve himself in civil affairs
not directly related to the functioning of the army with his theme varied considerably and were
probably restricted. Yet as the highest authority in the theme until around the eleventh century
or so, he had judicial duties as well, at least in theory. A stratēgos performed his juridical
duties, most likely exclusively, without the aid of legal training: stratēgoi were first and foremost
military men, and the background of the most well-known stratēgoi clearly shows that they were
career soldiers, often foreigners drawn to imperial service, for whom even rudimentary literacy,
much less literacy of the sort necessary to read and interpret Roman law, would have been rare.
It is assumed that other judicial functionaries, so-called symponoi, could have been assigned to
the stratēgos to assist him in judging.

The vesting of ultimate civil and military powers in a single official was gradually eroded
over the course of the tenth and eleventh centuries by the increasing power of a theme’s chief
civil official, the judge (kritēs, dikastēs, praitōr). By the eleventh century thematic judges had
become the civil administrators of themes, and were the highest judicial officials within their
jurisdictions. The central administration appears to have taken for granted that the decisions of
these provincial courts would be imperfect, and therefore allowed appeal of their decisions to the

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Taktikon and the Theme of Dalmatia”, Σύμμεικτα 17 (2005): pp. 49-85 presents a convincing argument that the
Taktikon Uspenskij was originally authored in c.811-3 and then was reworked and edited afterward.
17 Brubaker and Haldon, p. 769.
18 Taktika of Leo VI, ed. and trans. by George Dennis, CFHB 49; Series Washingtonensis (Washington, D.C.:
Dumbarton Oaks Research Library and Collection, 2010), const. 1.9: “The stratēgos is the person who, after the
emperor, has greater authority than anyone else over the entire province subject to him. (Στρατηγὸς τοῖν ἐστιν ὁ
τῆς ὑπ’ αὐτὸν ἀπόστης ἐπαρχίας μεῖξον πάντων ἐξουσίαν ἔχον μετὰ τὸν βασιλέα).”
emperor, patriarch and other officials in Constantinople. Two novels of Constantine VII (r. 944-59) demonstrate that these thematic judges and their staffs were paid legal fees (Lat. *sportulae*, Gr. *ektagiatika*) by both parties in court. Constantine IX Monomachos (r. 1042-55) created a judicial office, the *epi ton kriseōn*, to verify and correct the decisions of thematic courts.

In Constantinople, the *eparch* (*eparchos*) was the highest ranking legal official in the capital, with the *quaestor* as well having considerable legal authority. But the *Peira* also makes it clear that the various imperial departments or *sekreta* of administration in the capital had their own internal jurisdictions. Thus legal disputes involving a member of a particular *sekreton* would be judged by the head of that *sekreton*. Also in the capital were the so-called *politikoi* or “city” judges, judges with a relatively high level of legal training who were probably assigned cases by the emperor and other higher-level administrators with juridical powers. According to the most recent work on the subject, the two main groups of these judges, the judges of the Hippodrome and the judges of the Velum, respectively, formed tribunals which took place in the covered Hippodrome. These city judges could also be assigned as *symponoi* to other officials. The aforementioned novels of Constantine VII on legal fees state that these judges and their staffs were forbidden from receiving customary legal fees rendered by both parties in court.

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20 *Eisagoge* 11.9.
21 *JGR* vol. 1, col. 3, n. 7 (pp. 218-221) and n. 9 (pp. 227-9); Franz Dölger, “Zum Gebührenwesen der Byzantiner” in *idem*, Byzanz und die europäische Staatenwelt. Ausgewählte Vorträge und Aufsätze (Darmstadt: Wissenschaftliche Buchgesellschaft, 1964), pp. 232-60 [A reprint of an article which appeared in *Études dédiées à la mémoire d’André Andréadès* (Athens, 1939): pp. 35-59], here pp. 241-4. These matters are discussed much more extensively in Ch. 2.
22 Oikonomides, p. 134.
23 *Eisagoge* 11.7; Gkoutzioukóstas, pp.103-7.
24 *Eisagoge* 11.8, Gkoutzioukóstas, pp. 107-10.
25 *Peira* 51.29.
26 Gkoutzioukóstas, pp.119-81.
III. The Law

Unlike its Classical and Early Imperial Roman predecessor, the Byzantine Empire had, at least in theory, a codified legal system. In general surveys as well as in some of the secondary literature on the subject, the official law of the Byzantine Empire during the period of Macedonian rule is sometimes assumed to have been the Basilika. Yet as this dissertation shall demonstrate, it is at best only partially correct and at worst misleading to state that the Basilika constituted the official law of the Byzantine Empire during this period, because in fact there is no conclusive basis for this sort of statement and normative legal texts from this period tend to support a broader definition of what valid law actually was. Notwithstanding some opinions to the contrary, it also does not appear as though the publication of Leo’s Sixty Books/the Basilika invalidated older Justinianic law. The Basilika was, after all, valid law only insofar as it was assumed to represent, in paraphrased Greek, the Corpus Iuris Civilis of the Emperor Justinian I (r. 527-65): in the words of the H.J. Scheltema, “[n]un werden aber die Basiliken nicht als ein neues Gesetzbuch betrachtet, vielmehr lediglich als eine offizielle Sammlung des bereits geltenden Justinianischen Rechts.” It was not until considerably later, in a novel of Manuel I Komnenos (r. 1143-80) issued in 1166, that the Basilika was granted exclusive legal force.

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27 See for instance Alexander P. Kazhdan, “The Basilika as a Source” in ODB, vol. 1, pp. 265-6: “The Basilika was considered the official collection of actual law...”; this is the assumption of much of Kazhdan’s work on Byzantine law, including his “Do We Need a New History of Byzantine Law?” While it is true that the Basilika became the official compilation of Justinianic law after the middle of the twelfth century, this was not the case for much of the Middle Byzantine period, including the epoch of Macedonian rule.


Byzantine jurists often used the phrase “The Breadth of the Laws” (*to platos tôn nomôn*) to refer to all of the valid law in existence.\(^{31}\) This phrase much more accurately encapsulates what the Byzantines considered valid law, even though individual jurists would have disagreed as to what it encompassed. Depending on the definition, “The Breadth of the Laws” included the *Corpus Iuris Civilis*, the various didactic materials of the *antecessores* and *scholastikoi* as well as post-Justinianic legislation. It is possible that private legal collections of the period may have also fallen in this category in certain cases.\(^{32}\) With regard to the various didactic materials available to Byzantine jurists, H.J. Scheltema has stated that the essential clash of legal authority in the Byzantine Empire was not between imperial and provincial law (*à la* Mitteis’ dichotomy between *Reichsrecht* and *Volksrecht*),\(^{33}\) but rather between didactic juristic writings and valid law.\(^{34}\) This rather expansive definition of valid law is the one employed in this study. Moreover, as shall be demonstrated in the coming chapters, in addition to formal laws Byzantine jurists derived legal paradigms from a variety of non-legal sources.\(^{35}\)

**IV. Conclusion**

This very brief introduction to the economic, legal-administrative and political context of the Byzantine Empire under the Macedonian dynasty is intended mostly as a necessary overview

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\(^{31}\) It has also been argued that “The Breadth of the Laws” referred to a standardized Greek translation of the *CIC*, based on the *indices* (translations and paraphrases) of the *antecessores*, at least until the end of the ninth century; see Juan Signes Codoñer and Francisco Javier Andrés Santos, *La introducción al derecho (eisagoge) del patriarca Focio*, Nueva Roma 28 (Madrid: Consejo Superior des Investigaciones Científicas, 2007), pp. 246-67. This represents the most complete discussion of the *πλάτος τῶν νόμων*. Signes Codoñer and Andrés Santos do not however (quite understandably given the scope of the book, which is mainly concerned with the *Eisagoge*, nor do they pretend to present a complete discussion, [p. 246]) discuss how the term is used in sources which are analyzed in this study, particularly the *Peira* and the *Edicts* of the Patriarch Alexios Stoudites.

\(^{32}\) See Ch. 5.

\(^{33}\) For a discussion of Mitteis and the dichotomy of *Reichsrecht/Volksrecht*, see Ch. 5, section I.


\(^{35}\) See in particular Ch. 2.
for the non-specialist reader in preparation for reading the rest of the study. Each of the following chapters can be read in isolation from the others, although of course these chapters inform one another considerably.
Chapter One

Anakatharsis tōn palaiōn nomōn: The “Recleansing of the Ancient Laws” under Basil I and Leo VI

I. Introduction

The subject of this study, Byzantine Legal Culture, was framed by a number of important influences: the tradition of Roman law, the precepts of Orthodox Christianity and the customs of the Byzantine aristocracy. Of course, these three factors were influential throughout Byzantine history, not just during Macedonian rule. Nevertheless, the Macedonian dynasty, perhaps more than any other in Byzantine history, employed law and particularly legal reform as a means of legitimation. Although all Byzantine emperors recognized that the maintenance of the law and the legal order was an imperial prerogative and duty,¹ the first two emperors of the Macedonian dynasty, Basil I (r. 867-86) and Leo VI (r. 886-912) chose to present legal reform, particularly the codification project which would eventually culminate in the completion of the Sixty Books/Basilika, as one of the principal achievements of their reigns.²

This chapter will demonstrate that the recapitulation of Justinianic law was a component of a larger political program directed at the recovery of “Romaness” or Romanitas in the face of new threats to imperial legitimacy, represented in the West by the rising power of the

Carolingians and the Papacy and in the Balkans by the second Bulgarian Empire. While the Arab invasions of the seventh century and nearly-continual warfare with the Umayyad and then ‘Abbāsid Caliphates had resulted in the empire adopting an introspective worldview, which emphasized the Orthodox Christian rather than Roman Imperial portion of the Late Roman political legacy, this trend had abated by the ninth century due to the changing political situation. The Byzantine Empire’s eastern frontier was stabilized under the Macedonian dynasty, but it was confronted now by the Carolingian Empire claiming imperial authority in the West, a series of popes who challenged the Byzantine emperor’s ecumenical leadership, as well as a new Bulgarian state which, by adopting Orthodox Christianity, attempted to supplant Byzantine authority in the Balkans. These three powers from an ideological standpoint presented fundamentally different challenges to Byzantine authority than that of the caliphates. While the latter constituted a rival state with superior resources, neither the Umayyads nor the ‘Abbāsids challenged the Byzantines as heirs to the Late Roman political legacy, choosing instead to lay claim to the philosophical and scientific traditions of Antiquity. The Carolingians and the Bulgarians, by contrast, sought to appropriate certain aspects of the Roman imperial legacy itself, including the title of emperor and much of its attendant symbolism. Tsar Symeon (r. 893-927), who himself was educated in Constantinople and steeped in Byzantine culture, attempted to fuse his Bulgarian realm with the Byzantine Empire. Additionally, the Carolingians and the Papacy

3 A different facet of the Macedonian dynasty’s response to a changing geopolitical situation can be observed in the creation of a new military ideology, heavily influenced by a resurgent Orthodox Christianity, to combat Muslim adversaries during the reign of Leo VI; see Meredith L.D. Riedel, “Fighting the Good Fight: The Taktika of Leo VI and its influence on Byzantine cultural identity” (D.Phil. thesis, University of Oxford, 2010).


could also challenge the *Romanitas* of the Byzantines on linguistic grounds: how, they asked, can you call yourselves Romans when you don’t even speak Latin?

Evidence of this challenge to the *Romanitas* of the Byzantines is especially evident in the sources of the second half of the ninth century. For instance, amidst the controversy of the Photian schism a letter of Pope Nicholas I (858-67) addressed to Michael III (r. 843-67), the predecessor and eventual victim of Basil I, contained a scathing response to the charge that the Greek language was preferable to Latin.\(^7\) Although the letter of Michael III has not survived, apparently he had described Latin as both “barbaric” (*barbaram*) as well as “Scythian” (*Scythicam*).\(^8\) Pope Nicholas, obviously offended by such an assertion, defended the use of Latin and then proceeded to ridicule the absurdity of the Byzantines calling themselves Romans, stating “…if you thus call the Latin language barbarous, because you do not understand it, then keep in mind that it is ridiculous to call yourselves emperors of the Romans and not even know the Roman language.”\(^9\) Continuing in this vein, Pope Nicholas urged Michael to “stop calling yourselves emperors of the Romans, because according to your opinion you are barbarians…the Romans however use this language, which you call barbarian and Scythian.”\(^10\)

A letter of Louis II (r. 876-82) addressed to Basil I, likely written by the bilingual Carolingian intellectual Anastasius Bibliothecarius, also contested the claim to Byzantine *Romanitas* along much the same lines.\(^11\) Writing on behalf of the Carolingian emperor, Anastasius asserted that the Franks were worthier successors of the Roman imperial legacy than the “Graeci” over whom Basil ruled. In an elaborate metaphor, Anastasius reasoned that just as

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\(^7\) *MGH Epistolae*, 8 vols. (Berlin: Apud Weidmannos, 1889-), vol. 6, pp. 454-87.


\(^11\) *MGH Epistolae*, vol. 7, pp. 385-94.
Christians were more worthy of being God’s chosen people than the Jews, the descendants of Abraham, because of their belief in Christ, for the same reason the Franks were worthier heirs of the Roman imperial legacy than the Byzantines: “therefore we have undertaken the office of the Roman imperium because of our good belief, *orthodosia*; the Greeks, because of their *kacodosia*, that is bad belief, have ceased to be Roman emperors, deserting the only city and capital of the empire, but also utterly parting with both the Roman people and the very Roman language, and transplanting themselves to another city, capital, people and language in all respects.”

Additionally, Basil had claimed in his letter, now lost, that the title of emperor (Gr. *basileus*, Lat. *rex*) was reserved for the Byzantine emperor alone. However, “*rex*” had apparently been rendered “*rix*” in his letter, a source of great amusement to Anastasius.

As Marie Theres Fögen has likewise emphasized, these two letters, which contain respectively papal and Carolingian attempts to undercut Byzantine *Romanitas*, definitely shaped, and indeed probably in some respects were a cause of, the “Recleansing of the Ancient Laws” undertaken by the Macedonian dynasty. In her view “[t]he reanimation of Roman law in the time of the Emperor Basil I and the Patriarch Photios looks like the answer to Nicholas’s letter, an attempt to regain the mighty symbol of Roman power and to demonstrate that the Byzantines were still and forever true Romans.” The “Recleansing of the Ancient Laws” was, therefore, as much an exercise in reasserting the Roman identity of the Byzantine Empire under the Macedonian dynasty as it was a more practical matter of reforming the legal system. One cannot

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separate the “Recleansing of the Ancient Laws” from the wider political and social context—it cannot simply be seen as a “correction” of a flawed legal system, but rather a hearkening to the power and glory of the Justinianic age. This chapter will examine in detail the legal reforms of the first two Macedonian emperors, Basil I and Leo VI, and the results of their codification projects: the Prochiron, the Eisagoge, and the Sixty Books. The novels of the most prolific legislator after the emperor Justinian, Leo VI, will then be discussed. The intent of these novels has long been the subject of debate in the secondary literature. Finally, the proem to the Epitome will be presented as the apogee of the effort to link the Macedonian dynasty with the Roman past, not only in its Imperial but also its Republican iteration.

II. The Prochiron

Before the examination of the Macedonian codification effort begins, it is necessary to briefly examine the texts which constituted the written law on the eve of the reign of Basil I. Unfortunately such an excursus is brief by necessity, since there is an appalling paucity of evidence as to how the law was interpreted and applied before the advent of the Macedonian

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dynasty: there are no casebooks (such as the *Peira* for the eleventh century) and no monastic records, which appear only slightly later, particularly from Mt. Athos.

As far as we can ascertain the Justinianic corpus of Roman law was still valid. However, it could be used only with great difficulty even in the capital, and even then largely through the medium of translations and commentaries into Greek made by the *antecessores*. From the *Ecloga*, the law-book promulgated by Leo III (r. 717-41) and Constantine V (r. 741-75) in 741, we learn that in the provinces the Justinianic corpus was nearly impossible to use. This may have led to the use of the so-called *leges speciales*, such as the *Nomos Georgikos* and *Nomos Mosaikos*, which did not presuppose an extensive knowledge of Roman law. In any case, there was by the time of the Macedonian dynasty a pressing need for the presentation of Justinianic law in a new format.

The impetus for the codification, or more precisely the recapitulation process begun by Basil I, is given in the *Vita Basilii*:

Upon finding that the secular laws contained much obscurity and confusion because of the juxtaposition of good as well as wicked laws, that is the indistinguishable and joint listing of valid and abrogated [laws], he fittingly corrected them according to what was suitable and what was possible, by removing the uselessness of the abrogated [laws] and recleansing the multitude of the valid [laws], and by placing the former infinity [of the laws] in chapters, just as in a summary, so that they could be remembered easily.

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18 See Ch. 4.
19 *Ecloga*, proem., lines 36-40: “…[The emperors] being mindful that the matters legislated by previous emperors are written in many books and that knowing their intent is difficult to understand, and for some quite indiscernible, especially for those outside of this divinely-protected and queenly city of ours [Constantinople]… (…ἐν πολλαῖστι τῷ Βίβλῳ τῶν προβεβασιλευκότων νενομοθετημένων γεγραφαί γνώσκοντες καὶ τοῖς μὲν δυσδιάγνωστοι τῶν ἐν αὐτοῖς περιεχόμενοι νοῦν, τοῖς δὲ καὶ παντελῶς ἀδιάγνωστον, καὶ μάλιστα τοῖς ἐξ ἀυτῆς καὶ ἀναγραφῆς ἠμῶν πόλεως εἰδότες τυγχάνοντα…).”
20 See Ch. 5.
22 *Vita Basilii*, §33: “Εὑρὼν δὲ καὶ τοῖς πολιτικοῖς νόμοις πολλὴν ἀσάφειαν καὶ σύγχυσιν ἔχοντας διὰ τὴν ἄγαθον ὁσπερ καὶ πονηρὸν συνανατροφῆν, ἔγι ζῆν τὴν τῶν ἀνηρμένων καὶ πολεμισμένων ἀδιάκριτος καὶ κοινὴν ἀναγραφῆ, καὶ τούτως κατὰ τὸ προσῆκον καὶ ἐνδεχόμενον προσφόροις ἐπηνισθώσατο, τὴν τῶν ἀνηρμένων...”
Although one might be tempted to attribute some of the information in the passage to topos, especially the topos of a legal reformer finding the laws in a state of confusion, the description does not conflict with what we know about the state of the secular laws at the start of the Macedonian dynasty. The Justinianic corpus was indeed massive and did contain much legislation that was no longer used. Interestingly, this passage from the *Vita Basilii* does not mention the *Ecloga*, the ostensible target of the attack in the *Prochiron* according to most scholars. The passage need not refer to either the *Prochiron* or the *Eisagoge*, but instead to the codification effort in general.

According to the traditional dating schema the first text published as part of the Macedonian codification effort was the *Procheiros Nomos* (*ho procheiros nomos* /“The Law Ready at Hand”); it is referred to as the *Prochiron* in much of the secondary literature. For a long time in the secondary scholarship it was believed to have been published during the “reign of the three emperors”, that is, Basil along with his sons Constantine and Leo (870-9). However, this view was challenged by Andreas Schminck in his *Studien zu mittelbyzantinischen Rechtsbüchern*. Schminck argued that the *Prochiron* postdated rather than predated the *Eisagoge*, and that the unnamed work which is attacked in the proem of the *Prochiron* was the *Eisagoge* and not the *Ecloga*, as most scholars had assumed. Among the reasons for this,

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23 The same topos of “correction” (ἐπανόρθωσις) is used, for instance, in both the proem to the *Ecloga* as well as the eleventh-century *Novella constitutio*; in general see Hunger, pp. 103-9.
according to Schminck, was that the *Eisagoge*, generally believed to have been authored by the Patriarch Photios, contains rather expansive views on the role of the patriarch and his relationship to the emperor.\(^{27}\) Thus while the emperor was defined as “lawful authority, and a common good to all his subjects”\(^{28}\), the patriarch was a “living and animate body of Christ, imprinting the truth by his deeds and words.”\(^{29}\) Schminck thus believed that Photios was attempting to raise the office of the patriarch over that of the emperor.\(^{30}\) Whatever its purpose, it is probably the most powerful statement of the patriarch’s power in the Middle Byzantine period. As Gilbert Dagron succinctly put it, the position of the patriarch in the *Eisagoge* is that of “…un Nouveau Moïse et un Nouveau Melchisédech.”\(^{31}\) Additionally, Schminck argued that the name Basil had been interpolated by Leo into the rubrics of the *Prochiron* manuscripts in order to give the work greater authority. Schminck’s dating of the *Prochiron* was challenged by van Bochove, who upheld the traditional dating of the *Prochiron*.\(^{32}\) Van Bochove subordinated the other relevant issues discussed by Schminck, such as the dynastic aspirations of Basil and Leo, to the question of the rubrics, and maintained strongly that the presence of Basil’s name was genuine and not an interpolation. The most recent examination of the authorship and dating of the *Prochiron* and *Eisagoge*, that of Signes Codoñer and Andrés Santos, for the most part maintains


\(^{28}\) *Eisagoge* 2.1: “Βασιλεύς ἐστὶν ἄνωμος ἐπιστασία, κοινὸν ἁγιάθον πάσι τοῖς υπηρετοῦσι…”

\(^{29}\) *Eisagoge* 3.1: “Πατριάρχης ἐστὶν εἰκόνα ἁριστός καὶ ἐκμορφὸς, δι’ ἐργῶν καὶ λόγων χαρακτηρίζομαι τὴν ἀλήθεια.”

\(^{30}\) See also Schminck’s attempt to link Photios’ conception of the relationship between emperor and patriarch with contemporaneous mosaics in Hagia Sophia; see *idem*, “‘Rota tu volubilis.’ Kaisermacht und Patriarchenmacht in Mosaiken” in Ludwig Burgmann, Marie Theres Fögen and Andreas Schminck (eds.), *Cupido legum* (Frankfurt: Löwenklau Gesellschaft, 1985), pp. 211-34.

\(^{31}\) Dagron, p. 238.

\(^{32}\) Th. E. van Bochove, *To Date and Not To Date: On the date and status of Byzantine law books* (Groningen: Egbert Forstein, 1996), pp. 29-56.
the traditional dating. Affirming Photian authorship, Signes Codoñer and Andrés Santos argue that the *Prochiron* was promulgated in the period 870-9 and was then revised after the death of Leo VI during the second decade of the tenth century, while the *Eisagoge* was written by Photios between 880 and 888 as a revision of the *Prochiron*.

An examination of the proem of the *Prochiron* illuminates some of the relevant issues with regard to its dating. The first thirty-two lines of the proem contain a number of commonplaces in Byzantine legal texts, supported by Biblical citations. Justice is the best means by which a ruler can give benefit to his subjects and by which they are uplifted. Law has been given by God to humankind as an aid. While attempting to implement the divine injunctions for justice, the emperors undertook the present work. However, they realized that a comprehensive law-book would be almost boundless. The character of the work is further elaborated upon in the following lines. Much of the law was clarified, while other portions were deemed worthy of proper correction; other regulations were passed over in silence. The didactic purpose of the work is then emphasized: “Since instruction [in the law] is necessary for all, what should we have intended, in order to put away men’s hesitation and to make instruction in the law easy to comprehend? Nothing other than to closely examine the mass of the legal writings and to select together that which is most necessary and important and to write them up by chapter in this law ready-at-hand, without omitting almost anything, which most ought to have knowledge of.”

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33 Signes Codoñer and Andrés Santos, pp. 160-278; in support of Photian authorship, *ibid.*, pp. 147-60.
34 *Prochiron*, proem, lines 9-10: “ὦν πάντων ἐστὶ πρῶτον καὶ μέσητον ἡ δικαιοσύνη, δι’ ἑς καὶ ἔθνος ἀνυψώνται κατὰ τὸν σωφὸν Ἑλεφόντην. Φησὶ γὰρ: Ἑλεφόντην ὑψοὶ ἔθνος’…”
35 *Prochiron*, proem, lines 26-7: “‘Δικαιοσύνη’ δὲ φημι, ἡτὶς καὶ διὰ νόμου θεόθεν τοῖς ἀνθρώποις δεδώρηται, ὡς φησιν ὁ αὐτὸς Ἡσαΐας: ‘Νόμον γὰρ εἰς βοήθειαν ἔδωκεν.’”
36 *Prochiron*, proem, lines 33-41.
37 *Prochiron*, proem, lines 42-5.
38 *Prochiron*, proem, lines 45-51: “Καὶ ἔπειδὴ ἡ τούτων διδασκαλία τοῖς πᾶσιν ἀναγκαία ὑπάρχει, τί ἄν ἐπινοήσαμεν, ὅτι καὶ τῶν ἀνθρώπων τὸν ἄκοιν ἀποθέσαται καὶ τὴν τῶν νόμων διδασκαλίαν εὐληπτὸν ποιήσαι; Οὐδὲν ἔτερον ἢ ἐγκύωσι εἰς τὸ πλήθος τῆς γραφῆς τῶν νόμων καὶ εἰς ἑκάστου βιβλίου τὰ ἀναγκαία καὶ χρειώδη καὶ συγχροὸς ξηροῦμενα ἀναλέξασθαι καὶ τάτα κεφαλαιῶδες ἐν τῷ τοῦ προχείρο νόμῳ ἐγγράψασθαι, μὴ παραλύποντες σχεδὸν, ὅσα τοῖς πολλοῖς ἐν γνώσει καθίσταται δίκαιον.”
Perhaps with the didactic purpose of the work in mind, terms in Latin were rendered into Greek, therefore creating what are known as *exellēnismoi* in the secondary literature.\(^{39}\) Although the vast majority of the *Prochiron* is based on the Justinianic corpus, the proem also states that in areas where there existed no law, new constitutions were introduced.\(^{40}\) All told, the *Prochiron* constituted 40 titles. In a reference to the ongoing codification effort, the proem then states that if someone needs to find a solution to a problem which is not found in the *Prochiron*, then he must diligently search through “the breadth of the law recently recleansed by us (ἐν τῷ παρ’ ἡμῶν ἁρτίως ἀνακεκαθαρμένῳ τοῦ νόμου πλάτει).”\(^{41}\) All Justinianic law which remained valid was to be found in sixty books, while the abrogated portion was to be found in a single volume, “so that its clear and manifest lack of validity would be known to all (ὡς ἂν δήλη καὶ σαφῆς ἢ τούτων ἁργία πᾶσι γνωρίζοιτο).”\(^{42}\)

The attack on previous legislators in the proem of the *Prochiron* is crucial for determining the dating of the work. It is given in full below:

Since those before us undertook something similar in this way, one might say, why were we not content with that summary and instead proceeded to introduce a second. It is necessary to know, that the so-called “handbook” constituted not so much a selection as an overturning of good legislation according to the will of the redactor, which was not of benefit to the state, and his caution was senseless. For why would someone of sound mind think it just to remember a law which effects so great an overthrow of legislation piously written by many emperors and teachers, both reverent and great, who instituted reverence for the law to a greater degree? For one who accepts such a law shall be shamed by pride against the earlier pious legislators rather than receiving instruction. For this reason the earlier handbook was untouchable even by those before us, not the whole thing however entirely so, but rather that part that should have been. And that which has been recently redacted and put together by us is intended for the support of good legislation and the facilitation of knowing it.\(^{43}\)

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\(^{39}\) *Prochiron*, proem, lines 52-3.

\(^{40}\) *Prochiron*, proem, lines 57-9.

\(^{41}\) *Prochiron*, proem, lines 59-62.

\(^{42}\) *Prochiron*, proem, lines 77-83.

\(^{43}\) *Prochiron*, proem, lines 63-76: “Εἰπειδῆ δὲ καὶ τοῖς πρὸ ἡμῶν τινι τοιούτων τι γέγονε, φαϊη τις ἂν ἰσως, ὅτου δὴ χάριν οὐκ ἐν ἐκείνῃ τῇ συντομίᾳ σχολήν ἠγοντες μή πρὸς δευτέραν ἐκλογήν ἐληλυθέναι ἡμᾶς ἑφήν. Εἰδέναι χρή, ὡς οὐκ ἐκλογή μᾶλλον ἢ ἀνατροπῆς ὀ καλούμενος «ἐγχειρίδιος» καθίστατο τῶν καλῶς νομοθετηθέντων κατὰ βούλησιν
The dating of the Prochiron and Eisagoge thus partially hinges upon the object of the proem’s attack: does it, as Schminck argues, refer to the Eisagoge,\textsuperscript{44} or does it instead reference the Ecloga, as was assumed by scholars before Schminck and defended by van Bochove?\textsuperscript{45} The Eisagoge also mentions the legislation of the Isaurians.\textsuperscript{46} Both theories certainly have their merits: one cannot argue, for instance, for an identification of the aforementioned “handbook” with the Ecloga purely on linguistic grounds, as the term is used for other law-books of the Macedonian period.\textsuperscript{47} Unfortunately, space does not permit an exhaustive treatment of the dating issues at stake, which as Schminck and van Bochove have proven, is deserving of a monograph of its own. In this dissertation both the Schminckian (907) and traditional (870-9) dating of the Prochiron will be noted.

More relevant to the present study is the relation of the Prochiron to the general Macedonian codification effort: what was the purpose of the work? According to the preface, the Prochiron’s function was primarily didactic—it constituted the absolute minimum amount of law which an unspecified group of people was required to know. Based on the relevant provisions in the Book of the Eparch, it was intended for, among other groups, the corporation of notaries in Constantinople. It should be noted here that by no means did the Prochiron represent the minimum familiarity with the law which any legal functionary was required to have—mid-level legal officials like thematic judges, for instance, were primarily administrators who were

\textsuperscript{44} Schminck, Studien, pp. 63ff.
\textsuperscript{45} Van Bochove, To Date and Not to Date, pp. 57-81.
\textsuperscript{46} Eisagoge, proem, lines 33-6.
\textsuperscript{47} Schminck, Studien, p. 64.
not necessarily expected to have a legal background, much as in the Late Roman context. At the same time many thematic judges would have been themselves notaries at an earlier stage in their careers.

Intertwined of course with the practical intent of the Prochiron as a didactic handbook is the underlying political theme of the text found in the proem of the Prochiron. Related to the Macedonian codification effort, this is the reappropriation of Roman (i.e. Justinianic) law, and thus an important part of the Late Roman heritage, by honoring the “legislation piously written by many emperors and teachers, both reverent and great.” The primary fault of the “handbook” mentioned in the proem was not that it did in fact constitute a selection (eklogē) of past legislation so much as an overthrow (anatropē) of this same legislation. Therefore the users of such a handbook were guilty of pride (hybris) against these emperors and teachers, rather than receiving instruction (didaskalia).

In the Prochiron are found all of the hallmarks of the Macedonian “Recleansing of the Ancient Laws.” On a practical level, the Prochiron was to improve the clarity and instruction of the law. From a political standpoint, the creation of the Prochiron was part of the Macedonian dynasty’s reappropriation of Romanitas; by excerpting the laws of past emperors and teachers, the creators of the Prochiron were in effect cementing the continuity of the Macedonian emperors with their pious predecessors. As shall be demonstrated with other proems from the Middle Byzantine period as well as the Novels of Leo VI, the Prochiron is a point of departure whereby the rationale for the law became more integrated within the tradition of Roman law rather than in Biblical and particularly Old Testament terms.
III. The *Eisagoge*

Traditionally the second recapitulation of Justinianic law issued by the Macedonian dynasty is the *Eisagoge*, a shortened form of Εἰσαγωγὴ τοῦ νόμου (“introduction to the law”), incorrectly referred to within older literature as the *Epanagoge* (“return [to the law]”).\(^{48}\) Schminck dated the work to 886, while van Bochove dated its promulgation to the beginning of the period 880-3.\(^{49}\) Signes Codoñer and Andrés Santos, who thoroughly compare Schminck’s and van Bochove’s arguments in favor of their respective datings, surmise that it was authored by Photios between 880 and 888.\(^{50}\) The work, or at least the proem and titles two and three, is generally assumed to have been authored by the polymath Patriarch Photios. As is the case with the *Prochiron*, an examination of the proem of the *Eisagoge* highlights the impetus behind the creation of the text and its role in the Macedonian codification process.\(^{51}\)

In contrast to other proems from the Middle Byzantine period, such as the *Ecloga* and *Prochiron*, the rationale and justification for law is strongly philosophical; indeed Biblical justification for the law, which is such a strong component in other proems, is completely absent from the proem to the *Eisagoge*. The value of the present work, Photios states, is proven by its “most holy nobility (ἡ ἁγιωτάτη εὐγένεια).”\(^{52}\) Even in these first lines, the Macedonian dynasty’s underlying goal to reaffirm the Byzantine Empire’s connection with its Late Roman past is affirmed—the validity of the work lies not *ipso facto* in its utility, but rather in its lineage, as a correct recapitulation of the ancient laws. Photios continues by explaining the divine origin of the law, in strongly Platonic rather than Biblical terms. God is here described as the “ruler and steward of all good things (ὁ τῶν ἁγαθῶν πρῶταν καὶ ταμιοῦχος)” who gave man a mixed

\(^{49}\) van Bochove, *To Date and Not To Date*, pp. 1-27.
\(^{50}\) Signes Codoñer and Andrés Santos, pp. 160-278.
\(^{52}\) *Eisagoge*, proem, lines 5-7.
constitution composed of two opposing and antithetical natures, the “knowable” (noēta) and “perceptible” (aisthēta). He introduced the “good law” to restrain and order his condition. God did this, according to Photios, not so that one would suppose that these natures were separated and delineated within their own boundaries by one source or another, but rather so that he would recognize that that their one source, God, is good and not wicked. God gave the “good law” to teach man that God had banished the impiety of the sacrilegious “Manicheans”—clearly a reference to the iconoclastic emperors—and introduced the power of the uniform monarchy. God did not intend this monarchy to be embodied in any one person, but rather three aspects: the knowable, the perceptible, and the law, which binds and holds them together, in imitation of the Trinity. The content of these opening lines of the Eisagoge mirrors the Prochiron’s narrative of a re-establishment of legitimate, law-abiding and divine governance after a period of misrule.

The means by which the new dynasty sought to reestablish the law are related in the next lines. First they “recleansed everything remaining in the breadth of the ancient laws, and mixed the mass of the law clearly and purely into forty books like a divine draught.” The mass of ancient laws did not include the Ecloga of the Isaurian emperors; Photios narrates that “now we have cast out and ripped away entirely the nonsense promulgated by the Isaurians in opposition to the aforementioned divine dogma and in the undercutting of the preserved laws…” Unlike the Prochiron, the Eisagoge appears to have been given the force of law. The legitimacy of the

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53 Eisagoge, proem, lines 7-12.
54 Eisagoge, proem, lines 13-6.
55 Eisagoge, proem, lines 17-23.
56 Eisagoge, proem, lines 23-7.
57 Eisagoge, proem, lines 31-3: “Καὶ πρῶτον μὲν τὰ ἐν πλάτει τῶν παλαιῶν νόμων κέιμενα πάντα ἀνακαθάρασα, ἐν τεσσαράκοντα βιβλίοις ἀθόλωτον καὶ ἀνόθετον τὸ πᾶν χῦμα τοῦ νόμου ὡς πῶμα θείον ὑμῖν ἐκέρασεν.”
58 Eisagoge, proem, lines 33-6: “νῦν δὲ τὰς ἐπὶ ἐναντίωσε τοῦ εἰρήμενον θείου δόγμας καὶ ἐπὶ καταλύσει τῶν σωστικῶν νόμων παρὰ τῶν Ἰσαύρων φληγναρίας ἐκτεθείσας πάντῃ ἀποβαλομένη καὶ ἀπορρίψασα…”
59 Schminck, pp. 73-4; Eisagoge, proem, lines 41-2: “Καὶ τοῦτον τὸν νόμον αὐτοκρατορικὸς τε καὶ παντοκρατορικός πάντων τῶν ὑπὸ τὴν ἐξουσίαν ἤμων πιστῶν ἀνδρῶν κρατεῖν κελεύμεν.” Signes Codoñer and Andrés Santos, pp. 165-82, by contrast argue that the Eisagoge was not in fact promulgated, a conclusion they base mainly on the limited number of Eisagoge manuscripts.
Isaurians is questioned further in a section which questions the rule of unorthodox emperors; “therefore the emperor is descended also from emperors, who did not [merely] become emperors, but who were remembered and praised for their orthodoxy and justice.”

The narrative presented by the *Eisagoge* outlines in brief the ideology behind the Macedonian codification project. Photios presents the law in powerful neo-Platonic terms: God, as Demiurge, gave law to humankind as a way of ordering its two natures, that of the knowable and the perceptible. Together, the knowable, the perceptible and the law constitute the three aspects of the uniform monarchy, corresponding to the three emperors (Basil, Constantine and Leo) mentioned in the rubric. The Isaurians represented a terrible caesura in imperial history: their laws were anathema and they were guilty of separating humankind’s two natures. The *Eisagoge*, the result of a recleansing of the ancient laws, is given the force of law by the new dynasty: this corresponds to the neo-Platonic “good law” in the text, the law which was given by God to aid humankind. Although there are strong elements of continuity, it is important to note that Photios presents the Macedonian dynasty as representing a distinctly new type of governance; God “has introduced the lordship and power of one rule and unitary monarchy.”

The Macedonian dynasty is thus innovative and traditional at the same time—past emperors are honored for their orthodoxy and justice, the ancient laws are purified, but these activities are subordinated to a very new political project.

The strongly neo-Platonic overtones of the proem to the *Eisagoge* also play a role in the presentation of the Macedonian dynasty’s codification process. While one could possibly ascribe the neo-Platonic rather than Biblical presentation of the law to the proclivities of Photios himself,

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60 *Eisagoge*, proem, lines 45-6: “διὸ βασιλεὺς καὶ βασιλέων ἐστὶν ἄνεκαθεν, καὶ βασιλέων οὐ τῶν τυχόντων, ἀλλὰ τῶν ἐν ὀρθοδοξίᾳ καὶ δικαιοσύνῃ πάνυ μηνυμονευομένων καὶ ἀδομένων.”

61 *Eisagoge*, proem, lines 22: “...εἰσάγων δὲ τὴν τῆς μιᾶς δεσποτείας καὶ ἐναίας μοναρχίας κυριότητα τε καὶ ἐξουσίαν.”
such a view is undercut by the fact that, whatever Photios’ personal views, he was still writing an officially-promulgated text, or at the very least a text he intended to be promulgated, at the behest of the empire’s rulers. Likewise, viewing the text solely as a legal analogue to the classicizing trend in Byzantine art under culture under the rubric “Macedonian Renaissance” is likewise problematic: at least among officially-promulgated texts, the neo-Platonic overtones of the proem to the *Eisagoge* are exceptional, and are not found in similar texts from the same period like, for instance, the *Novella constitutio* (in which the more traditional Biblical justification of law is utilized). This neo-Platonic presentation of the law, I would suggest, was meant to emphasize a complete break with the Isaurian dynasty, which had employed a very strong Biblical presentation of the law in the proem to the *Ecloga*.

IV. The *Sixty Books* of Leo VI

Moving now to the reign of Leo VI (r. 886-912), the son and successor of Basil I, the Macedonian codification effort reached its climax with the publication of the so-called *Sixty Books*.\(^{62}\) The *Sixty Books* is a term coined by Andreas Schminck to designate the forerunner to the code which would later, in the eleventh century, become known as the *Basilika*.\(^{63}\) Schminck believes that the first use of the term *Basilika* comes from document authored by one John during the reign of the Patriarch Alexios Studites, which is dated to September 1039—probably John Xiphilinos, future patriarch and *nomophylax* of the “law school” founded by Constantine IX Monomachos.\(^{64}\) According to Schminck’s theory, the *Sixty Books* were not exactly the same as the *Basilika* without the accompanying scholia (which were attached in the eleventh century), but actually contained some differences (particularly in Book 60), and that textual witnesses to the

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\(^{63}\) Schminck, “Basilika” in *ODB*, vol. 1, p. 265; *idem*, *Studien*, pp. 24ff.; Trōianos, Οἱ πηγὲς, pp. 185-8.

\(^{64}\) Schminck, *Studien*, pp. 30-2.
Sixty Books can be found in the earliest manuscripts, including the so-called Florilegium Ambrosianum, an early tenth-century anthology of passages taken from all the books of the Basilika. Van Bochove in To Date and Not to Date disputed whether there was any difference between what Schminck designated as the Sixty Books and the Basilika, while at the same time acknowledging that the term Basilika was not the original title Leo used for his sixty-book law code. In this study the term Sixty Books will be used to distinguish Leo’s codification from the Basilika, because even if they did not differ in content it is nonetheless useful to distinguish the Leonian codification, which did not contain the extensive scholia apparatus which was so useful for the interpretation of the Basilika, from the eleventh-century Basilika cum scholiis.

According to Schminck, the Sixty Books were promulgated along with the Novels of Leo VI on Christmas of the year 888. The preface to the Sixty Books, which was not included by the editors in the new Groningen edition of the Basilika, but is accepted by other scholars, including Schminck, as genuine, gives further evidence of the continuing codification process. As a sign of the growing concern to compare and connect the Macedonian codification effort with that of Justinian, the first lines of the proem recounts Justinian’s own legal reforms and lists the various components of the Justinianic corpus: the Digest, Institutes, Codex and Novels. Justinian’s magnum opus, however, was not without its flaws: “thus our Majesty thought that the state of the laws as it has been apportioned to be lacking with regard to both the elimination of the difficulty

65 Schminck, Studien, pp. 53-4.
66 Van Bochove, To Date and Not To Date, pp. 107-39.
67 Van Bochove, To Date and Not To Date, p. 204.
68 Van Bochove, “Some Byzantine Law Books”, pp. 262-6 argues that the term τὰ βασιλικά was used in at least one case before the eleventh century, in the scholia transmitted by cod. Taur. B I 20. This would undercut Schminck’s argument that the term τὰ βασιλικά was used as a noun only starting in the eleventh century. While van Bochove’s argument is interesting, Schminck’s schema remains for the Sixty Books/Basilika, in my opinion, persuasive and cannot be overturned based on scholia in a manuscript which can be dated only on paleographical/codicological grounds.
71 Sixty Books, proem, lines 5-15.
of studying the laws as well as to a clarification of their order.\textsuperscript{72} Towards that goal, all of the useful portions of the law (τὰς πᾶσας τῶν νόμων πραγματείας) were gathered into six volumes.\textsuperscript{73}

The parts of the Justinianic corpus which were not included in this collection, were grouped into two categories: that which was contradictory (πᾶν μὲν ἐναντίον καὶ τὴν χρήσιν) and that which seemed superfluous (ὁ μὴ ἀναγκαῖον, ἀλλὰ περίττὸν ἐδόκει).\textsuperscript{74} The useful matter was divided thematically into sixty books, so that Leo could proudly proclaim “we have offered through our diligence concerning the laws an easy study, and a final answer for any sort of pressing matter, with not a single piece of legislation which bears a correct judgment from the earliest times until the legislation of our Majesty omitted.”\textsuperscript{75}

The proem to the \textit{Sixty Books}, in contrast to the \textit{Prochiron} and \textit{Eisagoge} is much more explicit about the law which is being reworked: it is not merely the “old laws” but the laws of the Emperor Justinian. Furthermore, Justinian’s massive codification is implicitly compared, by juxtaposition, with that of the Macedonian emperors. Whereas emperors from earlier periods, such as Leo III and Constantine V in the \textit{Ecloga}, felt no need to state their affinity with Justinian and to situate their own legal reform efforts with regard to his, this had clearly changed by the end of the ninth/beginning of the tenth century.

\textbf{V. The Novels of Leo VI}

The source \textit{par excellence} for our understanding of the Macedonian codification effort are the novels of the Byzantine emperor who legislated more prolifically than any other since the

\textsuperscript{72} \textit{Sixty Books}, proem, lines 15-7: “Ὁὗτος οὖν ἡ τῶν νόμων ἀπομεμερισμένη οὐσα κατάστασις ἐλλείπειν ἐδοξε τῇ βασιλείᾳ ὑμῶν εἰς τὸ παρελθὼν τῆς τῶν νόμων φιλομαθείας τὴν δυσχέρειαν καὶ εἰς τὸ αὐτήν τάξιν τυχεῖν ἀκριβοῦς.”

\textsuperscript{73} \textit{Sixty Books}, proem, lines 19-20.

\textsuperscript{74} \textit{Sixty Books}, proem, lines 21-4.

\textsuperscript{75} \textit{Sixty Books}, proem, lines 28-31: “…παρέσχομεν τῇ περὶ τοὺς νόμους φιλοπονία ραδίων μὲν τὴν ἐντευξίν, τελείαν δὲ τὴν παντὸς οὐσίνοις ζητουμένοι διάκρισιν, μηδενὸς νομοθετήματος ὀρθὴν φέροντος τὴν ψήφον παραλευσθένος ἢ ηὗ τῶν χρόνων φορᾶς καὶ μέχρι τῆς ἡμῶν βασιλείας τεθεσπισμένων.”
time of Justinian: Leo VI. The Novels of Leo VI are unique in a number of important respects: 1) Rather than the general mentions of omitting laws which were no longer considered useful in the above-mentioned law-books, the Novels specify what particular portions of the Justinianic corpus Leo found objectionable, and sometimes, as shall be shown below, it lead to reworkings in the Basilika; 2) The Novels take great pains to reconcile secular with canon law, and are important for our understanding as to what degree the Byzantines saw the two as intersecting or overlapping.

For legal historians, the Novels of Leo VI have long been assumed to have had a minimal impact on Byzantine society. Jean-Anselme-Bernard Montreuil, writing in the middle of the nineteenth century, asserted that “…ces Novelles n’ont eu dans la législation d’Orient qu’une autorité très secondaire, sans influence sur les principes généraux du droit.” The manuscript tradition of the Novels confirms this assumption, as the collection of the 113 Novels was dispersed shortly after its promulgation. The testimony of Michael Attaleiates would tend to confirm the limited impact of the Novels, as he states in his Legal Textbook that: “The blessed lord Emperor Leo issued many novels, but they were not in use, expecting only those which were written without other laws already existing, or which were a supplement to the novels enacted by Justinian.” Only one of Leo’s Novels, Novel 71, is included in the Basilika. A brief history of Roman/Byzantine law edited by Andreas Schminck which was perhaps authored around the year

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76 Note that the edition of the Novels cited in this study is the new edition of Tröianos, which it is based primarily on the edition of P. Noailles and A. Dain, although with some corrections and in comparison with Zachariä von Lingenthal’s older edition. See Novels of Leo VI, p. 39.
79 Van der Wal and Lokin, p. 86.
80 Legal Textbook, p. 491: “Ο δὲ μακαρίτης βασιλεὺς χύρις ΛΕΩΝ νεαρὰς μὲν ἐκτέθεικε πολλάς, οὐκ ἐκράτησαν δὲ, εἰ μὴ μόνα, ἀτίτης ἐτάραν νόμων μὴ ὑπόντων ἐγράφησαν, ἢ εἰς προσθήκην τῶν παραλειπθέντων ταῖς νεαρὰς τοῦ Ἰουστινιανοῦ ἐγένοντο.”
81 Bas. 58.11.16
1080 likewise notes that few of Leo’s *Novels* were actually in use, with the exception of his novels concerning distances between fishing nets, a new house and a field boundary, as well as regulations for houses in Constantinople.\footnote{Andreas Schminck, “Ein rechtshistorischer ‘Traktat’”, *FM* 9 (1993): pp. 81-96. For the dating, see pp. 93-5; authorship, pp. 95-6. Lines 61-4: “Such was the state of affairs, until the sixty imperial books came into being. For [the emperor] united the 50 books of the *Digest*, the 12 books of the *Codex* and the *Novels* of Justinian, and there were 60 books. Lord Leon also composed 120 novels, but they are not all in use. Valid however is that which concerns [the distances between] fishing nets and pieces of land. (Καὶ ταῦτα μὲν, ἐδοξάσθη τὰ ζ’ βασιλικά βιβλία· καὶ γὰρ συνήνωσε τὰ πενήντα τὸν διεστόν, τὰ δώδεκα τὸν κωδίκιον καὶ τὰς νεαρὰς τοῦ Ἰουστινιανοῦ, καὶ ἐγένοντο βιβλία ἐξήκοντα. Ἐποίησε καὶ ὁ κύριος Λέων νεαρὰς ρκ’, οὗ πᾶσαι δὲ πολλαπλασιάζονται. Δόκιμον δὲ ἐστὶ τὸ περί τῶν ἐποχῶν καὶ τῶν ἐξο χωρῶν’.)” *The novels of Leo referenced by the anonymous author of the tract are nos. 71, 102-4 and 113.*}

What legal historians have judged to be the illogical and erratic nature of the laws has reinforced the notion that Leo’s *Novels* were more an academic exercise than a serious attempt at legislation. Henri Monnier, whose posthumously published study of Leo VI’s *Novels* represents the most recent monograph on the subject, wrote that “un long commerce avec les novelles de Léon n’est pas nécessaire pour nous apprendre que Léon n’est pas un bon rédacteur de lois. Il confond l’utile et l’inutile; il croit grandir les choses en exagérant le langage, et dissimule mal sous le cliquetis des mots l’ordinaire pauvreté des idées, *versus inopes rerum.*”\footnote{Henri Monnier, *Les Novelles de Léon le Sage* (Bordeaux: Ferret et Fils, 1923), p. 207.} In a section on the “Logique” of the *Novels*, Monnier concludes by stating “Ayant ainsi repoussé toutes les objections, Léon se flatte que son édit est juste et rationnel. Celui qui, après réflexion, le critiquera, donnera une pauvre idée de son jugement.”\footnote{Monnier, p. 205.} Peter Pieler surmised that from a legal perspective Leo VI only in a few cases solved the problems he presents.\footnote{Pieler, “Νομικὴ φιλολογία”, p. 332.} Maria Theres Fögen, in her comparison of the function of legislation of Justinian I, Leo VI, and the Palaiologoi, found that the *Novels of Leo VI* had a mainly symbolic role.\footnote{Marie Theres Fögen, “Gesetz und Gesetzgebung in Byzanz. Versuch einer Funktionsanalyse”, *Ius commune* 14 (1987): pp. 137-57; analysis of Leo VI’s legislation, pp. 149-53.} Recently, Juan Signes Codoñer has...
underlined the importance of examining the novels in the wider context of Leo’s literary oeuvre.\textsuperscript{87}

The content of the Novels, which treats some admittedly arcane subjects, likewise did little to dispel this notion: some of the topics include adoption by eunuchs (Novel 26), the consumption of blood (Novel 58), the required distance between a newly-constructed house and a field boundary (Novel 71), and the spacing between fishnets (Novel 103).

The raison d’être of the Novels, and its relation to the Macedonian codification effort is most evident in the proem and in Novel 1. Leo compares the laws to doctors, who hinder the coming of maladies and uproot evil.\textsuperscript{88} As is common in human affairs, however, many of the laws had been forgotten or neglected or have become contradictory.\textsuperscript{89} Finding this situation unacceptable, Leo then details how that he will rectify this unfortunate situation. Although the word “recleansing” (\textit{anakatharsis}) is not used, the methods Leo employs to correct the laws are consistent with the \textit{modus operandi} of the Macedonian codification program which has been examined above. First, the mass of laws was submitted to a careful examination, and the laws which were judged “useful” (\textit{lusiteles}) were granted the force of law again by imperial degree.\textsuperscript{90} Those laws which by contrast were considered without benefit were either explicitly derogated

\textsuperscript{87} Juan Signes Codoñer, “Las Novelas de León el Sabio” in Jan H.A. Lokin and Bernard H. Stolte (eds.), \textit{Introduzione al diritto bizantino: Da Giustiniano ai Basilici}, pp. 267-321; pp. 320-1: “De todo ello podemos concluir que las Novelas de León no deben valorarse sólo de acuerdo con los parámetros propios de una obra de derecho, sino como una obra literaria…Con todo, es preciso también considerar las Novelas en el contexto del resto de la producción escrita de León, que forma un \textit{continuum} literario en el que encuentran cabida temas políticos y de gobierno muy diversos, pro no decir la religiosidad misma del gobernante, mediante a procedimientos formales de una gran riqueze y complejidad. Como decía al principio de esta contribución, sería un error limitar nuestro análisis de las Novelas a su aspecto más técnico y jurídico, porque ello supondría malinterpretar la visión del derecho en la sociedad bizantina así como, algo igualmente grave, no hacer justicia a textos de una gran calidad, que fueron transmitidos y copiados durante siglos en buena parte debido a esta circunstancia.”

\textsuperscript{88} \textit{Novels of Leo VI}, proem, lines 10-4.
\textsuperscript{89} \textit{Novels of Leo VI}, proem, lines 14-25.
\textsuperscript{90} \textit{Novels of Leo VI}, proem, lines 26-32.
or were left unmentioned. Finally, customs which seemed reasonable were granted the force of law.

Novel 1 compares Leo’s own efforts at legal reform with those of his illustrious predecessor, Justinian, whom Leo deliberately employed as a legislative model. Like Justinian, Leo issued a new redaction of Roman law along with a collection of novels. Leo himself, however, saw at least one crucial difference between his own legislative work and that of Justinian. He at first praises Justinian for his legal achievements, for “he thus perfectly rendered the dispersed substance of the laws into one body.” However, Leo then criticizes the sixth-century emperor for having sullied the completion of the CIC by later issuing a second redaction of his work, so that “thus Justinian himself was shamed through his own efforts.” This reference is to the Novels of Justinian, which were issued after the completion of the initial codification effort. Thus Leo could present himself to have surpassed Justinian’s legal achievements, at least in this respect.

The actual content of the Novels demonstrates that the Macedonian codification program was not a mere regurgitation of Roman law. The “Recleansing of the Ancient Laws” was both a mimetic and creative act; the new legal regime was substantially like the old one but the Macedonian dynasty presented it as an improvement in certain respects. As mentioned in the introduction to this section, the Novels evidence two major aims: to abrogate the aspects of the Justinianic corpus which Leo found objectionable and to accommodate the post-Chalcedonian canons within the existing synthesis of civil and canon law. The efficacy of the first of these

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91 *Novels of Leo VI*, proem, lines 32-36.
92 *Novels of Leo VI*, proem, lines 36-40.
93 *Novels of Leo VI*, Novel 1, line 22-4: “Καὶ γὰρ οὕτω καλὸς εἰς ἔν σώμα τε ποιησάμενος τὴν καταμερισμένην τῶν νόμων ὑπόστασιν...”
94 *Novels of Leo VI*, Novel 1, lines 33-4: “Τῷ μὲν οὖν οίκεῖῳ καμάτῳ οὕτως αὐτὸς δὴ ἐκατοῦ ὁ Ἰουστινιανὸς ἕλθοβησατο.”
objectives has been extensively analyzed by Marie Theres Fögen, who attempted to ascertain what effect if any Leo’s legislation had on the primary Middle Byzantine law-book, the Basilika.\textsuperscript{96} The working formula of the vast majority of the novels is to begin with an inconsistency or problem in the Justinianic corpus or canon law or both and then to present a solution, via an abrogation or new legislation or both. Generally, Leo is far more critical of past emperors, who are referenced in a general sense, than he is of canon law. It is treated as a given that the divine canons are perfect, “since the holy and divine canons and other acts which govern the priesthood and the ordination of bishops have regulated excellently and most accurately—how could they not have been pronounced accurately when the Divine Intent worked among their authors?”\textsuperscript{97} Leo’s imperial predecessors, by contrast, are by no means immune from critique. Justinian for example, who is only mentioned by name twice in the entire work, is criticized by Leo for having issued one novel which forbade a woman from contracting a second marriage (Nov. 22.16), then issuing another novel (Nov. 117.8) which Leo read (incorrectly) as making certain exceptions to this rule.\textsuperscript{98} Yet even in this context the Late Antique ruler is described as “that Justinian, whose piety and attentiveness toward his subjects honored [his] diadem.”\textsuperscript{99} In total, Fögen found that of the seventy-two novels which criticize the Justinianic corpus, in twenty of the cases Leo’s Novels indisputably led to interpolations in the Basilika.\textsuperscript{100} The comparatively incomplete implementation of Leo’s reforms is ascribed by Fögen to the

\textsuperscript{96} Marie Theres Fögen, “Legislation und Kodifikation des Kaisers Leon VI”, \textit{SG} 3 (1989): pp. 23-35. Note however that Signes Codoñer in a recent article has argued against Fögen’s thesis that the promulgation of Leo’s Novels was connected with the preparation of the Sixty Books/Basilika; see \textit{idem}, “The Corpus of Leo’s Novels. Some suggestions concerning their date and promulgation”, \textit{SG} 8 (2009): pp. 1-34; here pp. 1-8.

\textsuperscript{97} \textit{Novels of Leo VI}, Novel 2, lines 9-12: “Τῶν ἱερῶν καὶ θείων κανόνων τῶν τῶν ἄλλων καὶ ὧν περὶ τῆς ἱερωσύνης καὶ χειροτονίας ἐπισκόπων ἐθεσπισαν ἕως τὸ ἀριστον τε καὶ ἀκριβέστατον ἐκεφαρομηνέσθαι θείας ἐπινοιας ἐν τοῖς φθεγγομένοις ἐνεργοῦσης…” On the attitude toward canon law in Leo’s Novels, see Monnier, pp. 23-30.

\textsuperscript{98} \textit{Novels of Leo VI}, Novel 30; see p. 120 note 2 in \textit{Les novelles de Léon le VI, le Sage}, Noailles, P. and A. Dain (eds. and trans.) (Paris: Société de l’édition de “Les Belles Lettres”, 1944).

\textsuperscript{99} \textit{Novels of Leo VI}, Novel 30, lines 17-8: “Ἰουστινιανός ἔκεινος, οὐ μετὰ τῆς ἑυσεβείας καὶ ἐπὶ τῆς ὑπήκουν φροντίς ἐσέμνυσε τὸ διάδημα…”

realization of later jurists of Leo’s haphazard grasp of Roman law and, more plausibly, the supposition that when faced with the contradictory regulations of various emperors, in this case Justinian and Leo VI, the redactors of the Basilika could freely choose which regulations to adopt and thus often chose those of Justinian over Leo. Thus it is evident that whatever Leo’s competence as a legal scholar, the “Recleansing of the Laws”, of which Leo’s Novels were a component, involved a critical engagement with the Roman legal tradition in its Justinianic iteration.

Although this study is primarily an examination of Byzantine secular law, to a considerable degree canon and secular law were intertwined in the Middle Byzantine period. Leo’s Novels thus had the second principal aim of harmonizing post-Chalcedonian canon law with Byzantine law. Justinian’s Novel 131 gave the canons of the first four ecumenical councils the force of law, but there was no obvious provision within the Justinianic corpus which allowed the incorporation of canons from later councils. Spyros Trōianos has studied the canon law content of Leo’s Novels, and concluded that Leo’s Novels mainly had the effect of validating post-Chalcedonian canons, including Constantinople II (553) and III (680-1), for which no canons were issued until the Council in Trullo (691-2), Nicaea II (784) and the Apostolic Canons, the validity of which was confirmed by the second act of the canons of the Council in Trullo. Leo’s Novels in this instance led to an interpolation in the Basilika when Justinian’s

102 Nov. 131.1: “Sancimus igitur vicem legum obtinere sanctas ecclesiasticas regulas, quae a sanctis quattuor conciliiis expositae sunt aut firmatae, hoc est in Nicaena trecentorum decem et octo et in Constantinopolitana sanctorurn centum quinquaginta patrum et in Epheso Prima, in quo Nestorius est damnatus, et in Calcedone, in quo Eutychis cum Nestorio anathematizatus est. Praedictarum enim quattuor synodorum doigmata sicut sanctas scripturas accipimus et regulas sicut leges servamus.”
Novel 131 was incorporated, so that the three post-Chalcedonian ecumenical councils were also given the authority of law.\textsuperscript{104}

Though a connection between the Macedonian dynasty’s reappropriation of Romanitas and Leo’s efforts to bring canon law into line with more recent councils may appear tenuous at first glance, further examination allows the link to be much more clearly seen. The states that challenged Byzantine claims to the Late Roman Imperial heritage, including the Papacy, the Carolingians and the Bulgarian Empire, differed from the threat of the Arab invaders and Islamic successor polities in that they challenged the emperor’s spiritual leadership of the Christian peoples. The empire’s claim to doctrinal orthodoxy and leadership of the Christian peoples had been undercut, in the view of later writers, by the policies of the Iconoclastic emperors. Part of the Macedonian dynasty’s program of legitimation was to reassert its role as a defender of orthodoxy and rehabilitate the emperor’s spiritual authority. Thus although the Macedonian dynasty’s codification project was primarily a recapitulation of Justinianic law, in the canon law component of Leo’s Novels one can deduce some of the importance which was attached to rehabilitating the spiritual authority of the emperor.

The Isaurian dynasty and its principal law-book, the Ecloga, are not mentioned explicitly by Leo in his Novels.\textsuperscript{105} Novel 20 attacks some of innovations in marriage law found in the Ecloga, claiming that “[r]egulations concerning prenuptial gifts, which seemed good to the

\textsuperscript{104} Bas. 5.3.2: “Θεσπίζομεν τοίνυν τάξιν νόμων ἐπέχειν τοὺς ἁγίους ἐκκλησιαστικοὺς κανόνας τοὺς ὑπὸ τῶν ἁγίων ἔτη συνόδων ἐκπέμποντας ἢ βεβαιωθέντας, τούτους τῆς ἐν Νικαίᾳ τῶν τρικοσίων δέκα καὶ ὡκτὼ πατέρων, καθ’ ἢν Ἀρείος ὁ τῆς μανιας ἐπόνυμος ἀνεθεματίσθη, καὶ τῆς ἐν Κωνσταντινουπόλει τῶν ἁγίων ἐκατόν πεντήκοντα πατέρων, ὡς ὁ πνευματικὸς Μακεδόνιος ἐκστηλιτεύθη, καὶ τῆς ἐν Χαλκηδόνι, καθ’ ἢν Ἀρείος ἐκστηλιτεύθη, ἐκ τῶν ἀνακτών ἡγίων ἑπτάςυνοδῶν ἐκκλησιαστικοὺς κανόνας τοὺς ὑπὸ τῶν ἁγίων ἑπτάςυνοδῶν καθαρὰς τὸ ἅγιον ἔκκλησιας ἀπεκηρύχθηναι· τῶν γὰρ προειρημένων ἁγίων συνόδων τὰ δόγματα καθάπερ τῆς ἁγίας γραφῆς δεχόμεθα καὶ τοὺς κανόνας ὡς νόμους φιλάττομεν,...”

\textsuperscript{105} Monnier, p. 16.
ancients, were overturned by [their] successors.”

Leo goes on to criticize these Eclogian provisions and later in the novel mentions that his father, Basil, overturned Eclogian marriage law with a novel. Yet he praises Eclogian marriage law at another point. Notwithstanding the Isaurian emperors portrayal as despicable heretics by post-Iconoclastic hagiography and historiography, Leo still thought it acceptable to enact some the Ecloga’s provisions. Novel 32 concerns the punishment that should be meted out to adulterers caught in flagrante delicto (τοῦ ἐπ’αὐτοφόρῳ ἀλόντος μοιχοῦ ἢ μοιχαλίδος). In it, Leo mentions a constitution of Constantine I which ordered that adulterers be put to death. Though Leo admits that adultery merits a punishment, in his opinion, no less than that of murder, he finds the aforementioned constitution too harsh. He then orders that a more humane provision (φιλανθρωποτέρα ψήφον, in obvious reference to the Ecloga, which its promulgators touted as a selection of laws “with a more humane tendency” [εἰς τὸ φιλανθρωπότερον]) be enacted later which mandates the amputation of the offender’s nose. Another novel which reduces the number of witnesses required for a will in rural areas from five to three coincides with a provision of the Ecloga, but Leo appears to have been unaware of it.

Overall, the examination in the preceding section has demonstrated the connection between Leo’s Novels and “The Recleansing of the Ancient Laws.” Unlike the law codes which have been examined in this chapter (the Prochiron, the Eisagoge and the Sixty Books), which for

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106 Novels of Leo VI, Novel 20, lines 23-4: “Ἀλλὰ ταῦτα μὲν τοὺς ἀρχαιοτέρους δόξαντα τοὺς μεταγενεστέρους ἀπῆρεσεν.”
107 Novels of Leo VI, Novel 20, lines 54-8.
108 Novels of Leo VI, Novel 110, which says that a wife only has a claim on the property of her deceased husband if her prenuptial possessions have been diminished over the course of the marriage; she must also produce an inventory which lists her pre-nuptial possessions. The novel refers to Ecloga 2.5.
109 Cod. 9.9.29.4: “Sacrilegos autem nuptiarum gladio puniri oportet.”
110 Apparently unknown to Leo was Justinian’s Nov. 134.10, which had already abolished the death penalty for adultery: Noailles and Dain, p. 128, note 1.
111 Ecloga 17.27. The Ecloga tends to proscribe amputation for offences which would have been met with the death penalty under Roman law.
112 Novels of Leo VI, Novel 41; Ecloga 5.8.
the most part represented recapitulations of Justinianic law, Leo’s *Novels* represent an attempt to critically engage with the Middle Byzantine Empire’s Roman legal tradition and to harmonize seeming contradictions and obsolete rules as well as to legitimize post-Chalcedonian canon law. Both of these aims were congruent with the Macedonian Dynasty’s “Recleansing of the Ancient Laws,” which was itself a part of a larger program of dynastic legitimation that included the reappropriation and renewal of *Romanitas*.

VI. The *Epitome (legum)*

The culmination of the Macedonian dynasty’s efforts to reappropriate the Roman past and to place themselves within the arc of Roman history is to be found in the so-called *Epitome (legum)* (“Extract from the laws”).113 Probably first authored in 912-3 before being extensively reworked in 921 during the reign of Romanos I Lekapenos (r. 920-44), the designation *Epitome (legum)* is not supported by the manuscript tradition but is nonetheless overwhelmingly used in the secondary literature.114 The *Epitome* appears to be an expanded version of the *Prochiron*. In adding relevant excerpts from the *CIC*, the author of the *Epitome*, the Symbatios named in the proem (lines 66-7), evidently consulted the writings of the *antecessores* rather than the corresponding passages in the *Sixty Books*.115 Little is known about this Symbatios and “the other pious and righteous men” mentioned in the proem, other than his rank (*prōtospatharios*) and likely ethnic origin (“Symbatios” is a hellenized form of Armenian “Smbat (Սմբատ)”.

References to a jurist by the name of Symbatios are found in later legal texts.116

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113 In general see Christopher M. Moulakis, *Studien zur Epitome Legum* (Munich: A. Schubert, 1963); Pieler, “Νομικὴ φιλολογία”, pp. 348-99; Trōianos, Οἱ πηγὲς, pp. 190-3; van der Waa and Lokin, p. 90; Wenger p. 709.
115 van der Waal and Lokin, p. 90.
The proem of the *Epitome* begins with a typical rationalization for law, before Symbatios states that “I shall give a history of the ancient genesis of [the law], whence it received its beginning and some of the laws the Romans put into effect during particular times.” The *Epitome* thus begins a trend found in later Middle Byzantine law books, which often give some sketch of Roman legal history and present contemporary legal works as successors to Roman antecedents. Symbatios then offers a brief history of Roman law using Digest passages of Gaius and Pomponios, which in his account begins in the time of the Seven Kings and continues through the Republican period. The scope of the history is likewise innovative as it stretches back before even Constantine, and indicates a newfound interest in the pre-Christian phase of the Roman Empire. Later in the proem the story of the Twelve Tables is recounted, and it is perhaps noteworthy that in an age in which the papacy challenged the *Romanitas* of the Byzantines by pointing out that they spoke Greek and not Latin, the Greek origin of Roman law is emphasized. The Twelve Tables, according to Symbatios, were written originally in Greek, before, some say, “a certain Hermodōros, an Ephesian exile in Italy, translated the Twelve Tables from Greek into Latin.” Thus Symbatios, who was probably working exclusively from Greek sources to compile the *Epitome*, underlines that the origins of Roman law were likewise written in the Greek language. Though no direct link need be posited, an emphasis on the Greek origin of Roman law is found in later texts, particularly from the eleventh century.

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118 *Epitome*, proem, lines 8-10: “Ἐνειδηθὲν οὖν ὡς ἐν ἀρχὴν καὶ τίνες τῶν νομικῶν καὶ κατὰ τίνας ἐνομοθέτησαν χρόνους Ῥωμαιοῖς.”
119 For example the Legal Textbook of Michael Attaleiates and the Synopsis legum of Michael Psellos.
121 *Epitome*, proem, lines 29-31: “Φασὶ δὲ τινες Ἐρμοδώρον τινα, Ἐφέσιον, ἐξόριστον όντα ἐν τῇ Ἰταλίᾳ, τὴν μεταφορὰν τοῦ δυοδεκάδελτος ἀπὸ τῆς τῶν Ἑλλήνων μεταφράσαι εἰς τὴν τῶν Ῥωμαιῶν γλώσσαν.”
Symbatios gives a very brief synopsis of law during the Republican period before moving on to the times of Imperial Rome. Like Leo VI, Symbatios describes Justinian’s codification effort which was directed by Tribonian. As in other texts of the Macedonian codification project, the sheer unwieldiness of the laws in their Justinianic redaction is emphasized: “Thus the laws were so extended and multiplied by legislators in their times that they seemed infinite in [their] multitude, and men thought that the advantageous and sweet burden of the law was heavy rather than light and useful.” Symbatios then gives an overview of the codification effort: how Leo VI commissioned the Sixty Books and issued his Novels. The result of the “Recleansing of the Ancient Laws” is the reestablishment of the Roman legal order: “Having related in brief this exercise of the collection of the selection of the law, we have transmitted most of the laws [from] the aforementioned times, in which they were honored and praised.” The legal codification project of the first two Macedonian emperors, Basil I and Leo VI, was thus brought to a successful conclusion—even though the completion of the Basilika with its scholia apparatus would not take place until well into the eleventh century.

VII. Conclusion

This examination of the proems of various texts associated with the Macedonian codification effort (respectively the Prochiron, Eisagoge, Sixty Books and Epitome) along with the Novels of Leo VI has clearly delineated the goals and scope of the Anakatharsis tôn palaiôn nomôn “The Recleansing of the Ancient Laws.” The impetus for the Macedonian codification effort consisted primarily of the need for dynastic, ecumenical and political legitimation in the

123 Epitome, proem, lines 56-8.
124 Epitome, proem, lines 58-61: “Καὶ εἰδὸν οὕτως τῶν νόμων ἐκπεισομένων καὶ ὑπὸ τῶν κατὰ καρπὸς νομοθετῶν πληθυνομένων ὡς ἀπείρως πλῆθει ὅντων, βάρος ἐνομίζετο τοῖς ἰδίοις ὁ χρηστός καὶ ἴδιας ζυγὸς τοῦ νόμου ἢ κούφος καὶ ἑσφέλλος.”
125 Epitome, proem, lines 62-71.
126 Epitome, proem, lines 72-4: “Τούτῳ τὸ προγενάσθαι τοῦ συλλογισμοῦ τῆς ἐκλογῆς τοῦ νόμου ὡς ἱστοριογραφήσαντες ἐν ἑπτῶμῳ, τὰ πλείστα τῶν νόμων τοὺς προεξηγηθῆσαι χρόνος παρεπέμψαμεν, ἐν οἷς καὶ ἐτιμήθησαν καὶ ἑδοξᾶσθησαν.”
face of new powers which challenged the Byzantine Empire’s claim to the legacy of Roman imperial authority. Thus, the codification effort can be seen in large part as the reappropriation of Romanitas.

This effort to reappropriate the past was not, however, merely mimicry. Resurrecting the Roman legal order was both a creative and emulative act. As the Novels of Leo VI in particular demonstrate, the codification effort was legitimate because it was based on Roman law, but it many respects the new Macedonian redactions of primarily Justinianic law were presented as an improvement: more humane and more in line with contemporary canon law. Even the great Justinian was not spared from criticism.

“The Recleansing of the Ancient Laws” is important for our understanding of Middle Byzantine Legal Culture both because it frames the entire period with which this study is concerned and also because the ideological impetus of the Macedonian codification project—the reappropriation of the Roman legal past as a means of legitimizing dynastic, ecumenical and political authority—permeates all the juristic works written during this period as well as what we know of Middle Byzantine jurisprudence. As the rest of this study shall demonstrate, the effort to strengthen the link with the past at the behest of the present was applied not merely to legal compilations which we would call Byzantine rather than Roman, as in texts like the Rhodian Sea-Law or the Farmer’s Law, but also to elements of the Christian, and particularly Old Testament, legal tradition, as is the case with the Nomos Mosaikos.\textsuperscript{127}

\textsuperscript{127} In general see Ch. 5.
Chapter Two

Paradigms of Justice and Jurisprudence within Byzantine Legal Culture

I. Introduction

The greatest contrast between ‘classical’ Roman and Byzantine legal literature lies in the intellectual quality of the legal thinking that speaks from them. With the exception of the Justinianic age, in which Tribonian was the directing genius behind the codification, Byzantine lawyers did not reach the level of legal sophistication of their Roman predecessors. To that extent our interpretation of Byzantine legal literature probably suffers from the difficulty we experience when trying to place ourselves in the position of these Byzantine lawyers, who apparently found it harder to grapple with a Roman legal heritage than, for example, the Italian lawyers of the high Middle Ages. It is not easy to ascertain to what extent they understood and put to good use the rich material at their disposal in, for instance, the Basilica. When dealing with Byzantine law it is probably best to abandon the modern habit of thinking too much of law as a system, an approach advocated in any case by the eclectic way the Byzantines have mostly proceeded in legal questions. At the end of the day, they lacked the legal mind characteristic of the ancient Romans.¹

The passage above, from an entry on legal literature in the Oxford Handbook of Byzantine Studies, encapsulates the evaluation which Byzantine legal literature and Byzantine jurisprudence have received over the past several centuries. Not unlike other literary genres such as poetry and historiography, Byzantine jurisprudence has been continually compared, almost always in a negative light, to its Roman antecedent. In contrast to the perceived rationality of Roman legal thought, previous studies of Middle Byzantine Legal Culture have highlighted first and foremost, its irrationality.² This most conspicuous aspect of Byzantine jurisprudence was

² Dieter Simon, Rechtsfindung am byzantinischen Reichsgericht, Wissenschaft und Gegenwart; Juristische Reihe 4 (Frankfurt: V. Klostermann, 1973), p. 27: “Die Qualität der einzelnen Argumente spielt hierbei zunächst keine Rolle, jedenfalls dann nicht, wenn man Rationalität nicht inhaltlich als Verwendung rationaler Argumente, sondern formal als willkür- und widerspruchsfreie Begründung faßt. Rationale Begründung mit irrationalen Argumenten ist dann kein Widerspruch.” In his study of Byzantine canon law between the fourth and ninth centuries, David Wagschal likewise finds that Byzantine canon law (and much of the literature he cites applies to Byzantine secular law as well)
famously underlined by Dieter Simon in his *Rechtsfindung*, a work which discusses the mode of reasoning employed by Eustathios Rhomaios, a high-ranking judge active during the last quarter of the tenth and first two quarters of the eleventh century. Simon proved, convincingly, that Byzantine judges practiced a style of jurisprudence which suited their Orthodox Christian worldview, in explicit contrast to the modern judge who supposedly reaches a decision without personal bias. Therefore these judges would justify a particular decision with reference both to Roman law as well as to concepts and paradigms outside of the Classical Roman legal tradition, such as notions of Christian clemency, Biblical conceptions of justice, and even anecdotes from the literature of the Byzantine educational curriculum.

Though a considerable amount of time has passed since Simon’s verdict of the *Peira*, his work has not been substantially challenged or revised. Only one monograph, that of Elena Ėmmanuilovna Lipshiǐs, has appeared on Middle Byzantine jurisprudence since the publication of *Rechtsfindung*.³ In this chapter, Simon’s conclusions will first be situated within the narrative of legal-historical scholarship over the last century. An overview of his work on the jurisprudence of the eleventh-century judge Eustathios Rhomaios will serve as an entrée into an examination of the principal features of Middle Byzantine jurisprudence and its role within Byzantine Legal Culture. Having contextualized Simon’s work along with the work of other recent Byzantine historians, this chapter will then expand upon his conclusions in *Rechtsfindung* by using a wide variety of sources to demonstrate that the jurisprudence of Middle Byzantine Legal Culture was indeed permeated by juridical paradigms outside of Roman law, particularly from Orthodox Christianity. Contrary to Simon, who emphasized the essentially rhetorical nature

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of Middle Byzantine jurisprudence, this chapter will demonstrate that the mode of juridical reasoning exemplified by Eustathios Rhomaios represented a discernible “system” of Middle Byzantine jurisprudence. As John Haldon wrote in his study of the seventh-century transformation of Byzantine society, “Byzantine judges worked within a widely respected normative judicial framework only at the most general level. They did not order and interpret their case material within a pre-existing normative system according to which the correct interpretation and the solution to a given problem could be read off. Their activity was seen instead as determined by moral-ethical considerations within a Christian framework, drawing upon the accepted principles of an orthodox culture and the accepted ‘common-sense’ understanding of the society as a whole.”4 This chapter is thus an exploration of the components of this non-normative system.

II. Byzantine Legal Scholarship and the Weberian Paradigm of Qadi Justice

The continental tradition of *Rechtsgeschichte*, an appellation applied to the dominant mode of legal-historical scholarship practiced in Europe in the nineteenth and twentieth centuries, has been mainly characterized within Byzantine legal history by the study of formalist legal source such as law codes, edicts, and commentaries. Much of this literature employs a contrastive methodology between historical and contemporary legal systems. Via this scholarly approach, pre-modern law and legal culture, with its supposed flaws and shortcomings, is compared in a negative light with the logical and rational legal systems of modern democracies.

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The implicit methodological paradigm for Rechtsgeschichte, and hence Simon’s analysis of Byzantine law, is based on Max Weber’s sociological analysis of legal systems.⁵

Writing at the end of the nineteenth and beginning of the twentieth centuries, Weber sought to account for the rise of polities which employ a rational-legal form of authority, particularly the states of Western and Central Europe as well as the United States. According to Weber, there are ideally four systems of legal thought: Formal Irrational Thought, Substantive Irrational Thought, Substantive Rational Thought, and Formal Rational Thought. Formal Irrational Thought comprises a legal order in which disputes are resolved based on “irrational” devices like divine revelation or national phenomena, and no reasoning is given for adjudication. Nonetheless, there are fixed rules for consulting these irrational devices. An example of this form of legal reasoning would be dispute resolution through trial-by-combat. In a legal system based on Substantive Irrational Thought, by contrast, judges practice a jurisprudence which depends not only on legal rules and procedure but also the subjective values and observations of the judge. Weber famously analogized this particular mode of legal reasoning with the way an Islamic judge or qadi arbitrarily adjudicates a case using both the precepts of Islamic law as well as his own personal values and biases. The third of Weber’s ideal legal systems, the one based on Substantive Rational Thought, employs a jurisprudence guided by philosophical principles derived from non-legal sources. The Substantive Rational Thought system is therefore a system of postulates rather than fixed legal rules. An example of this sort of legal system is the rock edicts of the Emperor Asoka, a body of legislation based on Buddhist philosophical principles. Finally, the legal system guided by Formal Rational Thought is based on clearly-written laws

which are applied uniformly to all users of the legal system. Weber associated Formal Rational Thought with the legal systems of modern continental Europe.

Returning to Simon’s conclusions concerning Byzantine jurisprudence, he made a clear contrast between the mode of reasoning employed by Eustathios Rhomaios and his colleagues and that of the modern-day judge. Though Simon does not explicitly employ Weber’s sociological classification of legal systems, this model is clearly used when he examines Middle Byzantine jurisprudence in detail. Since Byzantine judges did not justify their decisions based solely on written laws, but instead on other factors like Christian dispensation (oikonomia), they utilized a legal system based on Substantive Irrational Thought, or “Qadi Justice.” On the other side of Simon’s dichotomy, a modern judge works within a legal system of Formal Rational Thought. This characterization of Middle Byzantine jurisprudence as a form of Qadi Justice is, at least within the confines of continental legal scholarship, ubiquitous.

Another paradigm of thought which clearly influenced modern analyses of Byzantine jurisprudence is that of the German historian of Roman law Franz Wieacker’s dualism of Vulgarismus and Klassizismus. In chronicling the history of these two “styles” of law in Late Antiquity, Wieacker described the Constantinian Revolution and the beginning of the

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Christianization of the late Empire as the apogee of the “vulgar style of law” (*vulgärer Rechtsstil*), which was in part driven by the replacement of classical legal language with a new style of speech which was, in his view, highly rhetorical, vapid and moralizing.\(^9\) To say that Simon employed Wieacker’s dichotomy in *Rechtsfindung* would understate the sophistication of his analysis as well as to ignore the cautious way he refers to it elsewhere,\(^10\) but nonetheless the dichotomy described by Wieacker can still be found in recent evaluations of Byzantine jurisprudence.

**III. The Bases of Byzantine Jurisprudence**

…Byzantine law was in principle a codified system. In such a system the sentence of a judge must be based on one or more passages, ‘articles’, of a code of a law previously issued by the legislator. In other words, the judge needs the authority of the legislator and is unable to ‘create’ law on his own or to build on previous judgements only, so-called ‘precedents’. It is this aspect that distinguishes Anglo-American common law from continental, codified law.\(^11\)

Legal scholars have long classified Middle Byzantine law as a codified system, or a legal system within which the law is applied from a discrete set of written rules. In a general sense this classification is correct. Whatever its deviations from the letter of Roman law, there is no doubt that the grounding for any legal decision was Roman law, at least as it was preserved in the various Macedonian redactions of Justinianic law. As late as the beginning of the twentieth century, legal scholars postulated an essentially uninterrupted continuity of the Roman legal tradition into the Byzantine period. Edwin Hammond Freshfield, a translator of several Byzantine legal collections into English, opined in 1928 that “…I must again remind the student

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\(^9\) Wieacker, p. 45ff.
that there was no break in the continuity of Roman law.”

Likewise, Peter Pieler’s overview of legal literature in the *Hochsprachliche profane Literatur der Byzantiner* stressed the continuity between Roman and Byzantine law: “[n]irgendwo anders als in der Einstellung zum Recht ist die Kontinuität zwischen Rom und Byzanz inniger.” Since that time there have arisen reasons to doubt the strength of this continuity, as shall be shown later in this chapter. Nonetheless, it is important to emphasize that of the examples of jurisprudence which survive from the Middle Byzantine period, almost all decisions or verdicts were framed within the compass of Roman law.

In the scholarship on Byzantine law, the question of the importance of Roman law in Byzantine law has understandably dominated scholarship for centuries, the traditional view being that the Byzantines acted as conservators, albeit at times flawed ones, of the Roman legal tradition. Within the last forty or so years, Byzantine legal historians have taken a more nuanced view of the role of Roman law in Byzantine law and the Byzantine legal system. Bernard Stolte has argued that beneath a Roman legal façade Byzantine law in fact was more fluid than it may seem at first glance: “…reverting to Justinianic law and not having changed the law regularly by legislation need not be a sign of conservatism and immutability of Byzantine society. Moreover, the formal sources will never be able to tell the full story. The problem is that we often have information about the legislation in force, without the means to check how legal

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14 Bernard H. Stolte, “Not new but novel”, p. 268: “The consequences of the origins of Byzantine legal scholarship are twofold. On the one hand interest in Byzantium for its own sake has mostly been secondary to an interest in Byzantium as the repository of Roman law. On the other hand it is precisely this interest for the sake of Roman law that always tended to emphasise the continuous rather than the changing in Byzantine law.”
practice in the wider sense dealt with this legislation.”15 While recognizing that indeed we lack a full corpus of texts to document how the law was enforced during this period, isolated anecdotes offer some clues.

According to some interpretations of Byzantine law, the Basilika, a recapitulation of earlier Justinianic legislation, represented an extensive codified legal system.16 Outside of the Basilika, there existed two other legitimate sources of legal authority: custom and the emperor himself. Within Roman law, custom acquired legal sanction where there existed no written law.17 This principle is stated as follows: “From Ulpian: Longstanding custom takes precedent in place of law in those situations where there is no written [law].”18 A longer passage elaborates: “From Ulpian: Concerning matters where there is no written law, one must observe tradition and custom. Failing this, one must follow what is fitting and appropriate in the matter under investigation. And if none of these [methods] yield a result, then the law which Rome utilizes must be observed. For ancient custom is observed in place of law. Just as the establishment of the law is either written or unwritten, thus also its repeal can come about through law written or unwritten, that is in the case of disuse.”19 In Classical Roman legal thought, the difference between law (Gr. nomos) and custom (Gr. synētheia or ēthos, though ethos also appears often in Byzantine Greek) was between written and unwritten law. As an anonymous scholiast to the Basilika explained, “Law and custom differ in this one respect only: law happens to be written

15 Ibid., pp. 276-7.
16 See Introduction Part II.
18 Bas. 2.1.42: “Οὐλπι. Ἡ μακρὰ συνήθεια ἀντὶ νόμου κρατεῖ ἐν οἷς οὐκ ἦσσεν ἐγγραφος.”
19 Bas. 2.1.41: “Οὐλπι. Περὶ τοῦ ἐγγραφος οὐ κέται νόμος παραφιλάττειν δεῖ τὸ ἔθος καὶ τὴν συνήθειαν· εἰ δὲ καὶ τοῦτο ἐκλείπει, ἀκολουθεῖν δεί τοῖς πλησίαζοι καὶ ἐωικόσι τῷ ζητομένῳ. Εἰ δὲ μήτε ταῦτα εὑρίσκεται, τότε τὸ νόμομον, ὁτινὶ ἡ Ὀρήμη κέρηται, φυλάττειν δεί. Ἡ παλαιὰ συνήθεια ἀντὶ νόμου φυλάττεται. Ὅσπερ ἡ θέσις τοῦ ἢ δι’ ἐγγράφου ἔστιν ἢ ἄγραφος, οὕτω καὶ ἡ ἀνάφεσις αὐτοῦ ἢ δι’ ἐγγράφου γίνεται νόμου ἢ δι’ ἄγραφου, τούτεστι τῆς ἀρχησίας.”
custom, and custom is unwritten law.” Custom continued to play an important role throughout the period of Macedonian rule as well, at least to judge by frequency with which custom was granted the force of law in the legislation of Leo VI and other emperors, but it has recently been argued that the use of custom was attenuated in the ninth and tenth centuries by legislatively-inclined emperors as well as by changing social conditions in the countryside, such as the conflict between the “poor” and “powerful.”

The other main source of legitimate legal authority, indeed the highest authority beneath God himself, was of course the emperor. At the official level, the emperor was not subject to the laws of the Empire, though from the standpoint of moral economy this was not necessarily the case. The extent of imperial control over the written law was stated bluntly as “Whatever pleases the emperor is law…” This power to change the written laws was exercised in the form of edicts, and these edicts or novels often addressed particular abuses of the legal system. The edicts against the “powerful” (dynatoi), enacted by the Macedonian emperors, are an excellent...
example of the corrective power Byzantine emperors exercised upon the legal system. We know that imperial legislation exercised some influence at least in the cases of the Court of the Hippodrome, some of which are documented in the Peira. One case, revolving around the confiscation of property of those who assist in bride-kidnapping, highlights a contradiction between the legislation of Romanos Lekapenos and the Basilika. In this instance, the intent of the emperor is important: whether he meant to exercise authority only in a particular case or meant to apply it to the whole empire. If he had intended his prescriptions as a new law, then the judges reminded the emperor that there already existed provisions concerning those who assisted in bride-kidnapping.

In addition to the written evidence of imperial legislation, one case in the Peira demonstrate the fascinating phenomenon of the oral transmission of imperial precedent. Peira 15.2 states: “The Bestēs [i.e. Eustathios Rhomaios] said, that an owner cannot legally eject

25 This case is discussed and provided with a German translation in Günter Weiss, “Hohe Richter in Konstantinopol. Eustathios Rhomaios und seine Kollegen”, JÖB 22 (1973): 117-43. Peira 61.3: “The Magistros [maintained] that the Emperor Romanos wrote that the possessions of those who assist in bride-kidnapping [Gr. hapargē/Lat. rapiō] are to be confiscated. But the judges answered, that if this was written for his personal power or assertion thereof, it requires no correction. But if he wrote it for the law, his holy majesty ought to recognize the law ordains that the possessions of those who participate in bride-kidnapping and those who aid in the seizure of women shall belong to the women who were attacked. It subjects those who knew about it or those serving them or those who in some way incited them to the bride-kidnapping only to certain penalties, and does not cause their property to be lost (‘Οτι ὁ μάγιστρος γράψαντος τοῦ βασιλέως κυροῦ ρωμανόν ἵνα τῶν συναραμένων πράγματα δημευθῶσιν, ἀντίποιν οἱ δικασταί, ὅτι εἰ μὲν ὡς ἀπὸ ἐξουσίας ἢ ἀποφάσεως γέγραπται, διορθόθεσες οὐ δεῖται· εἰ δὲ πρὸς τὸν νόμον, ὀφειλεῖ γινόσκειν ἢ ἀγία βασιλεία σου τὸν νόμον διοριζόμενον τὰ πράγματα τῶν ἀρπασάντων και βοηθησάντων ἐν τῇ ἄρπαγῇ τῆς διασειστέιας γίνεσθαι τῶν μασθησίων γυνακίων, τοὺς μέντοις συνειδότας ἢ ὑπερτετήσαντας ἢ υποδεξαμένους ἢ οἰκονόμησε σπουδήν τῷ ἄρπαγι συνεισενεγκόντος ποινας μόνας ὑποβάλλεσθαι, οὐ μην καὶ εἰς πράγματα ζημιοῦσθαι.)”
26 On the practice of bride-kidnapping in Byzantine law, see Dēmētrios Delēs, Η ἄρπαγή γυναίκας στο Βυζαντινό δίκαιο, Forschungen zur byzantinischen Rechtsgeschichte 16; Athener Reihe (Athens: Ekdoseis Ant. N. Sakkoula, 2005). The practice of bride-kidnapping was associated with some writers of the period with paganism. For instance, the author of the Russian Primary Chronicle describes some of the customs of some of the Slavic tribes prior to Prince Vladimir’s conversion to Christianity in 988. The Polyanians, who settled Kiev, practiced the custom of delivering the bride to the bridegroom the evening before the dowry was paid. By contrast, the Derevlians “killed one another, ate every impure thing, and there was no marriage among them, but instead they seized maidens by capture.” The author explains that “[s]uch customs were observed by the Krivichians and the other pagans, since they did not know the law of God, but made a law unto themselves.” See Samuel Hazzard Cross and Olgerd P. Sherbowitz-Wetzor (trans.), The Russian Primary Chronicle: Laurentian Text (Cambridge, MA: The Mediaeval Academy of America, 1953), pp. 56-7.
paroikoi [peasant tenants] who are found to have been granted the lands of their tenancy without interruption and to have paid rent for a thirty-year period. These ones are like owners through the length of their possession, but they have the obligation to pay rent. And he [the Bestēs] said that he heard this, that the blessed Lord Basil [i.e. Basil II, r. 976-1025] had shrewdly managed his own paroikoi [in this way].”

As this passage demonstrates, even the living memory of the way in which a deceased emperor had managed his paroikoi could acquire the sanction of law, or at least be used as justification for a particular law.

Although imperial legislation, as in the excerpt from the Peira above, usually appears in the context of correcting a particular abuse, other motives often prompted imperial legislative efforts. Marie Theres Fögen has demonstrated convincingly that imperial legislation, especially in its Middle Byzantine iteration, was more often than not an assertion of imperial power, a gesture meant to underline the ultimate source of authority, and less a response to a particular problem. Like other imperial acts, such as the late Roman and Byzantine triumph, which Michael McCormick has shown to be occasioned less by genuine military victories than the need for the legitimation of new and insecure emperors, these novels, similar to codification efforts, celebrated and confirmed imperial power.

IV. Middle Byzantine Jurisprudence and the Question of Innovation

In spite of its quasi-perfection, Roman law was antiquated; its application upon this boiling society could not but create problems, as it did not take into consideration the new realities. The flexible court of the hippodrome was the

27 Weiss, pp. 130-1. Peira 15.2: “Ὅτι παροίκους εὑρισκομένους ἀδιακόπως νεμηθέντας τὰ τῆς παροικίας αὐτῶν τόπια καὶ τὸ πάκτον διδόντας ἐπὶ τριακονταετίᾳ, ὁ βέστης ἔλεγε μὴ ἔχειν τὸν δεσπότην ἑπιστρέφειν ἐκδιώκειν αὐτοῦ. Δοκοῦσι γάρ οὗτοι ὡς ἅπα καὶ τὸν τόπΟν διὰ τῆς ἐκδομῆς νομῆς, ἀνάγκην δὲ ἔχουσι παρέχειν τὸ πάκτον. τούτῳ δὲ ἔλεγεν ἀκούσας καὶ τοῦ μακαρίτου βασιλέως κυρίου βασιλείου τοὺς ἱδίους παροίκους πυκνῶς ἀποκινεῖν.”


place where the necessary adjustments could be made. The existing law was applied, but sometimes it was also twisted or even ignored in order to take into consideration specific situations, specific interests, specific pressures. Now, when the application of law also depends on a down-to-earth relation of forces between the parties, when the judge is obliged to use his own common sense in order to read of oikonomia (of arrangement), it is obvious that legal precedents acquire paramount importance for the further functioning of the tribunal, which is thus engaged in the procedure of not only applying, but also of shaping the law.\(^{30}\)

Above is the renowned Byzantine historian Nicholas Oikonomides’ evaluation of the *Peira*. For him as well as for many other scholars, the question of how a legal system, which had been codified in the sixth century under the auspices of the Emperor Justinian, managed to adapt to the completely changed social, political, and economic circumstances of the succeeding millennium proved extremely problematic. While imperial legislation as well as custom may have played a role in adapting the legal system to new challenges, nonetheless no introduction of a completely new set of written laws, à la a *Code Napoléon*, was promulgated during the entire political existence of the Byzantine Empire. As we shall see, Oikonomides was quite correct in his characterization of eleventh-century Byzantine law as full of contradictions and loopholes, a conclusion which Simon and Weiss postulated in earlier work. This prompted Oikonomides to suggest that the anonymous compiler of the *Peira* had perhaps intended that the verdicts and special treatises of Eustathios Rhomaios would constitute a new source of law, thereby alleviating the need to refer to outdated law codes. This section will highlight how Eustathios confronted and resolved obsolete portions of the Byzantine legal corpus. It will become clear quite early on that obsolescence did not at all hinder the resolution of legal questions. *Peira* 16.10, for example, concerns the granting of legal guardianship to wards with property in Africa or Syria:

There is a law which says “A guardian [epitropos] is able to be validly granted with matters in Syria or Africa of the ward.” And [this] appears to contradict what is said earlier. But Stephanos and the magistros interpreted it [thus], that the property of the ward in Africa and Syria is inviolate. At the same time a guardian of a child [i.e. ward] in Byzantium is unable to competently look after the ward’s affairs in Africa because of the length of the road [to there]. And for this reason a testator knows that he indeed can allow another guardian for the property in another territory; it [the property] is granted validly to the new [guardian].

The difficulty of the above rule is that it refers to territories (Africa and Syria) which had been completely lost by the seventh century; this passage more than likely did not refer to any existing case. Even though the chances of a ward having property both in the Byzantine Empire and North Africa by the early eleventh century were practically nonexistent, Eustathios still felt compelled to solve a legal problem which likely had nothing to do with any of the cases he worked with by advocating that a testator could appoint a new guardian if a ward had property a great distance away from the original guardian. Nowhere does Eustathios indicate that this provision is obsolete; as a part of the Roman legal corpus (presumably from the antecessor Stephanos), it is still a valid portion of the legal tradition.

The corpus of Roman law by this time was so massive and in places seemingly contradictory that it in fact allowed for considerable leeway in its application and interpretation. An excellent example of this is Peira 51.16. In this section a contradiction is noted on how a tribunal of judges must reach a decision. One passage of the Basilika requires that when disagreement arises among the members of a tribunal, each judge must give the same opinion.

31 Peira 16.10: “Ὅτι ἐστὶ νόμιμον λέγον ὅτι «ἐπίτροπος καλὸς δίδοται τοῖς ἐν συρίᾳ ἢ ἀφρικῇ πράγμασι τοῦ ἀνήβου.» καὶ φαίνεται πως ἕναντι τοὺς προφητεύειν. ἄλλα τούτο καὶ ὁ στέφανος καὶ ὁ μέγαστρος ἡρμήνευσε, ὅτι ἀκεραία ἐστίν ἢ ἐν ἀφρικῇ καὶ ἐν συρίᾳ ὑπόστασις τοῦ ἀνήβου. καὶ ἁμα οὐ δύναται ὁ ἐν βυζαντίῳ ἐπίτροποις παιδός, καὶ τῶν ἐν ἀφρικῇ αὐτοῦ προγόματοι τυχόν φροντίζειν καλὸς διὰ τῇ τῆς ὄδοι μήκος· καὶ δία τούτο εἴπερ ὁ διαδέμενος εἶδος ἐὰςκε καὶ ἔπερον ἐπίτροπον ἐν τῇ ὑποστάσει τῆς ἑτέρας ἐπαρχίας, τὸ νέον καλὸς δίδοται.”

32 Discussed in Weiss, pp. 125-6.

33 Bas. 7.1.18: “We order that none of the judges in no manner and at no time should disclose [anything] in the cases which have been allotted to them to our serenity, but should examine the matter thoroughly and to judge that which appears to them to be just and lawful. And if the parties acquiesce in the proceedings, then the verdict will be executed according to the power of the laws. If however someone should think that he has been harmed by an
Another passage, however, states merely that the opinion of the majority should hold sway. Should verdicts therefore require unanimity or majority? A rival judge, Ophrudas, determines that the second passage, since it is more ancient and from the Digest of Justinian, should hold sway, rather than the first passage which is newer. Eustathios however disagrees with the opinion of Ophrudas, and proceeds to give a long explanation as to why the two laws, both of which are found in the Basilika, are not in fact contradictory. In the end Eustathios basically endorses the law which says that only a majority opinion is necessary for a tribunal. In fact the first law dealt with courts of appeal, while the second concerned only a normal suit. The inability of Eustathios to more accurately interpret the Roman legal tradition in this instance prompted Weiss to dismiss his attempt at harmonization. This dispute shows eleventh-century Byzantine jurisprudence in its most sophisticated form, and, as Oikonomides noted, the unwieldiness of the legal codes to which judges had to make reference is noteworthy. Clearly, Byzantine judges faced many challenges in interpreting such an old and continuously redacted legal tradition, but they still managed to use it effectively.

arbitrary verdict, then he shall utilize lawful appeal, and an ordinance shall be exercised according to the prescription of the laws and he shall receive a final decision. But if there are two or more judges deliberating the case, and there arises disagreement between them, we thus order that each one of them must give the same verdict according to circumstances as they appear to him. (Kελεύομεν μηδένα τὸν δικαστὸν καθ’ οἰονόδηποτε τρόπον ἂν χρόνον ἐπί ταῖς παρ’ αὐτοῖς προτεθημέναις δίκαιαι μηνύειν πρὸς τὴν ἲμιτέραν γαληνότητα, ἄλλ' ἐξετάζοι τελείως τὸ πράγμα καὶ ὅπερ αὐτοὶς δίκαιον καὶ νόμιμον φανείη κρίνειν. Καὶ εἰ μὲν τὰ μέρη ἐρησιμάσατο τοῖς κεκριμένοις, τὴν ψήφον καὶ ἐξβεβλασμὸ παραιδίσοντα κατὰ τὴν τῶν νόμων δύναμιν. Εἰ δὲ τις νομίσοι ἐκ τῆς αὐτότελος ὑποθελεί 

34 Bas. 9.3.36: “If one [judge] among the many who adjudicate [cases] concerning manumission shall swear that he does not know the truth, and the others vote, if one judges in opposition, then the judgment of the others is enforced. (Εἰ πολλὸν περὶ ἐλευθερίας δικαζόντων ὁ ἐλξ ὁ μόσει μήπω γνώνῃ τὸ ἅληθὲς, οἱ ἄλλοι ψηφίζονται, ἑπειδὴ κἂν ἐναντία κρίνου, ἢ τῶν ἄλλων ψηφίως κρατεῖ.)”

35 Eustathios justifies this interpretation by stating that the minority opinion among the judges has resort to appeal, though only within the time allotted for appeals.

Although one can certainly not maintain that official legal discourse sanctioned anything other than imperial innovation, there are some instances of legal innovation which were accomplished without actually calling it as such. Two short Peira cases will illustrate this point, with the first case explicitly rejecting innovation and the second implicitly condoning it. Peira 14.5 rejects an innovation regarding the number of witnesses needed to certify a will:

For the security of a will, when of the seven undersigned witnesses two die, is valid through the remaining five. But if they all live, the security is not valid, unless all of them come and testify. And the patrikios Alópos did this. For he presented fifteen witnesses, that is fewer than those living who were undersigned in the will, and thus gave security to the will. But the magistros contradicted this, [saying] that it was instituting a legal innovation.

According to Byzantine law, a will was invalidated unless it was attested by either five or seven witnesses. Within the Justinianic legislation, wills were considered valid if a will was attested by seven witnesses. In the Ecloga the number of witnesses was reduced to five, thus explaining the allowance for five or seven witnesses in later redactions of Roman law. A novel of Leo VI even allowed for three witnesses in places where there was a scarcity of men worthy enough to be called forth as witnesses. For whatever reason, the provision allowing for three

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37 The editor suggests Gr. Biston = Lat. Visum. Although I have not consulted the manuscript, I would suggest Gr. piston (pledge, security, warrant).
38 Peira 14.5: “Ὅτι ἐπὶ τῆς βεβαιώσεως τῆς διαθήκης, ἐὰν μὲν ὄντων ἐπτά υπογεγραμμένοι μαρτύρων οἱ δύο τελευτήσωσι, δύναται βεβαιωθῆναι διὰ τῶν πέντε τῶν περιόντων· ἐν δὲ πάντες ζῶσι, οὐ δύναται βεβαιωθῆναι, εἰ μὴ πάντες ἔλθωσι καὶ μαρτυρήσωσι. καὶ τοῦτο ὁ πατρίκιος ὁ ἄλοπος ἐποίει· καὶ δεκαπέντε γὰρ μαρτύρων ἢ καὶ ἑλάττων υπογεγραμμένοι ὄντων ἐν διαθήκη καὶ ζῶντων πάντας παρίστα, καὶ ὄσως ἐδίδοτο τῷ χριστῷ τῇ διαθήκῃ. ὅ δὲ μᾶγιστρος ἀντέλεγεν εἰς τούτο, κατανομάζεται εἶναι τὸ πρόμα νόμου ἐνστάμενος.”
39 Bas. 35.1.24: “A valid testament is that which the testator has sealed and prepared with the seals of five or seven witnesses. (‘Ερρέσται ἡ διαθήκη, ἂν ὁ διαθέμενος ἀποσφραγίσας παρεσκεύασεν ὑπὸ ἐπτά ἢ πέντε μαρτύρων ἀναφορεῖσθαι.)”
41 Novels of Leo VI, Novel 43: “…We therefore decree that in every territory and city for the most inhabited by the unlearned that for testaments, as is customary witnesses [must] be trustworthy. And we do not set the limit to the number [of witnesses] to five, but in those places where, as it is likely, there is a scarcity of men worthy to serve as witnesses, then to three, since it is acceptable and better than annullment [of a testament]. (Thεσπίζομεν τοίνυν ἐν πάσῃ χώρᾳ καὶ πόλει καὶ ὑπ’ ἁμαθῶν κυροῦσθαι τὰς διαθήκας, εἰ μόνον ἐκ τοῦ τρόπου τὸ ἄξιόπιστον οἱ μάρτυρες ἀποφέρονται. Καὶ τὸν ἀρχιμάχον δὲ οὐ μόνον ἐξερχόμενον περιορίζομεν, ἀλλ’ ἐν τόποις ἐν ὀικονομίᾳ, ὡς ἐκεῖνος, συμβαίνει σπάνιαν ἁνδρῶν εἰς μαρτυρίαν ἄξιον εἰσινεναι, καὶ μέχρι τριῶν, φθάνοντα τὸ εὐπαθείκτον ἐχειν καὶ εἶναι ἀθετήσιος κρείττο τὴν μαρτυρίαν.)”
witnesses found in Leo VI’s Novel 43 is not cited, which is either a deliberate omission or indicates an ignorance of Leo’s legislation. The regulation certainly applied to cases judged by the Court of the Hippodrome, for although the court was located in Constantinople, its function primarily (but not exclusively) as an appeals court meant that it heard cases from the provinces where there could have presumably been a dearth of men worthy to serve as witnesses. As is to be expected, legal innovation (kainotomia in the above passage), in this case by having a large number of witnesses appear, more than the five or seven required, is rejected because nonetheless not all of the living witnesses undersigned in the will appeared. Yet in the same section the magistros (leg. Eustathios Rhomaios) creates a procedure for the recertification (lit. “re-sealing”) of a will, a process for which he gives no reference to existing laws.

The magistros accomplished the recertification of a will in the following way. He summoned the quaestor and all of the copy-clerks (antigrapheis) and the notaries and the other witnesses, and in their presence had the will brought forth, with none of the witnesses undersigned in the will being present. And the notaries of the Koiaistōrion noted the day on which the recertification took place, and the place where it occurred, and the witnesses, in whose presence they were seated, then the cord with the seals was cut, and the entire text of the document was read, and a copy was made. Then the first seals were inserted on the inside of the document, and on the outside the document received another cord with the first seals, and the presently-summoned witnesses sealed it, and each wrote his name on the seal. My seal of such a thing, so that it may be clear, indicates [my] name. But they did not sign on the inside. And the quaestor imprinted it with his seal, and thus the recertification was accomplished.

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42 See also e.g. Peira 14.6: “Neither in the political law nor in the praetorian law nor in the breadth of the novels does a testament signed by only three witnesses hold force…(Ὅτι οὔτε τῷ πολιτικῷ νόμῳ οὔτε τῷ προαιρετῷ οὔτε τῇ αὐθεντίᾳ τῶν διατάξεων ἔχει ή παρά τριῶν μόνων ὑπογραφέσα διαθήκη,…).” Also Peira 14.23: “The magistros found a testament sealed by three witnesses, and he did not accept it, writing thus: Neither in the political nor the praetorian law nor in the breadth of the novels is the testament as it appears now valid. For it does not contain a sufficient number of witnesses, nor were they undersigned in it, but only three seals are affixed to the document. (Ὅτι οἱ μάγιστροι εὑρέθησαν διαθήκην ὑπὸ τριῶν μόνων σφραγισθέντας, οὐ παρεδέχομαι ταύτην, γράψας οὔτως: οὔτε τῷ πολιτικῷ οὔτε τῷ προαιρετῷ νόμῳ οὔτε τῇ αὐθεντίᾳ τῶν διατάξεων ἔχει ή ἐμφανισθέντα διαθήκη, οὔτε γάρ αὐτάρκης ἀριθμὸς μαρτύρων ἐν αὐτῇ παρελήφθη, οὔθ’ ὑπογραφαὶ ἦσαν ἐπί τούτῳ, ἀλλὰ τρεῖς μόνοι σφραγίζες ἔπικειντο τῷ γάρτῃ.)”

43 Peira 14.11: “Ὅτι ἀνασφραγισμὸν τῆς διαθήκης οὗτος ἐποίησε ὁ μάγιστρος, προσεκαλέσατο τὸν κοιαίστορα καὶ τοὺς ἀντιγραφεῖς πάντας καὶ τοὺς νοτάριους καὶ ἐτέρους μάρτυς, καὶ ἐνώπιον αὐτῶν προσεκοιμίσθη ἢ διαθήκη μηδὲν τῶν παρόντων μάρτυρος ἐν αὐτῇ ὑπογραφάντων καὶ ἐσθήμοσαντοι οἱ νοτάριοι τὸν κοιαίστορον
Responding to a similar problem in the previous passage, namely how to certify wills when the undersigned witnesses are no longer living, Eustathios Rhomaios created a legal procedure for re-certifying a will without actually calling it an innovation. Interesting as well is the *quaestor* is the official charged with certifying the will, although Novel 44 of Leo VI allowed this for other officials, namely *magistrioi* and *patrikioi*, the eparch of the city and all the others established as *epi tōn krisēon*, as well as *stratēgoi* and judges in the provinces. The implications of this passage are quite substantial. While there is no way to determine whether this procedure attained widespread acceptance, the anonymous author of the *Peira* is invoking a concept which is supposed to be anathema to Byzantine law: precedent.

Besides the examples cited above, there is evidence that contemporary legal institutions without a basis in Justinianic law were accommodated within the framework of Byzantine law during this period. For instance, a form of monastic trusteeship called *ephoreia* is cited in the *Peira*; it seems likely that future analyses of this text will likewise find evidence of contemporaneous legal institutions.

Though Oikonomides also noted the responsiveness of eleventh-century Byzantine jurisprudence within the framework of antiquated laws, he seems to have taken this to be the exception rather than the rule. However, in the absence of anything approaching extensive court records for the Middle Byzantine period, the *Peira*, along with the surviving monastic acts, are the best evidence we have for the “law in action”, and rather than antiquated regulations

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44 Novels of Leo VI, Novel 44.
impeding the functioning of the courts, the flexibility and adaptability of the legal system appear to be the more defendable conclusions.

V. Orthodox Christian Elements of Middle Byzantine Jurisprudence

Along with Roman Law, the precepts and teachings of Orthodox Christianity constituted the second major component of Middle Byzantine jurisprudence. Although Roman law had been Christianized since the time of Constantine I, to a significant extent these two strands of Middle Byzantine jurisprudence remained contradictory. If one were to generalize this dynamic in the simplest way, then it could be characterized as the tension between the role of the law as an impartial instrument of justice and objective seeker of truth (Roman law) and its role as a societal necessity which had to be ameliorated and softened in its application (Orthodox Christianity).

This section will explore which components of Orthodox Christianity influenced Middle Byzantine jurisprudence, and how jurists employed these Christian precepts alongside the dogmatic principles of Roman law.

Within Middle Byzantine jurisprudence, the Orthodox Christian imperative to judge mercifully and humanely was considered to be among the most important traits of a good judge. The Basilika commands that “it is necessary to interpret the laws humanely.” The eleventh-century aristocrat Kekaumenos within the section on judges in his Stratēgikon relates what would have been for his audience the case in which the imperative to judge humanely was most absent, the trial of Jesus:

But Pilate in no way assisted in the trial [of Jesus] or was able to hold Christ guiltless and did not do so, because he himself witnessed to Christ, saying “I have

46 Bas. 2.1.18: “Φιλαγάθως δὲ τοὺς νόμους ἑρμηνεύειν.” The Basilika redactors here very much changed the sense of the Celsus passage in the Digest on which it is based: “Benignius leges interpraetandae sunt, quo voluntas earum conservetur” (Dig. 1.3.18).
the power to release you”,47 but to the Jews he said “I find no fault in this man.”48 Accordingly the Lord heard him [Jesus] say “You have no power over me, except that which was given from to you above. Only the one who betrayed me has more sin than you.” And He made Judas the exarch of evil, and Pilate second-in-command. Why was Pilate condemned so harshly? Because he was able to release Jesus and did not do it, although it would have been swift mercy. Therefore take care and do not suffer the same things, but if you are able, help [him].49

The fact that Pilate had arrived at the correct verdict (that Jesus was not at fault) meant absolutely nothing to Kekaumenos because he had still allowed him to be crucified. Kekaumenos goes on to write that “if a multitude is accusing, and you have the power of judgment, be exact [in investigation]. And if you shall find that the multitude spoke justly, give a decision humanely, but if the multitude brought a suit against a man through scheming or envy, proceed wisely and absolve the accused and you shall be the mouth of God and of this very man.”50 The eleventh-century bishop of Euchaïta John Mauropous in a letter to a judge on behalf of a friend likewise emphasizes the importance of humanity in judgment: “If disputed cases are resolved by others in the spirit of humanity, I suppose for you it is more appropriate, indeed, to manifest greater humanity than any other in your deliberations and to include much benevolence in your decisions…”51 Likewise, Mauropous in another letter asks for clemency for a friend who was

47 John 19:10; 18:38.
48 John 19:11.
49 Stratēgikon 1:1: “καὶ τὸ Πιλάτον δὲ οὐδὲν άλλο τῆς καταδίκης γέγονεν πρόξενον ὡς τὸ δύνασθαι άθεόσαι τὸν Κύριον καὶ μὴ πεποιηκέναι, ὡς καὶ αὐτὸς ἐμαρτύρησε πρὸς μὲν τὸν Χριστὸν εἰπὼν ὅτι ἔξοισαν ἐχώ ἀπολύσαι σε’, πρὸς δὲ τοὺς Ἰουδαίους τὸ ‘οὐδεμίαν αἰτίαν εὑρίσκων ἐν τῷ ἀνθρώπῳ τούτῳ, διὸ καὶ παρὰ τὸν Γεσπάτου ἀκήκω τὸ οὗδεμίαν ἐξούσιαν εἶχες καὶ ἐμόν, εἰ μὴ σοι δεδομένου ἀνωθεν· πλὴν ὁ παραδίδους μὲ σοι μείζων ἁμαρτίαν εἶχε, καὶ τὸν μὲν Ἰουδαίον ἐποίησεν ἐξάρχοντα τοῦ κακοῦ, τὸν δὲ Πιλάτον διέτειμον. διὰ τί ὁ Πιλάτος θαρσεὶς κατεδικάσθη· διότι δυνάμειον ἄπολύσαι τὸν Κύριον τούτο οὐκ ἐποίησεν, εἰ τάχα καὶ εἰκονομία ἦν τὸ γινόμενον. πρόσεχε σὺν καὶ σὺ μὴ τὰ αὐτά πάθῃς, ἀλλ᾽ εἰ δύνασαι, βοήθησον.”
50 Stratēgikon 1.1-2: “εἰ δὲ πλήθους ἔστων τὸ κατηγοροῦν, σὺ δὲ ἐχεις τοῦ κρίνειν, ἀκριβολόγησον· καὶ εἰ μὲν εὑρίσκεις δίκαια λέγον τὸ πλήθος, δὸς ἀπόφασιν μετὰ φιλανθρωπίας, εἰ δὲ εξ ἐπιθυμίας τὸ πλήθος εκτιθῆκα κατά τὸν ἀνθρώπου ἔτει καὶ ἀπὸ φθούνο, σοφῶς ὑπελθὼν ἐξέλε τὸν κατηγορηθέντα καὶ ἐστὶ στόμα θεοῦ καὶ ἀνθρώπου αὐτοῦ.”
accused of smuggling. The bishop knows the unbending harshness of the law, but still asks for leniency in judgment: “…we know that the laws for what you call smuggling and for violations relating to it are set up as unmerciful and severe punishment. But again a provision of these laws is this, that they, sometimes, take into consideration the ignorance of the offenders and for the most part pardon such mistaken conduct.” 

Further, Mauropous maintains that even if the accused are guilty, nonetheless it is the duty of the judge to imitate God’s mercy: “In a word, therefore, if they appear to be completely free of guilt, deliver them, oh righteous guardian of the laws, to the laws and to justice. But if not, to imitate God’s clemency, inasmuch as it is fatherly…” In this case the act of applying clemency by the judge was imagined as an emulation of God’s love toward mankind. In these contexts, the intransigency of the law required the mitigation of love and mercy.

From a Middle Byzantine jurist’s perspective, the necessity of applying the laws humanely was balanced by the need to apply the law correctly. Eustathios remarked upon this dichotomy in Peira 51.22, where he notes one law which says to give milder verdicts and another law which states that judges should not depart from the prescribed boundaries of the law. His solution was the following: “A judge who follows this legal rule, where he finds two fitting punishments, one harsh and one milder, thinks to give a legal verdict by especially favoring the

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52 John Mauropous, Letter 11, lines 1-5: “…όσον δπόσοι οἱ νόμοι τοῖς καθ’ ὑμᾶς κλεπτοτελονήμασι καὶ ταῖς περὶ αὐτὰ κακουργίας ἀπαραίτηται κάθηνται ἐνίοτε τῶν πλημμελοῦντων συντρέχειν, καὶ ταῖς τιμώταις ἄγνοιαις συγγινώσκειν ὡς τά πολλά.”

53 Ibid., lines 18-21: “Τοῦτον συνέλω τὸ πάν, εἰ μὲν φανεῖν παντάπασιν αἰτίας ἐλεύθεροι, ἀφεῖς, οὗ δίκαιος προστάτα τῶν νόμων, τῶν τε νόμω καὶ τοῖς δίκαιοις, εἰ δὲ μὴ, θεοὶ τῶν οἰκτίρμων, ὡς καὶ αὐτός ὁν οἰκτίρμων καὶ τὴν τοῦ θεοῦ μιμεῖσθαι φιλανθρωπίαν πατρικήν κελεύόμενος.”
milder.” Nonetheless, judging a case humanely still had to occur within the framework of the Roman law.

VI. The Role of Reputation

Another important facet of Middle Byzantine jurisprudence was the reputations of the parties in court. The long-term behavior of the parties at trial clearly influenced the verdict of the judge. Individual lapses or violations of the law could be extremely leniently punished as long as they did not indicate more serious perceived failings of character. This was the case even in instances in which Byzantine canon law strongly punished individual lapses, such as adultery. When discussing the reasons whereby a wife could lose her dowry and be forcibly divorced from her husband, Eustathios lists among them drinking, bathing, or going to the chariot races and theatre with other men, all of which raised the suspicion of adultery. However, Eustathios is adamant that individual instances of these offenses are not to be punished by the law. He cleverly deduces this interpretation from the use of the present rather than aorist subjunctive in the words for “drinking together” and “bathing together”. It is only, Eustathios insists, repeated instances of these offenses which necessitate divorce and the loss of a wife’s dowry.

Likewise, repeated bad behavior could result in a judge giving preference to the opposing party. Peira 23.7 illustrates how the Byzantine judicial principle of partiality functioned in practice.

Many suits were issued against the Magistros Sklēros, saying that he had effected the theft of some of their possessions, attacked their guards, and struck them. When the Magistros and the Droungarios found that someone had wrought

54 Peira 51.22: “…καὶ τοῦτο ὁ δικαστής τῷ νομίμῳ κανόνι ἐπόμενος, ἔνθα εὔη ὁ ἄρμοζόωςας ποινὰς, τὴν μὲν ὀργῳδοξάτην τὴν δὲ προστέραν, πρὸς τὴν προστέραν μάλιστα ἀποκλίνων νομίμως δοκεῖ ἀποφαίνεσθαι.”
55 Peira 23.18.
56 “ἐὰν συμποσιάξῃ καὶ συλλούηται.”
vengeance, mistreated the guard, and that gold had been lost, this weighed only on him [i.e. Magistros Sklēros] to show that he could be excluded [as a suspect] or that the guard had been struck, and then [the Magistros] would prefer that he take an oath [first], stating his logic as “Since you imprisoned him and struck him and mistreated him, there is an assumption [of guilt], and since you excused yourself from these charges, for that reason I prefer that he [Magistros Sklēros] take an oath. For the presumption [of guilt] is present.” Normally, if no [past] violence or misdeed [of the defendant] is demonstrated, then the Magistros refuses [to convict him], and it weighs on the plaintiff to demonstrate [that some violence or misdeed occurred]; if doubt exists an oath is to be given to the Magistros.57

The case is also mentioned in Peira 69.5:

When [someone] struggles against a presumption [of guilt], the defendant and the one contesting [the case] is not to be preferred [i.e. to take an oath first] to take an oath, but rather the plaintiff. And the Magistros ruled this. For many suits had been set in motion against the Magistros Sklēros, that he had taken away some of their gold and had inflicted wrongdoings on them and their guards, and then the Magistros [said], that since someone had inflicted some evil and imprisonments [upon others], then the plaintiff was received to swear, as to what he had lost. For he [Eustathios] said, that the magistros [Sklēros] was struggling against a presumption of guilt. For since he struck a man or imprisoned him or did some other evil, then it is likely that either he or his men were attacked by this very man [i.e. Sklēros], on account of which the plaintiff is trustworthy. When some other misdeed of theft or violence was not carried out in the past, the defendant…[passage ends abruptly here].58

In the preceding passages, the Magistros Sklēros, who had been accused of attacking and striking guards in the past, is presumed to be guilty when a similar case arises. Eustathios explains that because of his past behavior there exists a presumption (prolēpsis) of guilt, and

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57 Peira 23.7: “Ὅτι δικαίως πολλαὶ ἐκκινήθησαν κατὰ τοῦ μαγίστρου τοῦ [Σ]κληροῦ, λεγόντων τινών ἀφαίρεσιν πραγμάτων αὐτῶν ὑποστήναι καὶ εἰς φυλακὰς ἐμβληθῆναι καὶ τυφθῆναι, ἐνθὰ μὲν σὺν εὐθυγραμμὸν ὁ μάγιστρος καὶ ὁ ὀρθογράφος ὡς ὑπέστη τῆς τιμωρίας καὶ φυλακῆς κάκωσιν καὶ ἀπώλειαν χρυσίου, ἐκεῖνον μόνον τοῦτο ἐβάρυνε δεικνύειν, ὅτι ἀπεκλάπθη τύχων [ἡ] ὅτι ἐτύφθη, καὶ τὸτε προσέπημα αὐτῶν εἰς τὸν ὁμολογὴν, λέγοντων λογισμῶν, ὅτι ἐπεὶ ἀπεκλάπθη αὐτῶν καὶ ἔτυφθη καὶ κάκωσις, προλήψῃ ἔστων, ὅτι καὶ ἐπεφέρετο ἁφελῶς, καὶ διὰ τοῦτο προσέπημα αὐτῶν εἰς τὸν ὁρκόν· προλήψῃς γάρ ἐστιν ἐνεπάθη. ὅπου δὲ μὴ ἐδείκνυτο βία ἢ κάκωσις, τότε ὁ ὀρθοδὸς ἀρνοῦμένων τοῦ μαγίστρου, ἀποδείχῃ ἐξάρνου ὁ ἐνάγγοντα, καὶ εἰς ἀπορίας ὁρκόν ἐπέφερε τὸ μαγίστροφ.”

58 Peira 69.9: “Ὅτι ἐνθά μάχηται προλήψῃς, ὁ ἐναγώμενος καὶ ἀρνοῦμένος οὐ προτιμᾶται εἰς τὸν ὁρκόν, ἄλλῳς ἐνάγγον. καὶ τοῦτο ὁ μαγίστρος ἔκρινε. πολλάν γὰρ κινοῦντον κατὰ τοῦ μαγίστρου τοῦ σκληροῦ ὡς ἀφελομένου ἐκ τούτων χρυσίου καὶ ἄλλας εἰσαγαγόντος αὐτοῦς κάκωσις καὶ φυλακὲς, ὁ μάγιστρος ἐνθὰ οὐκ ἔνωσεν καὶ συνίστησι τις τὴν ἄλλην κάκωσιν καὶ τὰ δεόμα, τότε ἐνάγγοντα ἐδέχθετο ὁμολόγοις, τί ἀπολέσην. ἔλεγε γάρ, ὅτι προλήψῃς μάχηται ὁ μάγιστρος, ἐπεὶ γὰρ ἔστω τὸν ἄνθρωπον ἢ ἐδέσμησαν ἢ ἄλλος ἐκάκωσε, εἰκὸς ἐστι καὶ τὸ ἐπιφερόμενον παρὰ τοῦ ἄνθρωπον αὐτοῦ ἀφελεσθαι καὶ ἄνθρωπος αὐτοῦ, καὶ τοῦτο πιστῶς ἐστιν ὁ ἐνάγγον. ἐνθὰ δὲ μὴ προηγεῖται ἐπέρα τῆς κάκωσις τῆς ἀφαίρεσις ἢ βία, τὸν ἐνάγγοντα...[lacuna here].”

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therefore he would have the defendant take an oath. Continuing in this line of reasoning, Eustathios writes that normally if the defendant has not demonstrated any past behavior of misdeeds then it is incumbent upon the plaintiff to prove guilt; in cases of doubt oaths are still resorted to. In the same passage Eustathios elaborates further that, presumably in cases where the plaintiff’s case has not been sufficiently proven by evidence, the judge can call the plaintiff to take an oath. Yet when *prolēpsis* exists, the defendant can be compelled by the judged to take an oath. Within Byzantine Legal Culture, giving an oath was considered the deciding factor in a case and usually trumped all other evidence.\(^{59}\) It is quite clear from this case and others that a defendant’s reputation was an extremely important factor within Byzantine jurisprudence, and it also hints at a possible motive as to why people accused of even very minor offences chose to contest them, often acting against their financial best-interest: the maintenance of one’s reputation was vital to being favorably looked-upon by the presiding judge, and could easily sway the verdict.

VII. For Richer or for Poorer: The Role of Social Class

Social class as well played an important role in Byzantine jurisprudence. Although there are various schemas for describing the class structure of Middle Byzantine society, the one used in this study, which in fact very well fits the way the legal system was used by various societal groups, is one recently advanced by John Haldon.\(^{60}\) In his social breakdown of Byzantine society, there are two overlapping groups of élites, namely a power élite and an élite in general. The latter and larger of these two élite groups, the élite in general, sometimes also called the

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ruling or dominant class, consists of “…those who, broadly speaking, occupied a social and
economic situation which either reflected, or ensured access to, senior positions in state and
church, social esteem from their peers, the ability to transmit their social, economic, and cultural
capital to their offspring, and the ability to control resources in terms of land and its products,
manpower, and movable wealth.” 61 A subset of the ruling class is that of the power élite, which
is “…the leading fraction of the economically dominant social strata, those who shared a
situation in respect of access to political/ideological power and influence, in particular at
Constantinople and in the various branches of the imperial administration.” 62 One can therefore
delineate a third group as an Unterschicht consisting of everyone excluded from the élite or
power élite, which will be referred to here as the “lower classes” or “lower social strata.” 63 The
ways in which the élite and power élite were able to exercise power through the legal system is
detailed in Chapter Three.

Many of the novels of the Macedonian emperors starting at the beginning of the tenth
century during the reign of Romanos I Lekapenos (r. 920-44) make provisions for the protection
of “poor” (ptōchoi or penētes) peasants against the incursions of “powerful” (dynatoi) predatory
landowners. 64 The ability to designate parties in court as “poor” or “powerful” had no exact
precedent in Justinianic law (though terms for the “poor” and “powerful” are used in the CIC,

61 Ibid., p. 171.
62 Ibid., p. 172.
63 Note that Haldon restricts his analysis to the two respective groups of élites; this third category is used here for the sake of convenience.
a reference to Prochiron 27.13 supposedly defining someone as “poor” who had a property valued at less than fifty
nomismata should instead be Prochirion 27.22; the former passage cited concerns witnesses and what to do if they
disagree with one another. For the use of “poor” and “rich” in Late Antique/Early Byzantine legal texts, see Evelyne Patlagean, Pauvreté économique et pauvreté sociale à Byzance, 4e-7e siècles (Paris: Mouton, 1977), pp. 9-35.
but usually in a more general way), although offices like the Late Antique *defensor civitatis* demonstrate that the government certainly had shown concern for the poor in the legal sphere.⁶⁵

Besides the description of the “powerful” found in the novel of Romanos Lekapenos which first announced the measures which were to be taken against the “powerful”, one also finds a number of criteria used to determine whether someone could be counted as a “powerful” person in law-books of the period. At the end of the ninth century one finds a definition of poverty in the *Prochiron*, where it is stated that the “poor” (*penētes*) are unable to serve as witnesses, a poor person being someone with an estate (*periousia*) of less than 50 *nomismata*.⁶⁶

This definition is found within the *Peira* as well, although in a slightly different context. Here, the conditions for prosperity (*euporia*), and thus the capability to serve as a witness, are listed: a witness must either possess a title, his own *strateia*, a trade/business or an estate of 50 *nomismata*.⁶⁷ The *Peira* passage would suggest that a person was defined as “poor” only in the absence of other potential poverty-negating criteria; that is, by no means was every person with an estate of less than 50 *nomismata* considered “poor”, but only those people who did not possess a livelihood (*epitēdeuma*), a *strateia*, or rank.⁶⁸

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⁶⁶ *Prochiron* 27.22: “Οἱ πένητες οὐ μαρτυροῦσιν: πένης δὲ ἐστιν ὁ μὴ ἔχων πενήκοντα νομισμάτων περιουσίαν.” This regulation is repeated in the *Eisagoge* as well (*Eisagoge* 22.8). This definition of poverty is based on *Dig.* 48.2.10: “Nonnulli propter paupertatem, ut sunt qui minus quam quinquaginta aureos habent.” Interestingly, the *Digest* passage concerns a completely different matter, that of making accusations in criminal cases, rather than rendering testimony in general, which is the case in the relevant passages in the *Eisagoge* and *Prochiron*.

⁶⁷ *Peira* 30.2: “Ὅτι τὸ ἐπιτήδευμα, ἐξ οὗ τις προσπορίζεται αὐτῷ τὰ χρεώδη, ἀρκεῖ πρὸς εὐπορίαν. ὁ γὰρ μάρτυς εἴτε ἀξιοματικὸς ὁφείλεται εἶναι, εἴτε στρατείαν ἐξαντλεῖ, εἴτε ἐπιτήδευμα, εἴτε νομισμάτων ν’ περιουσίαν.”

⁶⁸ Morris’ rejection of the possibility that this definition of poverty was ever actually used (Morris, p. 22, n. 55), is, I think, unwarranted. The limited context in which this 50-*nomismata* definition of poverty is discussed, that is concerning the qualifications of witnesses, tends to broadly agree with other qualifications witnesses were supposed to possess. In general, and this is confirmed by a perusal of the surviving monastic documents from this period, witnesses were almost always of high social standing: officials of various rank, village elders, churchmen, etc. Whether or not this definition of poverty was used in other contexts is more of an open question, but as a qualification to serve as a witness it would certainly not have been out of tune with other regulations regarding the characteristics witnesses were supposed to possess.
Outside of this (admittedly not widespread in the sources) 50-nomismata definition of poverty as a qualification to serve as a witness, there appears to have been no officially-accepted definition of what conditions were necessary to designate a party “poor” or “powerful”; it was probably left to the discretion of the judge. In cases deigned to be between “poor” and “powerful” parties, the party designated as “poor” paid a lower schedule of legal fees and was supposedly protected from predatory land acquisition by “powerful” parties.69

Despite its lack of a basis in the Macedonian redaction of Justinianic law, the imperial legislation regarding the “poor” and “powerful” seems to have been followed by judges. In fact, Title Nine of the Peira concerns among other things, the “poor.” One case mentions a Novel of Basil II which states that the sale of a “poor” person’s farm to a “powerful” person is not valid unless there is a great famine, as there was in the time of Romanos I, or if the transaction precedes the time of the legislation.70 “Poor” possessors of “poor” or “rich” property could gain ownership of it after a thirty-year period through the so-called longi temporis praescriptio; “powerful” persons could not.71 Persons designated as “powerful” were condemned for buying land illegally.72 The monastic record likewise confirms that Macedonian legislation against the “powerful” was enforced. In a verdict of the judge Samōnas dated to the year 952, which involved the validity of a donation of a brickworks, it is mentioned that the brickworks was

69 See relevant sections in Ch. 3.
70 Peira 9.1.
71 Peira 8.1. On the longi temporis praescriptio see Marie Theres Fögen, “Longi Temporis Praescriptio” in ODB, vol. 2, p. 1249; Dieter Nörr, Die Entstehung der longi temporis praescriptio: Studien zum Einfluss der Zeit im Recht und zur Rechtspolitik in der Kaiserzeit (Cologne; Opladen: Westdeutscher Verlag, 1969). Note that the conclusion of Sarris (p. 60) that Basil II, in his novel of 996, abolished the longi temporis praescriptio is incorrect, as he actually quite specifically states that this provision is only invalid for “powerful” persons acquiring the property of the “poor.” In fact a formerly “powerful” person could even benefit from the provision if found himself among the “poor”, as it is stated in §4 of the novel (ἀδύνατον μὲν, ἐσοι ὑπάρχῃ τῶν κάτω· καὶ τὸν χρόνον βοηθεῖν αὐτῷ συγχωρήσομεν); see Les novelles des empereurs macédoniens concernant la terre et les straties: introduction, édition, commentaires, Nikos G. Svoronos (ed.), Bibliothèque byzantine; Études 4 (Athens: Centre de recherches byzantines, F.N.R.S., 1994): pp. 190-217.
72 e.g. Peira 9.2.
surrounded by “powerful” persons, and that no “poor” neighbor could be found to invoke the right of first offer of sale or preemption (protimēsis).73

The protections accorded to the “poor” seemed to have been occasioned by a situation in which the “powerful” often resorted to violent means to acquire the properties of the “poor.” Although the terms “powerful” and “poor” are not mentioned in the following case, the following case which involves the above-mentioned Rōmanos Sklēros clearly describes the type of occurrence which the Macedonian Dynasty’s legislation against the “powerful” was meant to prevent:

The prōtospatharios Rōmanos Sklēros roughed up some villagers and came to their residence, then he made an agreement with them and ensured, that he would offer gold to them, and a transaction was made. But the villagers afterward brought suit, [claiming] that they made the settlement under duress, and that the [thematic] judge had compelled them [to agree to the settlement]...74

The ability to designate one party as “poor” and the other as “powerful” therefore constituted an important component of Byzantine jurisprudence, as it appears to have been left to the discretion of the judge. The use of this designation must have complicated by the fact that judges themselves were, from the standpoint of social class members of the élite, much closer to the “powerful” than to the “poor”. In the above case, for instance, it does not appear as though the villagers who were attacked by Rōmanos Sklēros were designated “poor” nor was Rōmanos himself designated as a “powerful” person.

73 Actes de Lavra, vol. 1, act 4 (952).
74 Peira 42.18: “Ὅτι ὁ πρωτοσπαθάριος ῥωμανὸς ὁ σκληρὸς ἐβιάσατο τινὰς χωρίτας καὶ ἐπήλθε κατὰ τῆς οἰκίας αὐτῶν, ἐπὶ συνεβιβάσθη μετὰ αὐτῶν καὶ ἠσφάλιστο, ὡς παράσχῃ αὐτοῖς χρυσίον, καὶ μεταβολὴν ἐποίησατο. οἱ δὲ χωρίται μετὰ ταύτα ἐκίνουν, ὡς καὶ τὴν διάλυσιν κατὰ βίαιν ποιῆσαι τε, τοῦ κριτοῦ βιασσαμένου αὐτοῦς...”
VIII. Non-Normative Legal Texts Which Illuminate Byzantine Jurisprudence

To this point this chapter has for the most part stayed comfortably within the remit of legal texts which in one sense or another might be described as “normative”: sources like the Peira or Basilika which reflect the official legal regime. Yet of course referring only to “normative” legal texts in the end produces an incomplete picture of Byzantine jurisprudence—for even within the Peira there are occasionally surprising glimpses of the influence of non-legal texts upon jurisprudence. For instance, Peira 25.25,\(^75\) in which Eustathios Rhomaios did not punish a woman who was living with another man but had not entered into a second marriage, three lines of the Odyssey are quoted: “[B]ut you know what women are—they always want to do the best they can for the man who marries them, and never give another thought to the children of their first husband, nor to their father either when he is dead and done with.”\(^76\) Peira 48.12 quotes Dionysios of Halikarnassos to define an assarion. A surviving document written by another judge of the Hippodrome and Velum, Nicholas Serbilas, likewise resorts to a literary reference, stating that the Persians’ love for aquiline noses is like the reciprocal love of justice for the law.\(^77\) This notion comes from Xenophon, Cyropaedia 8.4.21, which mentions that Cyrus was admired by the Persians for his extremely aquiline nose. The judge probably encountered it via Plutarch’s Moralia.

As Simon suggests in Rechtsfindung, there is certainly a rhetorical element to many of these intertextual references. While these authors did not officially have the sanction of law, they nonetheless indicate that the non-legal sources could suggest paradigms of justice and jurisprudence which the Byzantine jurist could apply to particular cases. Although Simon

\(^76\) Odyssey 15.23-25 (Samuel Butler translation).
\(^77\) Actes d’Iviron, vol. 1, act 34 (1062).
emphasized the rhetorical function of these passages, this conclusion seems overstated, as these intertextual citations highlighted particular features of the moral-legal universe which users of the Byzantine legal system inhabited in order to legitimate particular verdicts. The *Odyssey* occupied a privileged position within Byzantine education; students often were forced to memorize long passages of it by heart. By hearkening to a well-known text of the Byzantine educational curriculum, Eustathios Rhomaios contextualized his decision with a reference which would make the reasoning behind his verdict more readily understood. Similarly, the judge of the Hippodrome and Velum Nicholas Servlias introduced a decision with a quiddity from Xenophon and Plutarch which led into a metaphor about the relationship between law and justice. It is interesting to note that literary references in surviving legal records are all found within cases judged by high judges, judges of the Hippodrome and Velum.\(^78\) The manner in which the decisions of these high judges were written supports the notion that the rendering of justice at this level was framed in certain respects as a literary exercise.

With the importance of these non-legal texts in mind, the rest of this chapter shall examine two works which round out the present examination of Byzantine jurisprudence. The first text, that of Psellos’ “Usual Miracle”, whatever its historicity, indicates that there was an audience which appreciated the possibility of arbitrating legal disputes by divine means. The second, the *Nomoi* of St. Gregentios of Taphar, displays a legal regime invented for a newly-Christianized people. As a creative exercise, the author of the *Nomoi*, probably a monk, chose to create a system of laws with no reference to the Roman legal tradition. The *Nomoi* further

\(^78\) The types of works referenced by judges would put them within the “high style” of Byzantine prose writers. For the classic article on the subject of levels of style in Byzantine literature, see Ihor Ševčenko, “Levels of Style in Byzantine Literature”, *JÖB* 31/1 (1981): pp. 289-312.
underline the importance of Christian, in this case Old Testament, paradigms of justice in Middle Byzantine jurisprudence and Byzantine Legal Culture.

IX. A Case of Divine Dispute Resolution: The “Usual Miracle” at Blachernai

An inquiry into the importance of legal paradigms within Middle Byzantine jurisprudence would not be complete without mentioning the case of the “Usual Miracle” at Blachernai. The eleventh-century Byzantine polymath Psellos wrote about an ordinary legal dispute which was adjudicated by divine intervention. To begin, Psellos describes a miracle which occurred in the Blachernai church of the imperial capital, Constantinople. As works like the *Akathistos Hymn* attest, the Virgin was viewed as the divine protectress of Constantinople, and the Blachernai church contained the most important icon of the Virgin in the city. Every Friday evening a ceremony took place in which worshippers came to witness a silk veil covering the icon of the Mother of God miraculously rise and stay suspended in midair until Saturday morning. The circumstances of an usual means of arbitration are then related: “It was not a civil court of a civil case, but rather a mystical and ineffable place of judgment for the stated problem through the Virgin Mother of God. Nor was it a mortal finding, but rather it was a mystical choice, a judgment and sentence not from the lips of a judge, but a judgment and


80 On the importance of the cult of the Virgin in Byzantium and especially her role as an active rather than passive protectress of the imperial capital, see Bissera V. Pentcheva, *Icons and Power: The Mother of God in Byzantium* (University Park, PA: The Pennsylvania State University Press, 2006). For the importance of the “Usual Miracle” see pp.145-63.

81 Pentcheva, p. 145.
resolution from supernatural signs.” 82 The case revolved around the ownership of a watermill in the theme or province of Thrakesiōn, in what is now western Asia Minor. This watermill stood on the border between two properties, the owners of which were respectively the monks of the monastery Tou Kalliou and the stratēgos Leo Mandalos. According to Psellos, given the importance of watermills in this period, disputes over mills and the water which powered them were extremely common: “Men, especially those in fields and villages, take great care so that they are able to let water flow unsparingly in them and that the millstone is able to grind with it, so that grain may be ground more easily and without pain. For many neighboring farmers disagree about both matters and depart from one another in that same place, and the courts are full of disputes about these affairs.” 83 Psellos’ statement is confirmed by cases concerning the ownership or use of mills in the surviving monastic acts. 84 Thus, the ownership of this mill also became the subject of a dispute. Both sides brought forth documentation which they believed would prove their ownership of the land, as disputed boundaries were supposed to be adjudicated on the basis of boundary markers and public records. Multiple judges attempted to adjudicate the matter, but no final verdict could be reached. Finally the two parties decided that they would seek a resolution outside of the courts:

Then it happened that both parties came to an amazing agreement and welded themselves in a chosen court, which received its start from political laws, but was not accomplished by political means. For they did not seat themselves in a court managed by one of the judges, either a middling or special or some such court, since this is the law and they would not trust a judge’s decisions if he was

82 Psellos, “Usual Miracle”, lines 3-8: “Οὐ πολιτικοὶ τοῦ πολιτικοῦ ζητήματος τὸ συστὰν δικαστήριαν, ἀλλὰ μυστικὸν καὶ ἀπόρρητον τοῦ προβλήματος προβλήματος τὸ συμβάν παρὰ τῆς θεομῆτρος παρθένου δικαστήριον, οὐδὲ ἀνθρωποκινητὴ διαίγνωσις, ἀλλὰ μυστικὴ διαίρεσις, οὐδ’ ἔκ δικαστῶν χειλέων ἢ ψήφου καὶ ἢ ἀπόφασις, ἀλλ’ ἔξω ὑπερφυῶν συμβολῶν ἢ κρίσεις καὶ ἡ διάλυσις.”
83 Psellos, “Usual Miracle”, lines 166-73: “περισσούδαστον ἀνθρώπων, καὶ μάλιστα τοῖς ἐν ἀγρῖς καὶ χωρίοις εἰ τις ἐν αὐτοῖς ὕδωρ τε ἀρφονότατον ἔχου καταγράφειν καὶ μίλων ἀλλεθεῖσαι ὑπὸ τοῦτον διιφάτην, ἵν’ ἐκ τοῦ ῥάστου ἄληθεσμόν ὁ στὸς τούτω καὶ επιτρικτὸς γένηται. καὶ πολλοί γε τῶν ἀγροτεύτων περὶ ἀμορφῶν ἡμισχισθέντων καὶ ὀμόσε ἄλληλος ἐχώρησαν, καὶ πλῆρη τά δικαστήρια τῆς περὶ τούτων ἁμησιβήτησας.”
84 Actes de Lavra, vol. 1, act 14 (1008) and act 30 (1037).
selected, but they made the Mother of God the arbiter of the lawsuit. In what way? They did not fly up toward heaven, because this was not possible, nor did they bring her [the Mother of God] down from there, because this was also impossible, but they referred the entire matter to the adjudication of the miracle around the icon.85

The monastery Tou Kalliou and the stratēgos Leo Mandalos agreed that the Virgin would arbitrate the case in the following way. At a time when the miracle did not customarily happen, the two parties would stand in front of the icon holding their legal documents and beseech the icon by wailing and rending their clothes. If the cloth which covered the icon did not move, then the monks of the monastery Tou Kalliou would win the case. If however the cloth moved, then the stratēgos Leo would receive full control of the watermill. Both parties came to the Blachernai church at the appointed time and awaited the arbitration of the Virgin. For a long time, the cloth did not move. Finally, the monks started to become excited that they had won the case, and the stratēgos Leo gloomily prepared to hand over his documents of ownership to the monks. However, at the very moment when Leo handed over the documents, the cloth moved and remained stationary in mid-air. Now the stratēgos Leo appeared to have won the case, as the cloth had moved. The monks disputed this because even though the cloth had moved, it had taken an extraordinarily long time to do so. Psellos gives his own opinion on the matter, saying that the stratēgos had clearly won, and the monks had lost because they had acted shamelessly when it had appeared that victory was theirs.

This passage constitutes a fascinating instance within Byzantine Legal Culture, not least of all because Psellos was a teacher of the law, and in fact penned a “Summary of the Laws”,

85 Psellos, “Usual Miracle”, lines 209-221: “συνηλθέτην δὲ ποτὲ ἄμφω τῷ μέρῃ ἐπὶ παραδόξῳ συνθήματι, καὶ συγκροτοῦσιν ἑαυτοὺς ἀιρέτων δικαστήριον, ἐκ νόμων μὲν πολιτικῶν δεξάμενον τὴν ἀρχήν, οὐ πολιτικῶς δὲ τούτοις συμπεραινόμενον. οὐ γὰρ καθίζουσιν ἑαυτοῖς ἐν ὑ συνετάξαντο δικαστήριῳ τῶν τινα δικαστῶν, τὸν μέσον ἢ τὸν ἐξαίρετον ἢ τὸν ὑποδηπτὸτε ἔχοντα, ἐπεὶ καὶ τούτο νόμος καὶ μὴ δικαστῇ πιστεύειν τὰς ψήφους εἰ αἱρετῶς γένοιτο, ἀλλὰ τὴν θεομητὴρα ποιοῦνται διαιρέτως τῆς ἱστολέους. τίνα τρόπον; οὕτω αὐτοὶ πρὸς οὐρανὸν ἀναπτάμενοι, ἐπεὶ μὴ δὲ ἑυστατόν, οὕτ' ἐκείνην ἐναπάθη καταγαγόντες, ἐπεὶ καὶ τούτῳ τῶν ἀδύνατον, ἀλλὰ τῇ κρίσει τοῦ περὶ τὴν εἰκόνα θαύματος τὸ πάν ἀναθέμενοι."
referred to in the secondary literature as the *Synopsis legum*. Whether or not the arbitration Psellos describes actually occurred is a question that cannot be answered. Psellos uses legal language extensively in his account, and even plays with legal terms. For instance, Psellos describes the Virgin’s pregnancy with Christ using the participle *kainotomēsasan*, from the verb *kainotomeō* (usually used in legal texts in the sense of “to clear a piece of virgin land” but also “to innovate, introduce an innovation”). This verb is used in Byzantine legal literature to describe introducing new laws—always in a negative sense. Psellos makes the Virgin do just this in the next line, writing that she was “to innovate entirely in the judgment which was entrusted [to her] and in a more divine manner to dispel the doubt and to render the matter under dispute undeniable.” Psellos clearly recognizes the method of arbitration chosen by the two parties as an innovation, since he refers to it as such. The usually negative connotations of innovation found in legal terminology are in Psellos’ description of the “Usual Miracle”, however, absent. This deliberate circumvention of the legal system, leaving behind the shifting verdicts of various judges for the absolute certainty of divine arbitration, reminds us that the Byzantine legal system, designed and supported with all of the power of the Byzantine state, was not the only recourse for dispute resolution. Whether or not such an arbitration actually occurred, the inclusion of such an episode in the hagiographic orations of the most famous of Byzantine intellectuals suggests that the idea of dispute resolution by divine means was not completely foreign to Byzantine Legal Culture.

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86 Psellos, “Usual Miracle”, lines 9-10.
87 *Ibid.*, lines 11-14: “...καινοτομήσαι πάντως καὶ τὴν ψήφον ἢν ἐπιστεύθη καὶ θεώτερον τρόπον διελεῖν τὸ ἁμφίβολον καὶ εἰς τὸ ἀναντίρρητον καταστήσασθαι τὸ μαχόμενον.”
X. Laws for a Christian Nation: The Nomoi of St. Gregentios, Archbishop of Taphar

A text which offers the perspective of a Middle Byzantine monk on the laws which a Christian nation should adopt is a collection of laws known as the Nomoi ("laws") ascribed to the missionary Saint Gregentios of Taphar. The historicity of Saint Gregentios is extremely problematic, as well as where and when the texts ascribed to him were written. Scholars of pre-Islamic Arabia have shown a particularly keen interest in the texts, as they purport to tell the story of Gregentios’ conversion of the kingdom of the “Homerites” in what is now Yemen to Christianity. After his successful missionary efforts sometime during the sixth century, Gregentios issued a set of laws for the new converts. The editor and translator of the texts ascribed to Gregentios has argued for a tenth-century date of composition and Constantinopolitan provenance for the Bios and Nomoi of Gregentios. Particularly for the Nomoi, which describe an urban setting more reminiscent of the tenth-century imperial capital than pre-Islamic Arabia and the use of mutilation as punishment, a novelty of the Ecloga, a Middle Byzantine dating and provenance make good sense.

Given that the author of the Nomoi probably lived in tenth-century Constantinople, the character of the laws enacted by Gregentios for the Kingdom of the Homerites is remarkable for how far it is removed from Roman law. At roughly the same time that the Macedonian emperors Basil I and Leo VI were issuing new redactions of Justinianic law, the anonymous author of the

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88 The texts of the works assigned to Gregentios of Taphar along with English translation and an excellent analysis of the rather complex problems of the dating and provenance of these works can be found in Life and Works of Saint Gregentios, Archbishop of Taphar, Albrecht Berger (ed. and trans.), Millenium-Studien 7 (Berlin; New York: Walter de Gruyter, 2006). Further references to the Nomoi will be made from this edition. English translations from the Nomoi are Berger’s.
90 Berger, Life and Works, pp. 82-91.
Nomoi harkens to Moses as a legal reformer. As noted by Berger, the text also prescribes mutilation as punishment for particular offences, a feature the Nomoi shares with the eighth-century Ecloga. The authors of the Ecloga introduced mutilation as a milder form of punishment for crimes in Roman law which merited the death penalty. In the Nomoi, the form of mutilation inflicted often corresponds with the nature of the crime perpetrated. For instance, a man who sleeps with a married woman shall have his penis cut off, while the woman shall have her left breast excised. The justification for this punishment, as with the rest of the legal prescriptions in the Nomoi, is Biblical: “For it is better, says the Lord, that one of your limbs be lost in this world and not your whole body be thrown into the Gehenna of fire.” In contrast to the absolute authority of the Byzantine emperor, the power of the Homerite king to enact and change law is quite limited: “It is necessary that the king take counsel in great things with holy men and ask the holy God through them, and it is good if that be done what seems right to him. For whoever does so will not be put to shame forever.”

91 Nomoi, lines 14-9: “For when God revealed his orders and his statutes to Moses at the time of his exodus from Egypt, he finally said unto him: ‘If you listen with your ears to the voice of the Lord your God and do the things pleasing to him, I will not inflict upon you all the diseases which I have inflicted on the Egyptians.’ Therefore, that we may not make the experience of his righteous threat for this reason like the Egyptians, let us follow his statutes (Διαμαρτυράμενος γὰρ ὁ θεὸς τῷ Μωυσῆ τὰ προστάγματα αὐτοῦ καὶ τὰ δικαίωματα τοῦ καιρῆς ἐξόδου αὐτοῦ τῆς ἑξισίους τού Αἰγύπτου, τάδε ἐπὶ τέλους εἰρήκει πρὸς αὐτόν· Ἐὰν ἀκοή ἀκοοῦση τῆς φωνῆς κυρίου τοῦ θεοῦ σου καὶ τὰ ἄρεστά αὐτοῦ ποιήσῃς, πάσαν νόσον ἢν ἐπήγαγον τοῖς Αἰγυπτίων οὐκ ἐπάξω ἐπὶ σέ. Διὰ ταύτα τοιγαροῦν, ἵνα μὴ καὶ ἡμεῖς πειραθῶμεν ὡς οἱ Αἰγύπτιοι τῆς δικαίας αὐτοῦ ἀπελθῆς, μετὰ φόβου ἐπιτελέσωμεν αὐτοῦ τὰ δικαίωματα.)”

92 Nomoi, lines 69-71: “From a man that is found with a married woman, the tool of the body by which he committed the sin shall be cut off, and also the left breast of the woman shall be removed, because she has left her own husband and had intercourse with Satan (Ὁ εἰς γυναῖκα ὑπανθρὸν εὑρέθης τεμνέσθω τὸ ἐργαλεῖον τοῦ σώματος, μεθ’ ὧν τὴν ἁμαρτίαν εἰςπράττεται, ἁραίρεσθω τε καὶ ὁ εὐόνυμος μασθὸς τῆς γυναικοῦ, ἀνθ’ ὧν κατέληπε τὸν ἄνδρα τὸν ἱδον καὶ ἐμίγη τῷ σατανά.)”

93 Ibid., lines 71-2; Matt. 5:29.

94 Nomoi, lines 345-7.
The *Nomoi*, when compared to some of other texts surveyed in this chapter, is emphatically a moral code meant to effect the spiritual salvation of the people living in the Kingdom of the Homerites. Instead of viewing the law as a harsh and unbending institution which necessitated the application of mercy and clemency, the author of the *Nomoi* seems to possess no compunctions regarding the draconian measures prescribed in his code. Indeed, he underlines the essentially antagonistic nature of his legislation: “We swear the oath, which God swore to our father Abraham instructing him, that we will not cease in all the days of our life to display innumerable bad things to all those that do iniquity and tread our God-given law with their feet, if they do not cease to commit sin, nor will we pass over them in silence in order to destroy them. For the marvellous David also, doing the same thing, said to the world writing thus: ‘In the morning I have killed all the sinners of the earth,’ he said, ‘to destroy all those that do iniquity from the city of the Lord.’”

Although the *Nomoi* were never enacted or enforced, the moral code contained in the text demonstrates the profound influence of Biblical and particularly Mosaic conceptions of law and justice. The tenth-century author of the *Nomoi*, writing in a monastic milieu, composed a legal order with no reference to Roman law. For the newly Christian kingdom of the Homerites, the inspiration for law and justice was to be Biblical, not Roman. However, one cannot dismiss the *Nomoi* as the harsh ravings of a monk completely detached from his Middle Byzantine milieu. On the contrary, the popularity of the *Mosaic Law*, a compilation of quotations from the Pentateuch concerning family law and sexual morality, the manuscripts of which first start

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95 *Nomoi*, lines 136-43; Ps. 100:8.
appearing in the eleventh century, testifies to the power of Biblical, and particularly Old Testament, paradigms of justice within the Byzantine Empire.\textsuperscript{96}

XI. Conclusion

This chapter started with reference to Simon’s \textit{Rechtsfindung}, which while correctly emphasizing the importance of non-Roman legal paradigms in Middle Byzantine jurisprudence, underlined the rhetorical function of these paradigms rather than their actual influence and importance. In the preceding overview of the role of Roman in Byzantine law, it has been demonstrated that while Roman law occupied a pre-eminent position in Byzantine law, Roman law did not prevent Byzantine judges from adapting their jurisprudence to changing social conditions and applying Orthodox Christian precepts to their decisions. Finally, paradigms of law and justice outside of Roman law were explored, showing that these paradigms exerted a powerful influence upon the concepts of law and justice in various stations of Byzantine society.

The types of legal sources employed in this analysis included normative legal source like the \textit{Basilika}, the legal textbook known as the \textit{Peira}, in addition to non-normative legal sources such as the \textit{Stratēgikon} of Kekaumenos, Psellos’ description of the “Usual Miracle” at Blachernai, and the \textit{Nomoi} ascribed to Saint Gregentios, Archbishop of Taphar. Usually studies of Byzantine law focus on one set of sources, either normative or non-normative. Hopefully, this chapter has shown that an analysis of both sets of records can yield some useful insights into Byzantine Legal Culture under the Macedonian dynasty. While one cannot argue that Byzantine Legal Culture was based solely on the objective reading of legal codes, without the influence of

personal bias or legal paradigms not found in Roman law’s Middle Byzantine iteration, most pre-modern and modern societies would also fail to follow such exacting standards. Byzantine Legal Culture was a fascinating blend of disparate legal traditions: while essentially Roman in its formulation, it was Orthodox Christian in its justification and application.
Chapter Three

“Golden, they say, are your hands, your tongue and your justice”: How Gift-Giving and Patronage Networks were Legitimated within Byzantine Legal Culture

I. Introduction

The subject is clear. In Scandinavian civilization, and in a good number of others, exchanges and contracts take place in the form of presents; in theory these are voluntary, in reality they are given and reciprocated obligatorily…What rule of legality and self-interest, in societies of a backward or archaic type, compels the gift that has been received to be obligatorily reciprocated? What power resides in the object given that causes its recipient to pay it back?¹

The above quotation is taken from the introduction of Marcel Mauss’ seminal essay on the function of the gift in archaic societies, a work which inaugurated a host of studies devoted to the role of gift-giving in anthropology, history and sociology.² Crudely stated, the principal impetus in the studies of Mauss and others was the realization that no gift is ever freely given. Within Byzantine society as well, gift-giving played a vital role in a number of different contexts. In this chapter the importance of gift-giving, along with the accompanying and inseparable practice of patronage, will be highlighted within Byzantine Legal Culture. As shall be explored in detail below, both “gift-giving” and “patronage” encompassed a range of practices, including the payment of judges and their staffs by litigants and the exercise of influence or friendship to obtain a favorable verdict for oneself or one’s friends. The legality or the degree to which these practices were favorably or unfavorably viewed varied considerably in both normative and non-normative legal texts for the entirety of the Middle Byzantine period.

The considerable range of responses to gift-giving and patronage within Byzantine Legal Culture reflect the legal grey area which these phenomena occupied.

Despite the important contribution that the social sciences, in particular anthropology, have made in bettering our understanding of the function of the gift as well as patronage, many modern analyses of societies where patronage and influence are still facilitated via gift-giving have tended to group all instances of gift-giving under the rubric of bribery or corruption and have focused on ways of eliminating these practices. This is the case, for instance, when Western corporations have expanded their operations to regions where gift-giving and patronage are tied closely together, such as Latin America and China. Thus there exists a considerable literature in business journals concerning the Chinese concept of Guanxi, a form of patronage which often involves the use of bribes and personal favors.³ Many of these studies tend to treat Guanxi as an outmoded practice which will eventually be swept away by modernization.⁴

Like modern business journals, studies on the practices of gift-giving and patronage in Byzantine Legal Culture have tended to condemn them as symptoms of a corrupt legal system. Helen Saradi, the author of an excellent article on the Byzantine legal system, highlighted the susceptibility of Byzantine judges to bribery, the recognition of this fact by Byzantine emperors, and their subsequent attempts to combat corruption within the legal system.⁵ Presented in this way, the imperial administration was constantly in a struggle to attenuate corruption within the legal system. Although it is true that emperors and certain authors of the Middle Byzantine


period, most notably Kekaumenos, viewed corruption of judges and legal officials as a problem, this chapter will argue that what modern scholars often describe as “bribery” or “corruption” does not adequately encompass the relevant phenomena. A more heuristically useful way to approach what is usually termed “bribery” or “corruption” is to contextualize these concepts within the broader categories of gift-giving and patronage and their function within Byzantine Legal Culture. As shall be demonstrated in this chapter, factors such as the customary payment by litigants for legal services, the important role of patronage and the value placed upon friendship within the Byzantine élite all contrived to obscure the line between licit and illicit, between gift and bribe, between assistance and personal favor. That is not to say that bribery and corruption did not exist or that Byzantine authors did not possess a conception of these phenomena looked like in practice, rather that the line between legal and illegal influence was not clearly distinguished, or even if it was clearly delineated in certain instances by the law these regulations appear to have been largely ignored or sporadically enforced. Although there is no medieval Greek word which adequately expresses this style of patronage, there certainly existed in the Middle Byzantine period an analogue to Chinese Guanxi: the importance of knowing the right people, of cultivating relationships with people in positions of power through gifts and of asking for and rendering favors which were either illegal or which occupied a legal grey area.6

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6 There existed a term for this sort of patronage in Late Antiquity (Lat. patrocinium, Gr. προτασία), but by the Middle Byzantine period no single term was employed for describing patronal relationships: see Andrew J. Cappel and Alexander P. Kazhdan, “Patronage, Social” in ODB, vol. 3, p. 1602. Helen Saradi in another article has attempted to find traces of Late Antique patronage practices in Byzantium, see eadem, “On the ‘Archontike’ and ‘Ekklesiastike Dynasteia’ and ‘Protasia’ in Byzantium with Particular Attention to the Legal Sources. A Study in Social History of Byzantium,” Byzantion 64 (1994): pp. 69-117, 314-51. The approach employed in this chapter with regard to Middle Byzantine patronage differs from that of Saradi in that it does not attempt to categorize patron-client relationships according to Late Antique paradigms of patronage. The way patronage was exercised was, after all, quite fluid and depended on the social status, wealth and influence of the patron and client, with varying degrees of equality and dependence. In any case, as is evident from Saradi’s investigation, there does not appear to have been a standard set of recognized obligations for patrons and clients, nor even an agreed-upon term by which such a relationship was designated.
Imperial patronage as well as the patronage of the power élite, or what one might call “state patronage”, is a well-studied phenomenon in Byzantium, not least because of its conspicuous presence in sources concerned with court ceremony like the *De ceremoniis*. Indeed, as Paul Magdalino puts it “[a]s much as, if not more than, other royal courts from Cordoba to Beijing, that of the Byzantine emperor was society’s main hub for the concentration and redistribution of wealth, the performance and communication of government business, decision-making and dispute-settlement, the interface between rulers and ruled, social mobility both upward and downward, the group consciousness of the élite and their competition for individual status within the group.” In contrast with state patronage, private patronage, or patronage not carried out only by the power élite, has been less studied by Byzantinists. This is at least partially because Byzantium has long been seen as an intensely bureaucratic state, especially by the standards of its “feudal” Western medieval counterparts. A step in correcting this notion was taken in the 1960s by the eminent Byzantinist Hans-Georg Beck. Drawing on examples from the ninth through eleventh centuries, Beck demonstrated that the existence of retinues loyal to a powerful individual (*hetaireiai* or *phratriai*) played a key role in the accession of usurpers to the imperial throne. Time and time again, ambitious and lucky young men, often of humble origins,

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8 Magdalino, “Court Society and Aristocracy”, p. 212.
were able to advance to the highest levels of the Byzantine administration by participation in and use of these hetaireiai.9

Leonora Neville in her study on authority in the Byzantine “core” provinces articulated a powerful and convincing refutation of the traditional notion of Byzantium as a centralized, bureaucratic state.10 Drawing from a wide variety of sources, Neville demonstrated the essential apathy of the imperial administration in Constantinople toward provincial matters, outside of tax collection; as long as no overt display of power threatened the emperor, he largely left the provinces alone as long as their fiscal obligations were met.11 This benign neglect was exploited by powerful provincial households (oikoi), which could and did create and maintain spheres of local influence.12 Obviously, although loyalty to friends and family was prized, at least by the eleventh century loyalty to one’s oikos was not seen as inimical to serving the emperor.13 Friendship and patronage networks were entwined within the fabric of Byzantine society, and evidence for the existence of these networks can be evinced throughout the empire’s existence at every level of the administration and in the Church. Both the Byzantine legal system as well as Byzantine Legal Culture did not constitute exceptions to the general prevalence of friendship and patronage networks: on the contrary, it is in these areas that it was especially noticeable.14

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11 Neville, p. 39.
12 Ibid., pp. 66-135.
14 The importance of patronage in the Byzantine legal system is especially evident in Günter Weiss, Oströmische Beamte im Spiegel der Schriften des Michael Psellos, Miscellanea Byzantina Monacensia 16 (Munich: Institut für Byzantinistik und Neugriechische Philologie der Universität, 1973).
Byzantinists and legal historians, when confronted by the existence of these friendship networks tend to group them under the rubrics of “bribery” and “corruption.” By modern standards, of course, actions like paying a judge for his services or aiding a friend by handing down a favorable judgment undoubtedly constitute instances of bribery and corruption. Like most contemporary legal systems, these practices were condemned at an official level; as we shall see below, as the only legitimate legislators of the Byzantine state emperors attempted to regulate gift-giving. Further down the social scale, members of the power élite likewise imagined an ideal judge as completely free of corruption. Yet Psellos, among others, could both condemn corruption generally while at the same time court his friends for legal favors.\textsuperscript{15}

Rather than examining corruption and bribery as problems which prevented the Byzantine legal system from operating effectively and efficiently, this chapter shall examine how networks of gift-giving and patronage were legitimated through the legal system and legal culture.\textsuperscript{16} As shall be demonstrated, the tension between the ideal of the incorruptible judge and the reality of judges who utilized the same practices of gift-giving and patronage as the rest of the élite was to Byzantine writers of the period not contradictory. First, an examination of imperial legislation from Late Antiquity into the Macedonian period shall show that judges accepted fees from litigants as a matter of course, and it was the undue abuse of this practice, not the custom of accepting fees \textit{per se}, which garnered imperial condemnation. Moreover, the provincial judge’s function as the collector of secondary taxes reinforced his image as a fiscal


official. As Paul Magdalino has shown, justice and revenue were closely entwined within Byzantine Legal Culture. Second, the views of Middle Byzantine writers shall be scrutinized with regard to the qualities they looked for in the ideal judge, and how they legitimated the practices of gift-giving and patronage. Lastly, an examination of surviving legal documents, the majority of which are found within the various Athonite archives and the Peira, will show how patronage and gift-giving functioned in practice.

Thus, the practices of gift-giving and patronage were carried out as effectively and enthusiastically by officials with judicial powers as any other area of the Byzantine administration. Moreover, a heuristically useful examination of these practices should not underline that they were venal and corrupt, but rather emphasize that gift-giving and patronage were so basic to the Byzantine conception of state and society, and thus were replicated at every level of the administration from the emperor on down, that a completely impartial and incorruptible judiciary would have been utterly antithetical to the reality of Byzantine governance. Although one is unable in this instance to answer that age-old conundrum of whether a society develops laws and customs to best suit its mores or whether laws and customs order the society that utilizes them, nonetheless it can be stated with conviction that the Middle Byzantine legal system and legal culture were well-suited to accommodate the *prima facia* surprising coupling of Roman law and Orthodox Christian ethics.

Overall, the legitimation of gift-giving and patronage within Byzantine Legal Culture bears similarities to contemporaneous Middle Byzantine phenomena, like the increasing number of fiscal exemptions granted by the administration in the ninth to eleventh centuries, which has

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been extensively studied by Nicholas Oikonomides.\textsuperscript{18} In both cases “…[d]ans la mesure du possible, la machine de l’État se veut juste, objective, paternaliste mais arbitraire…”\textsuperscript{19} Yet at the same time, a striving for fairness at the official level of discourse was balanced by a reality in which the Byzantine élite continued to cultivate relationships and curry favors with one another, practices which had substantial repercussions for the fiscal as well as the judicial administration.

\textbf{II. The Practices of Paying \textit{Sportulae}, Bribery and Patronage in Imperial Legislation}

It is nowadays generally expected of a judge that he should not only be learned in the law but honest and independent, yielding neither to bribes nor to intimidation or social pressure. In the later Roman empire legal learning was, as we have seen, not expected of a judge. Honesty and fearless independence were highly esteemed, but they were rather ideals than normal requirements. Judicial corruption was an endemic evil which the emperors were powerless to overcome. It is attested not only by the denunciations of the moralists, Christian and pagan, but by many constitutions in the codes, and even more strikingly by the praise given to honest governors. An age in which it was a high compliment to a retiring judge to say that he left office as poor as when he entered upon it must have had low standards of judicial honesty.\textsuperscript{20}

As the quotation above from A.H.M. Jones’ section on “Justice” in his \textit{The Later Roman Empire} emphasizes, judges, who were seen primarily as administrators with judiciary powers rather than legal specialists, were constantly subjected to attempts at “bribery.”\textsuperscript{21} The term “bribery” here tends however to conflate two related phenomena: the customary payment of fees by litigants to legal officials for cases tried in their courts (Lat. \textit{sportulae}, Gr. \textit{ektagiatika}) and the purchasing of influence with legal officials by paying a sum above and beyond these fees.\textsuperscript{22}

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\textsuperscript{18} Nicholas Oikonomidès, \textit{Fiscaltié et exemption fiscale à Byzance (IXe-XIe s.)}, Fondation nationale de la recherche scientifique, Institut de recherches byzantines; Monographies 2 (Athens: Foundation nationale de la recherche scientifique, Institut de recherches byzantines, 1996).

\textsuperscript{19} Oikonomidès, p. 262.


\textsuperscript{21} Jones, pp. 470-522.

\end{flushright}
The problem in distinguishing between the two both in the Later Roman Empire as well as in the Middle Byzantine Empire is that imperial legislation alternated between banning and regulating *sportulae*. Nonetheless, it is clear that whatever the official imperial position regarding *sportulae* was, within Byzantine Legal Culture legal officials expected to be paid for their services and that these fees were to be provided by the litigants. While the customary amounts paid by litigants fluctuated, there was also a recognition that at some point a litigant crossed the line between paying these *sportulae* and purchasing undue influence in a case; the use of the term “bribery” will be confined in this chapter to the latter occurrence.

The first emperor who attempted to combat the practice of *sportulae* was Constantine I (r. 306-337), who issued a constitution which threatened bribe-takers with death. Despite the legal prohibitions against *sportulae*, they appear to have become institutionally accepted by the end of Late Antiquity. A list of *sportulae* for the consular of Numidia during the reign of Julian (r. 361-3) exists and the emperor Justinian I set a schedule for *sportulae* which is referenced frequently in the *CIC*, but it has unfortunately not survived. There is no reason to suppose that the practice did not continue into the seventh century and later despite considerable economic, military and political upheaval.

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23 Jones, p. 496; *Codex Theodosianus* 1.16.7 (Nov. 1, 331): “IDEM A. AD PROVINCIALES. Cessent iam nunc rapaces officialium manus, cessent, inquam: nam nisi moniti cessaverint, gladiis praecidentur. Non sit venale iudicis velum, non ingressus redempti, non infame licitationibus secretarum, non visio ipsa praedios cum pretio. Aeque aures iudicantis pauperrimis ac divitibus reserentur. Absit ab inducendo eius qui officii princeps dicitur depraedatio; nullas litigatoribus adiutores eorumdem officii principum concussiones adhibeant; centurionum aliorumque officialium parva magnaque poscentium intolerandi inpetus oblidantur eorumque, qui iurgantibus acta restituunt, inexpleta avida temperetur. Semper invigilat industria praesidalis, ne qui quam a praedictis generibus hominum de litigatore sumatur. Qui si de civilibus causis quidquam putaverint esse poscendum, aderit armata censura, quae nefariorum capita cervicesque detruncet, data copia universis qui concussi fuerint, ut praesidum instruant notionem. Qui si dissimulaverint, super eodem conquerendi vocem omnibus aperimus apud comites provinciarum, aut apud praefectos praetorio, si magis fuerint in vicino, ut his referentibus edocti super talibus latrociniiis supplicia proferamus. DAT. KAL. NOVEMB. CONSTANT(INO)P(OLI) BASSO ET ABLAVIO CONSS.”

24 Jones, pp. 496-8.
Bribery of judges is taken up again as a problem in the eighth century during the rule of the Isaurian dynasty. The emperors Leo III (r. 717-741) and Constantine V (r. 741-775) in their Ecloga chose to condemn bribery as a moral failing—like much of the Ecloga, venality is condemned in no uncertain Biblical terms:

For our Lord and Savior Jesus Christ has said “Judge not according to appearance, but judge righteous judgment” (John 7:24), [therefore] it is just to refrain from all bribery. For it is written: “Which justify the wicked for reward, and take away the righteousness of the righteous from him!” (Isaiah 5:23) and “Turn away the way of the meek” (Amos 2:7); “so their root shall be as rottenness, and their blossom shall go up as dust: because they have cast away the law of the Lord” (Isaiah 5:24). “For a gift doth blind the eyes of the wise, and pervert the words of the righteous.” (Deuteronomy 16:19). Therefore we have endeavored to entirely suppress such disgraceful venality, and we have determined that the most glorious quaestor, the antigrapheis, and all of those serving in the principal courts are to receive their wages from our pious treasury, so that they are unable to receive anything at all from anyone who is being judged by them, lest the saying of the prophet be fulfilled for us: “They sold the righteous for silver” (Amos 2:6), and [lest] we desire to receive divine censure as trespassers of His commandments.25

Thus we see quite clearly in the first major collection of post-Justinianic laws that bribery of judges and legal officials aroused imperial scrutiny. The passage above indicates that the quaestor, the antigrapheis and the officials serving in the principal courts (τοῖς ἐπὶ τοῖς δικαστικοῖς κεφαλαίοις καθυπουργούσι) were prohibited from receiving payment of any sort. However, just because these legal officials were precluded from receiving sportulae does not necessarily lead to the conclusion that all judges were forbidden from doing so or that the

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25 Ecloga, proem, lines 96-109: “Τοῦ κυρίου καὶ σωτήρος ἡμῶν Ἰησοῦ Χριστοῦ εἰρήκοτος· μὴ κρίνετε κατ’ ὅψιν, ἀλλὰ τὴν δικαιὰν κρίνετε, πᾶσας δοσοληψίας ἀπέχεσθαι δίκαιον· γέγραπται γάρ· οὐκ εἰς τις δικαιούντες τὸν ἁσβοῦν δῶρον καὶ ὅδον ταπεινοῦν ἐκκλίνοντες, τὸ δίκαιον τοῦ δικαίου αἵροντες ἀπὸ αὐτῶν· ὄν τῇ ρίζᾳ ὡς χοῦς ἔσται, καὶ τὸ ἀνθίζειν αὐτῶν ὡς κοινωρῶς ἀναβήσεται, ἀνθ’ ὧν τὸν νόμον κυρίου πληροῦν οὐκ ἴηλθεν. ξένα γὰρ καὶ δόρα ἐκτυφλοῦσθαι οὐκ ὕψαστα. οὗτος τοιαύτης ἀισχροκερδείας ἀναστόλην παντελῶς ποιεῖται σπουδάζοντες ἐκ τοῦ ἑσπερίου ἡμῶν σακελλίου ὕψισταν τὸ τε ἐνδοξοτάτῳ κυστόρι, τοῖς ἀντιγραφεῖσι καὶ πάσι τοῖς ἐπὶ τοῖς δικαστικοῖς κεφαλαίοις καθυπουργούσι τοῖς μισθοῦς παρέχεσθαι πρὸς τὸ ἔξω οἰωνόμου προσώπου παρ’ αὐτῶν κρινομένου μηδὲν αὐτῶς λαμβάνειν τὸ σύνολον, ἵνα μὴ τὸ ὑπὸ τοῦ προφήτου λεγόμενον καὶ εἰς ἡμᾶς πληροθῇ· ἀπεδότον ἀργυρίῳ τὸ δίκαιον, καὶ μέλλουμεν ἐνεπεθεῖν θείκες τυχήσειν ἀγανακτήσεως ὡς τῶν ἐντολῶν αὐτοῦ παραβάται γενόμενοι.”
practice stopped during this period. Indeed, the fact that these officials are enumerated as salaried and forbidden from accepting *sportulae* in place of a general prohibition against accepting *sportulae* tends to support the idea that they were exceptional and such an assumption would explain the same prohibition against accepting *sportulae* which applied to the “city judges” (*politikoi dikastai*), who appear in imperial novels of the tenth century. The period of Isaurian rule for the most part constitutes unknown territory for legal historians, and particularly for the legal administration we have a far more complete picture before and after rather than during this epoch. Yet here it must be noted that bribery of legal officials was first and foremost construed as a moral problem. Thus from the period of issuance of the *Ecloga* until eleventh-century writers like Kekaumenos bribery of legal officials was thought to originate out of character failings: as shall be shown, this notion was repeated time and time again by Byzantine writers. The efficiency of the legal administration did not constitute a secondary concern *per se*, since in Middle Byzantine Legal Culture a morally-upright judge was a necessary component of an efficient legal-administrative system. Nonetheless, whatever the perceived shortcomings of the legal system, both problem and solution were construed morally.

There are several regulations regarding judging in the *Eisagoge*. Like most of the *Eisagoge*, these regulations represent a reworking of material in the *CIC*. Concerning the practice of *sportulae*, the relevant passage in the *Eisagoge* represents either a misreading/mistranslation of the original text or a deliberate omission. *Eisagoge* 7.1 states that

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26 Pace Saradi, “The Byzantine Tribunals”, p. 177.
27 Recently Haldon and Brubaker have demonstrated that the Late Antique office of the *anthypatos* retained its juridical function until as late as the beginning of the ninth century; see Leslie Brubaker and John Haldon, *Byzantium in the iconoclast era c. 680-850: a history* (Cambridge; New York: Cambridge University Press, 2011), pp. 671-9.
magistrates in the provinces (archontes)\textsuperscript{29} should not allow judges to receive anything in any way when judging cases, not even in the name of custom, and that they are liable to damages if they knowingly do this.\textsuperscript{30} However, Justinian’s Nov. 8.6, on which Eisagoge 7.1 is based, states that judges are not to collect any fees beyond the regulated sportulae.\textsuperscript{31} Thus a reworking of the original text led to a very different regulation; judges were not to receive any sportulae whatsoever. Magistrates were also not allowed to appoint a guardian or a judge.\textsuperscript{32}

Judicial corruption is next indirectly referenced in the Novels of Leo VI.\textsuperscript{33} Novel 84 overturns Justinianic regulations which prohibited magistrates in the capital from constructing private buildings and purchasing movable or immovable property without the permission of the

\textsuperscript{29} \textit{άρχων} being a general term for any of the various high-ranking provincial magistrates; Eisagoge 6.1: “\textit{Archōn} is a general term which denotes the \textit{stratēgos}, the anhypatos and all of the provincial officials if they are of senatorial [rank], (Τὸ τοῦ \textit{ἀρχόντος} ὄνομα γενικὸν ἔστι, καὶ σημαίνει καὶ στρατηγὸν καὶ ἀνθύπατον καὶ πάντας τοὺς ἐπαρχίων διοικητάς, εἰ καὶ συγκεκριμένοι ὁσιν...)

\textsuperscript{30} \textit{Eisagoge} 7.1: “Οἱ \textit{ἀρχόντες} τοὺς ἐξ οἰκουδέτοις δικαστηρίου ὁμιλεύουσι συγχωρεῖν λαμβάνειν καθ’ οἰκουδέτοις τρόπων οὐδὲ ἐν ἀνόμοις συνηθεῖσιν, γινόμενοι, ὥς εἰ τοῦτο ραθμισίων πᾶσαν ἰμήριαν ἐνθύθην τοῖς ἡμιτέροις ὑποτελέσιν ἐπαγμένην αὐτοῖς καταθήκουσιν.”

\textsuperscript{31} Nov. 8.6 (Scott. trans.): “We desire all persons to be subject to the authority of the Governors of Our provinces; and this applies to all cases, whether pecuniary or criminal matters are involved. Those who are appointed for the discharge of civil functions by special judges shall also be responsible in fiscal and criminal cases. Governors of provinces must not permit officers despatched from Our court, or from any other, to carry sentences into execution, or to receive fees beyond those prescribed by Our law; and if they should knowingly permit this to be done, they themselves will be liable for any damages sustained by Our subjects. (Volumus autem omnibus iudicibus nostrarum provinciarum omnes subdi, privatos quidem secundum quod cinguli proprium est, in omnibus causis et universis pecuniariis et criminalibus occasionibus; qui vero in militiis constituiti sunt, etiam istos nihilominus occasione fiscalium et criminum subdi omnibus modis ei. Sed etiam eos qui hinc descendunt ex quolibet foro, qui quascumque executur sententias, licet provinciarum iudicibus non sinere amplius quam sacra nostra constitutio dispositum est percipere sportularum, scientibus quia, si hoc neglexerint, omne damnum ex hoc nostris collaboribus illatum ipsi persolvent. Damus autem eis licentiam et referre de eo non solum ad iudices a quibus sunt missi, sed etiam ad nos ipsos, ut nos haec agnoscentes causam competenter exequamur. Si autem ipsi aliquos invenerint propter dignitatis et cinguli supercilium nostris collaboribus violentias irrogantes, licentiam eis damus et examinare violentias et reos inventos privare cingulo et nostrum ordinem in provinciis adimplere, hoc quod etiam veteribus dictum est legibus. Sicut enim eos omni inustio lucro prohibemus, ita etiam pure cingulis utentes omni honore et reverentia et honestate frui sancimus.)”

\textsuperscript{32} Eisagoge 6.4: “An archōn cannot appoint his own special guardian or judge (Ὁ \textit{ἀρχῶν} ἑπίτροπον ἢ δικαστὴν ἰδικῶν ἐκατον ἢ διθωσιν).”

\textsuperscript{33} Saradi, “The Byzantine Tribunals”, p. 178. Saradi’s interpretation of the \textit{katakrisis} of judges issuing decisions without any basis in the law (included among the \textit{παράλειπόμενα} of Noailles and Dain’s edition) as referring to the bribery or undue swaying of judges seems, however, misplaced. It is much more plausibly a condemnation of judges who render decisions based on laws outside of the Leonian corpus of legislation, namely the \textit{Sixty Books} along with his \textit{Novels}. Together, these two works were intended to encompass all legitimate law; all legislation abrogated by the \textit{Novels} or unmentioned by the \textit{Sixty Books} was no longer valid (see Novels of Leo VI, proem, p. 9, lines 1-8) and judges were only allowed to employ regulations which had been sanctioned by Leo VI or Basil I (Novels of Leo VI, Novel 1, p. 15, lines 3-14).
emperor; additionally, any gift given to a magistrate while in office had to be confirmed in writing by the donor after the end of the magistrate’s term of office or if five years had passed since the magistrate’s term of office ended. In Leo’s view, these regulations had been passed to limit coercion (Bia), but were now unnecessary because of the ability of every citizen, rich or poor, to appeal to the emperor.\(^34\) While lifting the regulations for magistrates in the capital, Leo adds that magistrates in the provinces, namely the \textit{stratēgos}, are likewise not allowed to begin the construction of buildings nor to purchase or enjoy the use of something nor to accept gifts while in office; officials working under the \textit{stratēgos} involved in similar activities had to refer them to him.\(^35\) The \textit{stratēgos} during this period in which the \textit{Eisagoge} was written, at the end of the ninth and the beginning of the tenth century, was the \textit{generalissimo} of his province or theme and within it represented it the highest civil and military authority. As the chief civil authority in a theme, he naturally had judicial powers as well,\(^36\) so that the provisions of this novel can be taken as evidence of an imperial effort to curb judicial corruption.

A century and a half after the promulgation of the \textit{Ecloga}, the activity of judges again attracted imperial attention and renewed evidence of the payment of \textit{sportulae} comes from two novels of Constantine VII.\(^37\) The payment of these legal fees had been a custom which was granted the force of law by Constantine VII. According to the earlier of the two novels, a thematic judge (\textit{thematikos dikastēs}) could not receive more than three \textit{nomismata} per pound of gold under dispute,\(^38\) up to a maximum of 100 \textit{nomismata}. This worked out to a rate of a little over four percent. Litigants designated as “poor” were to pay only one \textit{nomisma}, which

\(^{34}\) \textit{Novels of Leo VI}, Novel 84, p. 285, lines 1-13.

\(^{35}\) \textit{Ibid.}, lines 18-24.

\(^{36}\) It is, however, questionable to what extent the \textit{stratēgos} ever actually exercised his civil authority in matters not directly related to the upkeep and functioning of the army; Brubaker and Haldon, p. 769.

\(^{37}\) \textit{JGR}, vol 1., col. 3, n. 7 (pp. 218-221) and n. 9 (pp. 227-9); Dölger, pp. 241-4.

\(^{38}\) NB: The novel does not explicitly state what is measured: Dölger conjectures “Streitwert.”
corresponded to a rather miserly 1.4 percent. In cases involving the contestation of ownership of land between “powerful” and “poor”, the judge was to receive one *nomisma* from the “powerful”, and nothing from the “poor.” These fees did not include expenses incurred for the travel and lodging of the judges. This amount was intended not only for the thematic judge but also his subordinates. The effect of this first novel seems to have been chaotic, as judges split the pleading of the litigants’ cases so that multiple judges could collect fees from one case.\(^{39}\)

Thereafter, a second novel was issued which attempted to correct these abuses.

The upshot of these regulations regarding legal fees was of course to create an incentive for thematic judges to judge as many cases as possible. This was apparently intentional as the second novel of Constantine VII states that the subordinates of the thematic judge would encourage him and work all the harder because they knew that they would be paid for each case which resulted in a final verdict.\(^ {40}\) Additionally, the schedule of legal fees doubtless affected the types of suits which were judged, as both thematic judges and their subordinates were paid much more for judging cases involving two wealthy parties. Not only were amounts under dispute much higher, but judges were paid at a rate of three times that of poorer litigants. And in those

\(^{39}\) *JGR*, vol. 1, col. 3, n. 9, p. 227: “For they [the thematic judges] reasoned that it would not be beneficial for one of the judges to make a profit from the loss of another, and so thus they split the presentation of evidence (by the litigants), so that oftentimes they did not abide the exposition [of evidence] of the litigants. And before the necessary examination and hearing they effected a transfer of the case [to another judge]. And oftentimes it happened, that from the proceedings of meddling judges and from the successive transfer [of cases] they overshoot the value of the established value of the estate through bribery. (θηρώμενοι γάρ ὡς οὐκ ὄφελον ἐνί τῶν δικαστῶν κέρδος ποιεῖν ἕκ τῆς ἐπέρου ζημίας, οὔτω κατασχίζουσι τὰς ἀποδείξεις, ὡς πολλάκις μιθὲ τῆν τῶν μερῶν παράστασιν ὑπομένειν. πρὸ γάρ τῆς δεούσης δοκιμασίας καὶ ἀκροάσεως φθάνουσι τὴν μεταγωγὴν δρόμουν τῆς νομῆς ἑν οἷς πολλάκις συμβαίνει, ἕκ τῆς τῶν συνεχῶν δικαστῶν ὕφοδου καὶ τῆς ἄλλαπαλλήλου μεταφορᾶς τῆς τῶν ὑποκειμένων διατίμησιν τῶν δικαιμένων ὑπερκοποιέσθαι.)”

\(^{40}\) *JGR*, vol. 1, col. 3, n. 9, p. 228: “Thus the judge be shall roused more diligently toward a final verdict of the [parties] seeking it, and his subordinates shall urge him on and encourage him in his duty and shall exhort him and serve more enthusiastically, knowing there will otherwise be no income outside of the final resolution of the case, and if he makes one verdict and judgment each day, then they will certainly carry away over three hundred *nomismata* in profit over the course of a year. (οὕτω γάρ καὶ ὁ κριτής ἐπισπόντιερον πρὸς τελείαν ἀπόφασιν τῶν ζητούμενων διανιστήτηται, καὶ οἱ προσκυντεὶται αὐτὸ ὑπηρέτα πρὸς τότῳ διουκήσεως ἐποτυπώθην αὐτὸν καὶ παρακάλεσον καὶ προθυμότερον ὑπερτινούσιν, εἰδότες ὡς οὐκ ἔσται ἄλλοθεν αὐτοῖς πορισμὸς εἰ μὴ ὁ ἀπὸ συντελείας τῆς δίκης, εἰ δὲ ἀν μίαν ἀπόφασιν ἕρ᾽ ἐκάστη ἡμέρα καὶ κρίσιν πούσηται, ύπήρ τὰ τριακόσια νομίσματα πάντως δι᾽ ὅλον τοῦ ἐνιαυτοῦ κοιμοῦνται κέρδος.)”
cases which involved a contestation of ownership between parties designated as “powerful” and “poor”, judges and their retinues received nothing at all from the “poor” party. Aside from the considerable wealth and influence which the “powerful” already had over thematic judges, the system of legal fees created substantial incentives for their cases to be judged and the cases of “poor” litigants to be consigned to the back burner. Likewise, lower-level legal functionaries stood to make much more money under a judge who regularly presided over suits with wealthy litigants, as opposed to a judge who mainly judged suits between poor farmers disputing their field boundaries: a Middle Byzantine analogue to a contemporary Harvard Law School graduate’s choice between making six figures in a boutique Wall Street firm or doing public interest work.

Crucially, these regulations were intended for thematic judges, the legal officials who were entrusted with the maintenance of the Byzantine legal system outside of the capital. As mentioned above, thematic judges, in addition to their substantial judicial powers, were the highest civil officials within the regional Byzantine administrative unit, the theme (thema), at least by the eleventh century. The increasing power of judges reflected a devolution of authority from the stratēgos, who for a roughly one hundred-year period from the mid-ninth to the mid-tenth century had been invested with supreme civil and military power within his theme. Indeed, one should not understate the fiscal role of these officials: the thematic judge was responsible for the collection of taxes within his theme. The public fisc also collected revenue from judges in the form of fees collected from fines and forfeits in certain types of private lawsuits, which included contracts, dowries, inheritances and sales, as well as confiscations from criminal

cases. It is difficult to establish what percentage of a judge’s income came from his public maintenance as opposed to his legal fees, but the potential obviously existed for a judge to substantially augment his public salary by judging enough cases.

While the novel of Constantine VII countenances the collection of legal fees by judges in the provinces, it condemns any similar activity by the “city judges”, that is those judges who made up the higher courts of the capital. For these high judges, the novel allowed no collection of “customary” fees: “For these [city judges] it is incumbent, not only that they govern with clean hands, but that they also possess subordinates who are above any disgraceful profit [i.e. bribe].” This prohibition is repeated later in the novel in even less uncertain terms: “None of the city judges [is allowed] to receive anything for any sort of reason, but they [must] instead have clean hands and disdain all money.” The supervisory and appellate role of the city judges meant that their rulings needed to be above suspicion. The thematic judges, on the other hand, perhaps understandably given their other rather considerable administrative duties and presumably low level of legal expertise, were not held to the same standard.

This section has demonstrated the inconsistent and ambiguous attitude of imperially-sanctioned legislation toward sportulae and toward the broader rubric of corruption. Imperial policy toward sportulae oscillated between condemnation and acceptance; it is hard to ascertain

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42 Magdalino, p. 96.
43 Saradi, “The Byzantine Tribunals”, p. 183, misreads the first of the two novels when she states that “[t]he judges and their subordinates should administer justice ‘with their hands clean’. In fact, the preceding line states that the extraordinary staff (ἀπαστηται) and executors of sentences (ἐκβιβασται) working under the “city judges” (πολιτικοί δικασται) are to be paid at the aforementioned rates in the novel. However, the “city judges” themselves and their regular subordinates (the two previously-mentioned groups were considered outside the normal staff of the “city judges”) were not to receive sportulae. The line only refers to the “city judges” and their staffs, not thematic or other judicial officials as Saradi states.
44 JGR, vol. 1, col. 3, n. 9, p. 219: “τούτους γὰρ ἀναγκαῖόν ἐστι, μὴ μόνον καθαρὰς ταῖς χερσίν ἄρχειν, ἀλλὰ καὶ τῶν υποργοῦντας ἔχειν παντὸς αἴγχροδ ζημίατος ἀνωτέρους.”
what the official stance towards the practice of *sportulae* at any given time actually was. To maintain that judicial corruption was a problem which Byzantine emperors consistently sought to combat, as Saradi does, fails to accurately convey the generally ambiguous, and in the case of Constantine VII even encouraging, attitude of Byzantine rulers towards *sportulae*. A more nuanced view would be that since efforts to completely ban the payment of customary legal fees by litigants were impracticable, Middle Byzantine emperors typically allowed the payment of *sportulae* in lower courts, that is the courts outside of Constantinople like the thematic courts, while banning the payment of *sportulae* to higher legal officials, such as the *eparch*, the *quaestor* and the “city judges.” The professionalism of the latter was held to a high standard; the decisions of the *eparch* and of the *quaestor* could not be appealed and were subject only to the emperor himself.\(^{46}\) It seems to have been taken for granted that provincial courts would require the correction of the higher courts in Constantinople. A passage in the *Eisagoge* states: “The magisterial courts are subject to appeal, and [their cases] can be retried by both the emperor and the patriarch, as well as the *eparch* and *quaestor*. For the further they are separated from the center of rule, the more they are in need of greater help and further corrections and retrials.”\(^{47}\) Interestingly, these passages on the hierarchy of courts found in *Eisagoge* 11.1-9 have no antecedent in the *CIC* nor are they later incorporated in the *Basilika*. They represent a “snapshot” as it were of the legal system at the turn of the ninth century.

The relative indifference or ineffectiveness of the imperial administration at affecting the mid- and lower-levels of the legal system is congruent with recent studies of the Middle

\(^{46}\) *Eisagoge* 11.7: “The decision of the *eparch* is not subject to appeal, except to that of the emperor alone (Ἡ τοῦ ἑπάρχου ψήφος ἐκκλήτῳ οὐχ ὑπόκειται, πλὴν ὑπὸ μόνου τοῦ βασιλέως).” *Eisagoge* 11.8: “The decision of the *quaestor* is not subject to appeal, but is also only scrutinized by the emperor alone (Ὡ τοῦ κοιαίστωρος ψήφος ἐκκλήτῳ οὐχ ὑπόκειται, ἀλλὰ καὶ αὕτη ὑπὸ βασιλέως μόνον σκοπεῖται...)

\(^{47}\) *Eisagoge* 11.9: “Τὰ ἀρχοντικά κριτήρια ἐκκλήτῳ ὑπόκεινται, καὶ ἀναγηλαφοῦνται ὑπὸ τοῦ βασιλέως, ὑπὸ τοῦ πατριάρχου, ἀλλὰ καὶ ὑπὸ τοῦ ἑπάρχου καὶ τοῦ κοιαίστωρος. ὅσον γὰρ πόρρῳ ἠφίστατα τῆς ἀρχῆς, τοσοῦτον πλείονος καὶ τῆς βοηθείας καὶ πλειάδος τῶν διορθουμένων καὶ ἀναγηλαφῶντων δέονται.”
Byzantine Empire which have emphasized the limited reach of the central government in the periphery as well as the central provinces.\textsuperscript{48} The Byzantine Empire, like any pre-modern state, did not possess the resources to comprehensively direct every facet of governance at a polity-wide, provincial, or local level. The practice of \textit{sportulae}, even when it attracted imperial attention during periods of imperial condemnation, seems to have continued relatively unhindered throughout the Middle Byzantine epoch.

\textbf{III. A Culture of Reciprocity: The Embedding of Gift-giving and Patronage Networks in the Byzantine Legal System}

At this point in the chapter imperial responses to the practice of paying \textit{sportulae} and bribery have been explored, but the question remains to what extent did official opprobrium of bribery find support among Byzantine élites. Certainly at some level, as in the imperial legislation examined above, censure of the practices of bribery and of granting favors for friends can be ascertained across the spectrum of Middle Byzantine writers. Even the practice of \textit{sportulae}, as common as they were, could be condemned in other contexts. The Patriarch Nicholas I Mystikos (901-7, 912-25), in a text which ordered that patriarchal letters be made available free of charge, likened the archivist’s (Gr. \textit{ostiarios}, Lat. \textit{ostiarius}) practice of collecting fees in exchange for access to the letters to a chronic bodily ailment.\textsuperscript{49} Nicholas

\textsuperscript{48} Neville, pp. 5-38. In her incisive study Neville convincingly demonstrates the considerable authority retained by local authorities in areas such as dispute resolution and policing. Paul Stephenson, \textit{Byzantium’s Balkan Frontier: A Political Study of the Northern Balkans, 900-1204} (Cambridge, New York: Cambridge University Press, 2000), likewise argues for a deliberate imperial policy of indirect governance in Byzantine territories lining the Danube River.

\textsuperscript{49} Nicholas I, Patriarch of Constantinople, \textit{Miscellaneous Writings, CFHB} 6; Dumbarton Oaks texts 2, ed. and trans. by L.G. Westerink (Washington, D.C.: Dumbarton Oaks, 1981); Text 201, pp. 84-7. Westerink’s translation of this text slightly misconstrues what is taking place: “Its keeper, who bears the Latin title of \textit{ostiarius}, used to demand fees from those who requested patriarchal letters in payment for the copy, a thing he should not have done. (Καὶ γὰρ ὁ τὸν τῆς τῆς φυλακῆς ἐμπεισπειραμένος, ἵνα ὀστιάριον ἡ Ῥωμαίων γλῶσσα καλεί, τοὺς πατριαρχικὰς αἰτομένους ἐπιστολάς μισθὸν, ὡς οὖκ ὀφειλὲν, ἀπῆτεί τῆς παραλήψεως·).” As far as I can tell, money is not being exchanged for a copy of the letter, but rather only for access to the letters.
corrected the practice by giving the ostiarios a salary and forbidding him from collecting fees in the future.

Concurrently, however, the frequent mention of these practices suggests their prevalence and acceptance within the Byzantine legal system. Having sketched the inconsistent imperial condemnation of sportulae, we shall now embark on an exploration of how Byzantine writers of the period construed the problematic dynamic of balancing legal ideals against the pervasive practices of gift-giving and granting favors to friends. As a counterpart to the imperial novels discussed above, it is first of all worth discussing whether judicial impartiality existed in Byzantium. There are certainly statements from normative legal texts that law was supposed to be rendered impartially; it is stated in the Basilika that “justice is a fixed and constant aim which renders to each [person] what is fitting.” As shall be proven below, however, not only was the idea of impartial justice far removed the everyday reality of Byzantine law, but within Byzantine Legal Culture judicial impartiality, as it understood in modern legal systems, was completely unknown. Judges were supposed to consider the character and past history of the litigants; not only that, but the relationship of the judge to the litigants was also a factor in jurisprudence. A discussion of judicial impartiality or in this case the lack thereof is extremely important to this chapter’s examination of the legitimation of gift-giving and patronage within Byzantine Legal Culture, because judicial partiality aided and abetted these two practices of the Byzantine élite.

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50 Bas. 2.1.10: “Δικαιοσύνη ἐστι σταθερὰ καὶ δημιουργὴς ἕκαστος ἰδιον ἀπονέμουσα δίκαιον.”
51 Byzantine jurisprudence is discussed more extensively in Ch. 2.
An excellent entrée on the subject can be made by no less an authority than the ninth-century Patriarch Photios (858-67, 877-86), who lists the traits an ideal judge should possess in a letter to Michael, the then recently-baptized ruler of Bulgaria, around the year 865:52

Consider the best judge to be he who seeks after the nature of the just by the swiftness of his thoughts, and after seeking it out produces [a verdict] correctly. He is quick to provide relief to the wronged, and slow to punish wrong-doers. He is above gold, and is not overcome by love of power. He retains control of his anger, and is not swayed by undue influence (Gr. *sympatheia*). He knows that in judging kinship, friendship and good repute alone [are components of] justice, while estrangement, enmity and ill-repute alone [constitute] injustice.53

Photios, like the emperors of the Middle Byzantine Period, underlined that an ideal judge should not be susceptible to bribery. Note again here however that condemnations of bribery are not necessarily condemnations of *sportulae*. In the passage above, what modern legal scholars would define as impartiality clearly did not constitute one of the qualities of the ideal judge—on the contrary, the patriarch states that kinship (*syngeneia*), friendship (*philia*) and good reputation (*doxa*) were components of justice. Conversely, negative preconceptions towards the parties at court, such as estrangement (*allotriosis*), enmity (*echthra*) and ill-repute (*adoxia*) were associated with injustice. Since the importance of mercy (*philanthropia*) within Middle Byzantine legal culture continually prodded legal officials to soften the application of the law, feelings of friendship toward litigants were not discouraged; thus the prescription that the ideal

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52 Letter 1, vol. 1, pp. 1-39 in *Letters of Photios = Photii patriarchae Constantinopolitani Epistulae et Amphilochia*, Bibliotheca scriptorum Graecorum et Romanorum Teubneriana, edited by B. Laourdas and L.G. Westerink, 6 vols. (Leipzig: BSB B.G. Teubner Verlagsgesellschaft, 1983-8). The first half of the letter concerns the history of church councils and doctrine, while the editors describe the variegated content of the second half of the letter in the following way: “deinde, ut in hoc genere scribendi fieri solet, varia caria capitula et sententias singulares nullo ordine inter se connexas congerit, sicut de prudentia, de decenti habitu, de consiliis, de amicis, de invidia, de iudicibus, de civium studio, de continientia, de legibus, de elementia, de beneficiis, de ira, de matrimonio (663-1169)” (vol. 1., p. 1).

53 Letters of Photios, vol. 1, n. 1, p. 28, lines 844-50: “Ἀριστον νόμιζε δικαστήν, ὡς τάχει μὲν λογισμὸν τὴν τοῦ δικαίου φύσιν ἠθεύει, θηρεύσας δὲ σὺν ὅρθοτητι προάγει· καὶ πράξας μὲν ἄνειν τοῖς ἀδικουμένοις ἀδίκος, βραδὺς δὲ κολάσαι τοὺς ἁμαρτάνοντας· καὶ κρείττων μὲν χρυσίου, οὐκ ἑλάττων δὲ δυναστείας· καὶ κρατῶν μὲν ὅργῆς, οὐκ ἠττομένος δὲ συμπαθείας· καὶ μόνην μὲν συγγένειαν καὶ φιλίαν καὶ δόξαν ὀδύν εἰ τῷ δικάζειν τὴν δικαιοσύνην, μόνην δὲ ἄλλοτρίωσιν καὶ ἔχθραν καὶ ἄδοξαν τὴν ἀδικίαν.”
judge is slow to punish wrong-doers. Drawing the line between due and undue influence was a trickier proposition. Byzantine authors often denoted undue influence with the Greek word *sympatheia*, which does not possess the same connotations as the English word sympathy, at least in a legal context. *Sympatheia* instead meant an inordinate leaning toward one of the parties within a case. For instance, in the *Bibliotheca* of Photios, the story of Original Sin is recounted, and Adam, when asked why he had eaten the fruit from the Tree of Knowledge, responded that Eve had given it to him. Photios writes that at that moment Adam had a merciful (*philanthrōpos*) judge, as well as a convenient (*sympathēs*) excuse. Of course Photios was not here implying that God was an illegitimate judge, but rather that Adam, through his mendacity, had attempted to subvert the righteousness of God’s judgment.54 In summation, the idea of judicial impartiality as understood in the modern sense, and evident at times in texts like the *Basilika*, did not exist in Byzantine Legal Culture. Naturally it was taboo for judges to accept bribes, but they were allowed *sportulae*. The judge’s relationship to the litigants was an legitimate component of jurisprudence.

Another catalogue of the qualities which good judges were to possess can be found in the roughly contemporaneous text *De re strategica*.55 Once thought to be the work of the so-called “Anonymus Byzantinus”, it is now accepted to have been written by one Syrianos Magistros, who previously had been credited with the composition of a treatise on naval warfare, and was likely authored sometime in the ninth century, perhaps during the reign of Theophilos (r. 829-

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In a section concerning magistrates ("peri archontōn"), Syrianos describes the characteristics of an ideal judge (Dennis trans.):

Judges must possess a good judicial temperament. Many men are full of good ideas but are incapable of deciding which one is best. Judges should know not only the laws, with which they are directly concerned, but also the other factors which may have some bearing upon the explanation of the laws. They should have control over their actions, their emotions, and their pleasures. They must not be terrified by fear. Friendship must not make them lenient, nor should enmity make them overbearing. Money should not make them waver. They ought to be stern with those who contemn the laws and gentle with those who observe them.57

As in Photios’ description of the ideal judge, Syrianos Magistros likewise underscores the need for judges to avoid having enmity (echthra) color their judgement. On the other hand, Syrianos, in contrast to Photios, recognizes that friendship (philia) can also have a negative impact on a judge. Despite the slight differences in their descriptions of the ideal judge both Photios and Syrianos are in agreement about one commonplace of Byzantine jurisprudence, namely that knowledge of the law does not constitute the sole or even the primary prerequisite for judging.

The constant tension between rewarding one’s friends while at the same time refraining from allowing undue influence in the courts is especially evident in the Stratēgikon of the

56 The proposal for Syrianos’ authorship of the the De re strategica as well as the Rhetorica militaris and his Naumachica, so that the three texts can be viewed as a “military compendium”, was advanced by Constantine Zuckerman, “The Military Compendium of Syrianus Magister”, JÖB 40 (1990): pp. 209-24. Syrianos’ authorship is now accepted as the scholarly communis opinio, although the dating for the composition of the text varies: Zuckerman believes it was authored in a late-sixth/early-seventh century context. Philip Rance (“The Date of the Military Compendium of Syrianus Magister (formerly the Sixth-Century Anonymous Byzantinus”, BZ 100/2 (2007): pp. 701–737) has advanced a convincing argument that there is no compelling evidence to assume that De re strategica was written around the time of the Emperor Justinian, as had been assumed for a long time, and that it was probably not authored before c. 790. Salvatore Cosentino (“The Syrianos’s «Strategikon»: a 9th century source?”, Bizantinistica 2 (2000): pp. 243-80, here pp. 262-75) argues that Syrianos wrote his military compendium in the second third of the ninth century, perhaps during the reign of Theophilos as the emperor mentioned in the text is not praised or named, which could signal his dubious reputation after the end of the Second Iconoclasm (p. 275).

57 De re strategica 3.30-37: “Τούτως δὲ δικαιστὰς εἰναι καὶ αὐτοῖς κριτικοὺς τὴν φύσιν—πολλοὶ γὰρ ἐνθυμημάτων μὲν εἰσποροῦσιν, πρὸς δὲ τὴν ἐκλογήν τοῦ κρείττονος ἀμαρτάνουσιν—ἐξετάζομαι δὲ ὡς μόνον τῶν νόμων περὶ οὗς καταλαμβάνει, ἀλλὰ καὶ τῶν ἄλλων ὡς συνελεύσει πρὸς τὴν τῶν νόμων ἀκράσας, καὶ χειρὸς μὲν καὶ θυμοῦ καὶ ἡδονῆς ὁμοίως κρατοῦσας, καὶ μήτε φοβοῦ καταστήσειν μήτε φιλία χαρίζεσθαι μήτε ἐξῆρα νικᾶσθαι μήτε φόβο χρήσαι δελεάζοσθαι, καὶ ἔτι φοβηροῖς μὲν τοῖς καταφρονηταῖς, προσηνεῖς δὲ τοῖς εὐπειθέσιν.”
eleventh-century aristocrat Kekaumenos. The *Stratēgikon* is a supremely informative source regarding the functioning of the legal system, since it contains two sections of advice for provincial judges and notaries, respectively. In his advice to provincial judges, Kekaumenos first of all warns them to avoid judging their friends, at the risk of censure by the city judges in Constantinople: “Do not feel compassion for anyone in judgment because of *philanthrôpia*, but if someone is a dear friend of yours and he is about to be judged, beg leave of judging such a case so that you do not judge unjustly. Far be it from you that you disgrace yourself, and your friend will be judged by the city judges.” As the two novels above of Constantine VII above demonstrate, provincial judges expected to receive *sportulae* from litigants, and this practice was sometimes abused. This passage from Kekaumenos, interestingly, reflects the imperial position regarding the different levels of the legal system: namely, that the thematic courts, subject as they were to the practice of *sportulae*, were easily subjected to bribery and were therefore in need of correction by the city judges, who were of course forbidden from receiving *sportulae*. Consequently, within this same section Kekaumenos also pens perhaps the most emphatic condemnation of bribery written in the Middle Byzantine period:

And if you are a thematic judge, do not extend your eye and hands toward the acquisition of gifts. For someone who is wholly absorbed in the [acquisition] of gifts goes into the darkness of ignorance, even if you are very knowledgeable in all judgment and full of inquiry. Instead be satisfied with what you are allocated. Do not let them send money to enrich you, but give justice to those who have been wronged… Unless you look away from the acquisition [of gifts], those who did not bribe you shall not seem good in your eyes, even if they are exceedingly excellent men, but those who bribed you shall seem good and your spirit shall give repose to them, though they be murderers. For it is the habit of those who appropriate bribes for themselves to imprint on their souls that “I am going to take these bribes from this person.” Should he accept [the bribe], and he looks away and receives them a second and third time, and if he doesn’t receive them,

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58 *Stratēgikon* 1.15, lines 16-20: “μηδενί διὰ φιλανθρωπίαν ἐν κρίσει προσπαθήσῃ, ἀλλ’ εἰ ἔστι σοι πάνυ φίλος τις καὶ μέλλῃ καταδικασθῆναι, παρατίθητα τὴν τοιαύτην ὑπόθεσιν καὶ μὴ κρίνῃς ἀδίκος. ἐσχατὸν μὲν γὰρ σὺ αἱσχυνθῆση, ὡς δὲ φίλος σου παρὰ τῶν πολιτικῶν δικαστῶν καταδικασθῆσεται.”
because he has been deprived of his own [due] he shall become filled with black bile, and the just shall turn into the impious.\textsuperscript{59}

The important conclusion to garner from this quotation is the extent to which gift-giving and friendship networks permeated the Middle Byzantine legal system and Byzantine Legal Culture. As Kekaumenos surmises, provincial judges did not selectively practice bribery. On the contrary, they expected to receive gifts from all litigants. Therefore particularly at the provincial level of the legal system, as described in Kekaumenos, the cultural practices of the Byzantine élite emitted an especially powerful resonance. As shall be noted in the section on legal documents below, testators ensured that legal officials received payment from their estates in order to ensure that their wishes were carried out.

Kekaumenos is not the only source which attests to the prevalence of bribery in the Byzantine period. Another example is a letter of the Patriarch Photios to the quaestor Basil. Photios, in shock, relates what others have said about Basil’s style of justice: “But now they say that you’ll do anything for gold, and I do not believe it. Golden, they say, are your hands, your tongue and your justice.”\textsuperscript{60} Note that as a quaestor Basil was likely excluded from receiving sportulae. Kekaumenos mentions similar judges who were laughed at for being so easily bribed.

\textsuperscript{59} \textit{Stratēgikon} 1.15, lines 10-15: “\textit{εἰ δὲ κριτῆς εἰ θεματικός, μὴ εἰς λήψιν δῶρον ὃμμα καὶ χεῖρας ὀρέξῃς. ὁ γὰρ πρὸς δόρα κεχηνωσεῖς εἰς σκότος ἁγνωσίας περιπατέσῃ, εἰ καὶ πολυμαθῆς ἔστι καὶ πάσης φρονήσεως καὶ γνώσεως ἀνάπλεως, ἀρκοῦ δὲ μᾶλλον ὃς ἀπὸ τύπου ἔχεις. \... ἐκακομένος... ἔναν ἀποβλέπεις εἰς τὸ λαβεῖν, οἱ μὴ διδόντες σοι δόρα ὀψί αὐγαθι θεούς ὃς φανησονται, καὶ καὶ λιαν εἰς χριστοὶ, οἱ δὲ διδόντες σοι ἀγαθοὶ φανήσονται καὶ τὸ πνεῦμα σοι ἀναπαυθήσεται ἐπ’ αὐτοῖς, κἂν ἀνδροφόνοι εἰσὶν. ἑδος γὰρ τοῖς νοσιδομένοις δόρα τυποῖν ἐν τῇ ἑαυτὸν ψυχῇ ὅτι “ἀπὸ του δενος μᾶλλον λαβεῖν δόρον τάδε” – καὶ εἰ μὲν λάβοι, πάλιν ἀποβλέπει καὶ δεύτερον καὶ τρίτον λαβεῖν, εἰ δ’ ὄλ λάβῃ, ὡς ὅδιον πράγματος στερηθήσεται, καὶ ἐσται ὁ δίκαιος ὡς ὁ ἀσεβής.”

\textsuperscript{60} \textit{Letters of Photios}, letter 154, p. 9, lines 6-8: “\textit{νῦν δὲ πάντα σὲ φασίν χρυσῷ πράττειν· καὶ οὐ πείθομα. χρυσός σοι, φασίν, αἱ χεῖρες, ἦ γλώσσα, τὸ δίκαιον.”}
One field which demonstrates how networks of friendship were mediated through the legal system is Byzantine epistolography.\textsuperscript{61} The writing of letters throughout the Middle Byzantine Empire served both a pragmatic and literary function for the Byzantine élite. Byzantine officials in the administration as well as the Church used official correspondence to compose epistles which underlined their own learning and cleverness. The letters themselves were often rhetorical exercises, while more mundane news was usually delivered orally by the messenger. The messenger also often bore a gift; fish seems to have been particularly popular (the fish were of course preserved).

These letters deal with a variety of topics of interest to this study: among them are condemnation of officials for bribery or mishandling of justice and appeals for clemency to legal officials. The correspondence of John Mauropous, an intellectual educated in Constantinople who became bishop of Euchaîta in Asia Minor, is of particular interest to this inquiry.\textsuperscript{62} Echoing a point made earlier in this chapter about the importance of the character of the litigants in a case, Mauropous maintains that the laws must “…examine the differences and the characters of the people, who is capable of treachery and villainy and who is most unlikely to be guilty of such a charge.” In another letter Mauropous discusses the difficulty of maintaining one’s friendships as a judge. Despite all the wonderful aspects of true friendship, “…when it comes to a judgement


\textsuperscript{62} Edition and English translation of the letters of John Mauropous in \textit{The Letters of Ioannes Mauropus Metropolitan of Euchaîta}, Apostolos Karpozilos (ed. and trans.), \textit{CFHB} 34; Series Thessalonicensis (Thessalonike: Association for Byzantine Research, 1990). N.B.: Unlike other epistolary collections from the Middle Byzantine period, there are no recipients listed for the letters of John Mauropous. According to Karpozilos, Mauropous intentionally omitted the recipients’ names in the course of selecting texts to demonstrate the literary quality of his \textit{oeuvre}. Karpozilos, (p. 29): “The names of the addressees must have been omitted by Mauropus intentionally. As he explains in the epigram with which he prefaced his collected works, his intention was to give to the public only a small part of his writings. The letters he chose for his collection represent only a fraction of his correspondence. The selection he made, however, he wanted primarily to be read as literary pieces. It was for this reason that the names of the actual addressees were withheld.”

\textsuperscript{63} \textit{Letters of Ioannes Mauropous}, letter 11, lines 5-7: “…[οἱ νόμοι] διαφοράς τε προσώπων ἐπισκόπων καὶ ποιότητας, καὶ τίς μὲν ἐστι δόλου καὶ πανυφρίας δικτικός, τίς δὲ τοιαύτην αἰτίαν ἀπώθανος ἀναδεξισθαί…”
of friends it is viewed with suspicion and it is not easily conceded as trustworthy, whether it be as witness or judge.” Mauropous goes on to recommend that the judge be less eager to praise his friends, lest suspicion arise that he is favoring them too much in his judgments. At another point the bishop asks for “a more clear interpretation [ekdēlotera saphēnia]” from a judge who had already rendered a decision against one of his friends. The tension between the maintenance of friendships and at the same time appearing to be impartial and just is manifest in all of these letters.

The cultivation of relationships with legal officials, as well as asking these officials for favors and protection, constitutes an important theme in Middle Byzantine epistolography and is evident as well in legal documents. For example, a letter of the Patriarch Nicholas I requested that the stratēgos of Strymōn protect church lands within his province; the curator of patriarchal properties there was in need of the stratēgos’ “supporting arm (antilēptikē cheir).” Not only are those who attack church property liable to divine condemnation, Nicholas writes, but also those who allow it to happen in the first place.

Among Middle Byzantine epistolary collections, the richest in content with regard to Middle Byzantine Legal Culture and the functioning of the legal system is that of the polymath Michael Psellus. As in Kekaumenos, the importance of friendship and patronage in Middle Byzantine society immediately strike the reader. In the letters of Psellus, however, unlike in the

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64 Letters of Ioannes Mauropos, letter 28, lines 21-2: “郤ποπτός ἐστι τὰς κρίσεις τῶν φιλουμένων, καὶ οὐκ εὐχερὸς αὐτῆς συγχωρεῖται τὸ ἠξίοστον, κἂν μαρτθῇ, κἂν δικάζῃ.”
65 Letters of Ioannes Mauropos, letter 31.
Stratēgikon of Kekaumenos, one can see how patronage was exercised within the legal system. Although like other contemporary Byzantine writers Psellos pays lip service to the notion of impartial justice, his letters more often play upon its mutability. In one letter to the thematic judge of Philadelphia Psellos, attempting to aid some villagers in the theme who had shown him hospitality in the past, noted that the initial verdict of the judge in the villagers’ case had not been favorable. To Psellos, an initially unfavorable verdict, if the matter were considered with Psellos’ friendship in mind, could be changed to a favorable one, just as the philosophers Plato and Aristotle had not been afraid to reconsider their initially incorrect beliefs: “Therefore I know that you would recognize everything that is just, and it seems to me to fit with the law. And if I somehow endanger our friendship, this would not be less just or merciful, lest you decide this wrongly. But by mixing my friendship with the arbitration of the case, perhaps you might recognize something more lawful and just that what has already been decided. For second and third approaches to matters change earlier diagnoses, [when] they had not arrived at the depth of the matter, but rather only the surface of it. Thus Aristotle and Plato thought differently earlier, and were not ashamed to change their ideas.”

Letters which reference legal disputes, attempt to garner favor with legal officials, or other such acts are found in the following letters: letters 20, 24, 41, 43, 45, 47, 49, 55, 63, 65, 76, 77, 78, 103, 119, 131, 134, 135, 146, 151, 158, 180, 192, 195, 200 in Sathas and letters 24, 28, 31, 35, 39, 41, 42, 47, 50, 51, 52, 55, 60, 63, 64, 65, 66, 69, 73, 74, 77, 79, 81, 82, 83, 84, 89, 90, 92, 99, 100, 106, 107, 108, 109, 117, 118, 119, 127, 140, 142, 152, 163, 166, 171, 181, 182, 184, 200, 221, 222, 227, 243, 248, 249, 250, 251 in Kurtz.

Letter 180, pp. 459-61 in Sathas: “Οἶδα μὲν οὖν ὅτι πᾶν ὁ ἁγνὸς σύ, τοῦτο δίκαιον, καὶ τῷ νόμῳ κάμοι συνόδευ· εἰ δὲ τι καὶ παρὰ τὴν ἐμὴν φιλίαν διακινδυνεύσεις, τοῦτο οὐχ ἦτον δίκαιον ἢ φιλάνθρωπον, μὴ δὴ τοῦτο δὴ παραγνοίης· ἄλλα τῇ διαίτῃ τῆς ὑποθέσεως τὴν ἐμὴν ἐγκαταμίζεις φιλίαν, ἵνα ἔτερον τι γνοίης παρὰ τὰ ἐγνωσμένα ἐννομότερον τε καὶ δικαίωτερον· αἱ γὰρ δεύτερα καὶ τρίται τῶν πραγμάτων ἐπιβολαὶ ἀλλοιούσι τὰς προτέρας διαγνώσεις, ὡς ἐπιστολευτέρας τοιχῶν, οὐκ εἰς βάθος ἀφικομένας τοῦ πράγματος. Οὕτω δὴ καὶ Ἀριστοτέλης καὶ Πλάτων ἔτερα ἐδόξασαν προϊόντες, καὶ οὐκ ἤσχυνθηκαν τὰς τῶν νομίμων μεταβολάς...”
ends his letter by stating: “And I would say in summation to be the sort of judge to him, who is an arbitrator of our friendship.”

Being a friend and a judge were seen by Psellos as complementary rather than competing influences. In order to court favor with legal officials, Psellos would call upon a judge to play both roles adequately. In letter to judge concerning a man who had committed a violent act, Psellos construed the official’s responsibility to act in the following way: “Since you are a friend and a judge, as a judge you should supply the laws to the unjust and as a friend you should not delay the matter, but swiftly you should bring forth a verdict.”

Likewise, a judge who did not render justice dishonored both his position and friendship, if he put friendship above the law. Justice and friendship, by which one understands patronage, were thus ideally supposed to operate in tandem and not in opposition to one another.

Bribery, understood here as the illicit courting of influence beyond customary gifts or sportulae, seems to have been a common occurrence, at least judging by how frequently Psellos mentions it in his letters. When one of his students considered law as a career, Psellos, in an attempt to sway him towards “philosophy” instead, noted that judges were swayed by reputation and money. Indeed, he praises judges who do not accept bribes.

In a letter to the judge Nikēphoritzēs asking to aid a bishop Psellos notes that “for other judges either the hand that gives or a huge stream of tears from the eyelids will do, but for you noble reason suffices.”

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70 Letter 41, pp. 273-4 in Sathas: “καὶ ἵνα τὸ πᾶν συλλεξάμενος εἴπω, τοιοῦτος πρὸς αὐτὸν φάνηθι δικαστής, οἷος οὖν περὶ τὴν ἡμετέραν φιλίαν διαιτητής.”

71 Letter 243, pp. 293-4 in Kurtz: “σὺ δὲ καὶ φίλος καὶ δικαστής ὃν ὡς μὲν δικαστής τούς νόμους τοῖς ἀδικηθέντι περισώσοι, ὡς δὲ φίλος οὐκ εἰς ἀνυβωλὴν θήσως τὸ πράγμα, ἀλλὰ ταχεῖαν ἐνέγκας ἀπόφασιν.”

72 Letter 142, p. 169 in Kurtz: “…Ιδ’ ὑδικήκοτα λόγως, ἀδικεῖς μὲν νόμους, παρ’ ὅν τὸ δικάζειν δικαίως πεπίστευσαι, ἀδικεῖς δὲ φιλίαν, ἢ καὶ νόμων ὑπερτέραν τίθης.)”

73 Letter 28, pp. 35-41 in Kurtz.

74 Letter 166, pp. 191-2 in Kurtz.

75 Letter 143, pp. 344-6 in Sathas: “Τοῖς μὲν οὖν ἀλλοις τῶν δικαστῶν ἢ χείρ λήμμα διδοῦσα δεδύνηται, ἢ δάκρυον ῥέον ἐκ βλεφάρων πολύ, παρὰ δὲ σοι ὁ γενναῖος λόγος ἀρκεῖ.”
Another letter notes that “merciful reason (philanthrōpos logos)” should be reward enough for the judge. Though refusing bribes was a noble act, it is worth emphasizing again that bribes and the legitimate collection of sportulae were not the same thing. In one letter Psellos recommends that a judge take a notarios in his service, despite the fact that “…the present times are difficult for help and for the thematic judges and their servants. For the exactitude of our emperor checks the hands of all.”

As a last demonstration of the importance of patronage in Byzantine Legal Culture, a hypomnēma (a word usually denoting the document of a judge which justifies a particular decision, but it is also used in a more general sense as well) of Psellos has survived in which he attempted to recover the dowry of his daughter upon breaking her engagement to one Elpidios. In recounting the numerous favors with which Psellos graced his presumptive future son-in-law, he mentions that he succeeded in having Elpidios appointed as one of the Judges of the Hippodrome by petitioning the emperor. Clearly knowing the right people and having their support at the right time was crucial for a successful career as a judge in the Middle Byzantine period. The patronage systems which permeated the legal system were openly called upon during the arbitration of legal disputes. As Kekaumenos emphasized, a judge had to walk a fine line between aiding one’s friends and potentially attracting scrutiny from higher courts.

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77 Letter 109, pp. 137-8 in Kurtz: “οἶδα γὰρ ἀκριβῆς, ὡς οἱ παρόντες καιροί στενοί πῶς εἰσὶν εἰς ὁφέλειαν καὶ τοῖς τῶν θεμάτων δικασταῖς καὶ τοῖς ὑπερετοῦμένοις αὐτοῖς· τὸ γὰρ ἀκριβῆς τοῦ βασιλέως ἡμῶν τὰς ἀπάντας χεῖρας ἐπέσχεν.”
IV. The Importance of Patronage in Monastic Charters

Among the surviving written sources which demonstrate the pervasiveness of patronage and personal relationships within Byzantine Legal Culture are the testaments of monastic founders (typika). These monastic charters, which date from the end of Late Antiquity, contain the stipulations and regulations of the founder. For the most part these regulations govern orthopraxy, the liturgy, feast days, and living arrangements, but some of these charters also give detailed information on the legal status of monastic foundations. Therefore these documents provide legal historians with an excellent approximation of how legal relationships were construed in practice, and it is here, within the Byzantine legal Alltag, that the importance of personal patronage among the Byzantine élite supersedes any institutional relationship that a monastic foundation may have had with an imperial office or department. As this section will demonstrate, legal obligations were often construed as personal obligations; that is, many of the monastic founders felt that their interests were best served by entrusting their foundations to particular powerful individuals, and though these officials were oftentimes bound by the privileges which these monastic institutions had received to protect and support them, the authors of these typika nonetheless preferred to emphasize the personal friendship they had cultivated together rather than the legal obligation of the official to intervene in particular instances. Furthermore, invocations of a particular office, such as a thematic judge or eparch, to protect a monastic foundation were sweetened with testamentary bequests, both monetary and otherwise. Thus in this area also the importance of gift-giving and patronage was paramount.

In examining how monastic founders went about ensuring that their institutions would last after the founder’s death, it is necessary to underline the degree to which these testators were on guard concerning potential threats to their foundations. The majority of the documents
denounce any attempts whatsoever by relatives, ecclesiastical authorities, the Patriarch of Constantinople, powerful officials or landowners, or even the emperor himself to appropriate any measure of authority or confiscate any property from these monastic foundations. The eleventh-century historian and judge Michael Attaleiates lists in great detail the potential hazards to his monastery and almshouse. Nor was this wariness unfounded; the *Peira* contains examples of ecclesiastical authorities attempting to acquire ownership of monastic foundations. For instance, *Peira* 15.4 involves the Patriarch Nicholas Mystikos of Constantinople attempting to acquire jurisdiction over the monastery *Tou Piperatou*, an attempt which was rebuffed by the Court of the Hippodrome. Sometimes this paranoia manifested itself as a deep mistrust of all temporal authority. For instance, John of Rila, who founded what became the most famous monastery of medieval Bulgaria, enjoined to the surviving monks to spurn all worldly patronage: “Do not rely on temporal authorities to preserve you: Nor look to be recognized and beloved by earthly kings and princes, nor put your hope in them, leaving the heavenly King, with whom you enlisted to be soldiers and ‘wrestle not against flesh and blood,’ but ‘against the ruler of the darkness of this

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79Edition and French translation in Paul Gautier, “La diataxis de Michael Attaliate”, *REB* 39 (1981): pp. 5-143. English translation by Alice-Mary Talbot in *BMFD*, pp. 326-76: “O Lord of mercy, do not permit that a malicious man ravage and disperse this [property], nor allow that powerful men who crave after property should gaze at the beauty of these estates with greedy and covetous eyes. Do not endure that a curious busybody, who devises the flimsiest of excuses and stirs up unjust things, should join others in villany and throw their property rights into confusion. Do not permit an evil man, a devisor of wickedness, to insinuate himself from inside into their services, or be imposed from outside to stir up numerous petty disturbances by his cunning ways. Rather, O Lord, protect these [offerings], and defend them with thy mighty hand, and may they be a blessing on thy holy name. Every emperor and noble and dynast, and all ministers of the holy sanctuary, both bishops and priests, and everyone involved in political and ecclesiastical affairs should keep their distance from this holy property of the poorhouse which was constituted for the pleasure of thy transcendent glory and for the holy flock of monks therein and everything belonging to them. For all this property is dedicated to God, and honored with inviolability. I adjure you all and bind you with a harsh and relentless sentence of condemnation, in the name of the holy and life-giving Trinity, that none of my regulations should be transgressed. You should not encompass with confusion and disorder that which has been piously consecrated and dedicated to God, and transform this [poor-house] into a refuge for powerful men instead of for the poor, contrary to the regulations for their care and administration of the pious donations, and what I am going to say. Nor should there be any removal whatsoever of the various properties and sacred treasures dedicated there, nor should you impose any expense which is beyond its resources and wealth, lest they thereby suffer deprivation and be reduced to poverty.”
world.” More often, however, a general declaration of hostility towards any attempts at outside interference was balanced by a reliance on particular notables to help preserve the independence of a monastery.

As a counterweight to potential outside interference, monastic testators often invoked local officials to help maintain the independence of a foundation. Two examples from the Peloponnese demonstrate the trust that monastic founders placed in particular officials, and both of these examples also rely upon the future holders of two offices, that of military governor and that of judge. In the late-tenth or early-eleventh century testament of Nikon *Metanoeite* for the Church and Monastery of the Savior, the Mother of God, and St. Kyriake in Lakedaimon, both the military governor and judge of the province were to receive five measures of wine and one measure of apples. Moreover, the military governor and judge, along with the emperor, were to be commemorated by the monks. These privileges were tempered by caution, as any bequests left to the foundation were to be given to the monks and priests, and the Nikon explicitly forbids the military governor, judge, or any other official from appropriating said bequests. The second example is unique in that it has survived as an inscription, with which one Nikodemos endowed a monastery church to maintain a then recently-built bridge over the Eurotas River in 1027. Again, the military governor and judge are enjoined to care for and protect the monastery church. The testament is unusually deferential to these officials, and it invests them with the power not only to select a superior but to do to the monastery whatever they (and the emperor) see fit. The deference which both of these testaments display towards the highest-ranking military and civil

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official respectively in the province underline just how much power these officials possessed at a local level. Additionally, since by the time of the Macedonian dynasty it was rare for either a military governor or provincial judge to serve in any province long-term, it behooved these monastic testators to refer to the offices rather than particular individuals. A last point is to be kept in mind as well: within the provincial milieu, in stark contrast to the capital, there was only one jurisdiction, that of the provincial judge, outside of the exceptional circumstance when an emperor empowered a higher judicial functionary to resolve a particular dispute. While there were many overlapping jurisdictions in Constantinople, a provincial judge possessed practically unlimited power in his jurisdiction. The novel of Constantine VII regarding sportulae, discussed above, is a reflection of just how easily a provincial judge could augment his salary through accepting gifts. The five measures of wine and one measure of apples given yearly to the provincial judge in the testament of Nikon Metaneoite might have been multiplied dozens if not hundreds of times even in a relative economic backwater like the Peloponnese.

While the thematic judge supposedly represented the highest level of civil authority in a theme, the stratēgos, who is also mentioned in these testaments, appears to have likewise held some sway in legal matters. As a case in point, the Patriarch Nicholas I Mystikos (r. 901-907, 912-925) wrote a letter to the stratēgos of Strymon asking him to support his curator of church property at Strongylizon. He gently chastises the stratēgos by stating that both those who attempt to steal church property as well as those who could prevent but don’t (i.e. the stratēgos) are guilty.

Another example of invoking the protection of an office for a foundation is the testament of Michael Attaleiates for his Almshouse at Rhaidestos and for the Monastery of Christ

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83 *Letters of Nicholas I*, Letter 35.
Panoiktirmōn in Constantinople. Michael Attaleiates was himself a judge, and he authored a “textbook” consisting of a brief introduction to Roman and Byzantine law followed by thematically-organized excerpts from the *Basilika*. Compared to the aforementioned foundations in the Peloponnese, Attaleiates donated what was a very large fortune, at least judging from the personal effects and sums listed in his testament. Mindful of potential interference by officials and relatives, Attaleiates chose to appeal to the most powerful legal official, other than the emperor, within Constantinople: namely, the *eparch* of Constantinople. Historians know a great deal about the office of the *eparch* because a tenth-century treatise details the regulations he was to enforce over the various guilds of the city.\(^84\) In a section of the testament describing what course of action is to be taken when a lawsuit is advanced against the almshouse or monastery, Attaleiates requests that such a lawsuit should be judged “with his knowledge and assistance.” For example, if the superior of the Stoudios Monastery, the most powerful and influential monastic foundation in the capital at that time, were to attempt to acquire ownership rights or guardianship of the monastery or almshouse, the *eparch* was commanded to intervene.\(^85\) In return for his services, the *eparch* was to have his name inscribed in the holy diptychs and commemorated, and he was also to receive five *nomismata*. The latter demonstrates just how embedded gift-giving was within Byzantine Legal Culture; moreover, to our knowledge, giving such a gift to the *eparch* was not an illegal act. According to the aforementioned Novel of Constantine VII, city judges were not allowed to accept any gifts, but there is no similar surviving regulation for the *eparch*. In the three monastic testaments discussed to this point, all of them from the tenth or eleventh century, the aid of the highest-ranking legal official within a particular jurisdiction is invoked, in two out of three cases in exchange for bequests. Nor were

\(^{84}\) *Das Eparchenbuch Leons des Weisen*, Johannes Koder (ed. and trans.), *CFHB* 33; Series Vindobonensis (Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 1991).

\(^{85}\) Gautier, “La diataxis de Michael Attaliate”, p. 75; *BMFD*, p. 352.
the bequests always worldly. Athanasios of Athos, the founder of the Lavra on Mt. Athos, which today hosts the largest Orthodox monastic community in the world, promised spiritual rewards to “…my most devout lord, the true lover of Christ and of monks, Nikephoros, the most glorious patrikios and epi tou kanikleiou, as administrator, protector, and advocate of our assemblage in Christ and our Lavra. In expectation of being rewarded by God and for the sanctification of his own soul, he should associate himself and work together with my lord John the Iberian, my spiritual brother and father, and the entire community in Christ in all the distressing circumstances of their way of life.” Demonstrably so in this monastic milieu, gift-giving and patronage ensured the independence of the testators’ foundations.

The one “secular” testament which has survived from this period, unique in that it does not involve the foundation of a monastic institution, is that of Eustathios Boîlas. Written in 1059, Eustathios Boîlas owned considerable estates in a region which had been, he states, full of forests, snakes, scorpions and wild beasts. The will is unusual in many respects, not the least of which because the estates which are referenced probably were found somewhere in the Empire’s southeastern borderlands. As executors (epitropoi) of his will he lists first of all Christ and the Virgin, but after them two brothers, the magistros Basil and the bestarchês Pharesmanês, and the bishop of the district (enoria). Thus Eustathios Boîlas names both specific individuals as well as the office of bishop. As compensation for their recognition of their duties the brothers Basil and Pharesmanês were to receive two or three litrai of gold, and the bishop six nomismata or a book. As in the case of the monastic foundations, testamentary bequests, in this case to executors, ensure that the stipulations of the testator are followed.

86 Die Haupturkunden für die Geschichte der Atosklöster: Grösstentheils zum ersten Male, ed. Ph. Meyer (Leipzig: Hinrichs, 1894); English translation by George Dennis in BMFD, pp. 271-80; here p. 275.
88 Discussion of location in ibid., 44-7.
Another testament which was likely secular is mentioned in the _Peira_. In this instance, a testator left behind a bequest for the thematic judge in his will. However, since he did not mention the judge by name, both the thematic judge who was in office at the time of the making of the will as well as the thematic judge who next took the office and opened the will took the bequest, causing the heirs of the testator to bring suit against the judges. Upon the case being brought to Eustathios Rhomaios’ attention, he decided that the judge who had been in office at the time that the will had been made needed to be questioned before the case could come to a resolution.\(^89\) Again, this _Peira_ case demonstrates how legal officials, particularly the thematic judge, were called upon to safeguard the testator’s wishes.

\(^89\) _Peira_ 43.5: “Someone in Mesopotamia wrote a will, and he wrote in it concerning a bequest specifically thus: ‘I leave by my authority a sum of so many _nomismata_ to the [thematic] judge.’ While the testator was still living the judge ended his term in office, and another one entered. The testator died, and the [first] judge took the bequest before the opening of the will. And he left office, and the other judge came, and he performed the opening of the will and the summary of the estate. And he [the second judge] took the bequest. However the heirs brought suit, claiming that the two judges had requested two bequests, and the [first judge] said ‘the bequest was left to me. For I was in office at the time of his death.’ And the other replied, ‘But I opened the will and made the division [of the estate], so I was right to take the bequest.’ And such were the statements. And I asked the _magistros_, and he said the following: ‘The testator seems to have left the bequest to the thematic judge who was in office after his death and who disposed of his estate, since he did not specifically write down the name of the judge, which would indicate his intention to us. But we should examine the judge at the time of the making of the will, whether it was to him. For if we find, that he disposed of it to him, and he made a promise to him about a bequest or trustee, and after his term of office if he came to him about the estate and if he shared it with him, then from this evidence the judge who is in the document of the bequest is the one at the time of the making of the will and he should receive the bequest.’ (Ὅτι ἐν μεσοποταμίᾳ ἔγραψε τις διαθήκην, καὶ προσεγράψατο αὐτῇ περὶ λεγάτου ἰητὸς οὕτως· ἀριθμῷ τῷ αὐθέντῃ μου τῷ κρίτῃ λεγάτον τόσον νομισμάτων. ἐτὶ ξόντος τοῦ διαθεμένου διενδήκθη ὁ κρίτης, καὶ προεβλήθη ἔτερος. ἐτελεύτησεν ὁ διαθέμενος, καὶ πρὸ τῆς ἀνοίξεως τῆς διαθήκης ὁ κρίτης ἔλαβε τὸ λεγάτον. διενδήκθη καὶ οὕτως, καὶ προεβλήθη ἔτερος, ὦς καὶ τὴν ἄνοιξιν τῆς διαθήκης καὶ τὴν ἀπογράφην τῆς ὑποστάσεως ἐποίησατο· καὶ ἔλαβε καὶ οὕτος τὸ λεγάτον. κατεγκαλούμενοι τούτοις ἀπὸ τῶν κληρονόμων οἱ δύο κρίται ὡς δύο λεγάτα ἀπατήσαντες, ὦ μὲν εἰς ἔλεγεν, ὃτι ἔμοι κατελείφη τὸ λεγάτον· ἐγὼ γὰρ εὑρέθην ἐν τῷ καιρῷ τῆς τελευταίας αὐτοῦ· ὡς ἔτερος ἀντέλεγεν, ὃτι μᾶλλον ἐγὼ ἤνοιξε τὴν διαθήκην καὶ τὴν ἀπογράφην ἐποίησαμην, καὶ καλὸς ἔλαβον τὸ λεγάτον. καὶ ἦν τοιαύτα ἡ ἡπτάμα. ἐστιν ἡ ἐποίησις ἐγὼ τὸν μάγιστρον, καὶ εἶπεν οὕτως· ὅτι ὁ διαθέμενος δοκεῖ τῷ κρίτῃ τοῦ θέματος ἀφίνεται τὸ λεγάτον τῷ εὐρεικομένῳ μετὰ τελευτήν αὐτοῦ καὶ τὰς ὑπάρξεις διενεργοῦσιν· ἐπεὶ γὰρ ὁ προσέθηκεν οὖνομα ἰητῶς τοῦ κρίτου, αὐτὴ ἡ ἐννοια δίδοται ἦμιν. ἀλλ’ ὕφελμοι σκοπεῖν καὶ τὸν κρίτην τὸν ἐν τῇ ποιήσει τῆς διαθήκης ἄντα, πῶς εἶπε πρὸς αὐτὸν· εἰ γὰρ εὑρομαι, ὅτι σχέσιν εἶπε πρὸς τοῦτον, καὶ ὑπογεγράφη ὑπὸ τοῦτον περὶ λεγάτου ἢ περὶ ἐπιτρόπου, καὶ μετὰ τὴν διαδοχὴν αὐτοῦ ἦν προσήγχυσεν ἦντος καὶ περὶ τῆς ὑποστάσεως αὐτοῦ ἦν ἐκοινοῦσα αὐτῷ, τότε ἐκ τοῦτον τῶν τεκμηρίων μᾶλλον ὁ κρίτης ὃ ὁ ἐν τῇ γραφῇ τοῦ λεγάτου καὶ τῷ καιρῷ τῆς ποιήσεως τῆς διαθήκης λαμβάνει τὸ λεγάτον.”
V. Conclusion

Over the course of this chapter evidence from imperial novels, epistolography, and monastic testaments has demonstrated that the practices of gift-giving and patronage were deeply embedded within Byzantine Legal Culture. The novel of Constantine VII concerning judges’ salaries makes it clear that it was customary for provincial judges to receive sums proportionate to the size of the cases which they were judging, and in fact the novel merely regulates the amount that provincial judges were to receive, without in fact outlawing the practice. Kekaumenos writes that thematic judges expected to be bribed as a matter of course. Although such practices would be linked today with bribery and corruption in modern legal thought, they were essential for the creation and maintenance of relationships among the élite in the Middle Byzantine Period. As shown above, there was no consistent definition of “bribery” in the normative legal sources, and therefore the practice occupied a grey area between the customary fees paid to legal officials, the so-called sportulae, and illicit gifts which were in any case often demanded under the pretext of custom. Sportulae were only completely outlawed for the higher Constantinopolitan courts, such as the Court of the Hippodrome.

An examination of epistolography as well as testaments yielded further insights. Legal matters are occasionally featured in Byzantine letters, and the examples from this genre make clear that patronage constituted an important component of Byzantine Legal Culture. The analysis of Byzantine testaments revealed that both gift-giving and personal relationships were crucial for implementing a testator’s wishes. Thus the highest-ranking legal official in a particular jurisdiction was often supplied with either money or goods to ensure that a foundation suffered no outside interference.
Returning to the example invoked at the beginning of this chapter, Byzantine Legal Culture was characterized by a set of practices, namely gift-giving and patronage, which roughly correspond to what scholars have termed *Guanxi* in Chinese culture. Amorphous though the latter concept may be, its general characteristics can likewise be attributed to Byzantine Legal Culture: knowing the right people, cementing relationships with these people via gifts, often of a legally dubious nature, and in this case exercising influence through these relationships within the legal system.
Chapter Four

Legal Education and the “Law School” of Constantinople

I. Introduction

But we are especially able to take heart and to hope that in all the time afterward, you would desire to do something worthy, acceptable and pleasing to both God and men. If matters happen to happily exceed our expectations, putting away all hesitation and at no longer losing one’s head at the difficulty of the enterprise and not despairing that the great and most divine education [of the laws] is entirely uncorrectable or correctable only with difficulty, you shall bear on toward this [goal] with a certain wise inspiration and mania (though you appear to be among the wise), and you shall consider the most outlandish things, and you shall place yourselves among the hardworking and law-loving youths of long ago in a distant land for the sake [of legal learning], some who were carried away to Older Rome by their love of the hearing of the Roman laws, and others settled in Beirut, where the most prominent of men in the legal profession taught the laws and were heard in the past; shall you yourselves not want to be able to enjoy such a good thing at home rather than a most wicked silliness (For why would someone request something else?), instead of experiencing from there something mythic and your own, and to be able to quench your terrible thirst in the middle of a spring?!

So the students of new “Law School”\(^2\) under the auspices of John Xiphilinos were addressed by the emperor Constantine IX Monomachos (r. 1042-55). After earlier describing a period of decline in legal teaching, the emperor emphasizes that these students, under the instruction of an office created explicitly for Xiphilinos, that of the nomophylax didaskalos (“Teacher and Guardian [of the Laws]”), were to resurrect their glorious Roman legal heritage.

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\(^1\) Novella constitutio, §24: “ἀλλά τούτο μὲν σφόδρα καὶ θαρρεῖν καὶ ἐλπίζειν παρ’ ὑμῶν ἔχομεν ἐν παντὶ τῷ μετὰ ταῦτα καιρῷ, εἴπερ τι βουλοῦσθε ποιεῖν δεξιόν καὶ θέω καὶ ἀνθρώπως εὐσπάδεκτον καὶ εὐφέρεστον· τά δὲ νῦν τῆλικαυτῆς παρ’ ἐλπίδας ὑμῖν εὐτυχίας ἀναφανείσης, ὅκυρον ἀποθέμενοι πάντα καὶ μηκέτι πρὸς τὴν τοῦ πράγματος ἀληχανίων διεσχέσαν μνή· ὡς ἀκατάρθιον ὅλος ἢ δυσκατάρθιον τὸ θεωτάτων τε καὶ μέγιστον ἀπογυνόσκοντες μάθημα, σύφωρον τινὶ κατοχὴ καὶ μανία (κατὰ τοὺς ὑμῶν σοφοὺς φάναι) πρὸς τοῦτο κατεχόμενοι φέρεσθε, καὶ τὸν ἀτοποβατόν λογίσασθε, τοὺς μὲν πάλαι τὸν νέου φιλοσόφους καὶ φιλονόμος ἀποδημάς τε στέλλεσθαι τοῦτον χάριν μακράς, καὶ τοὺς μὲν εἰς τὴν προσβυτέραν Ῥώμην ἀπαίρειν κατ’ ἔρωτα νόμων ρουμάκων ἀκροάςεις τοῦς δὲ τῇ Βηρυτίων ἐπίδημεν, ἔνθα νόμους διάδοκον στὶς τῶν νομικῶν ἀνδρῶν ἐξογιστεύει τοῦν τοὺς στὸν ἁγίαν ἱκόνον, ὑμᾶς δὲ μὴ’ ο kukoi τῷ καλὸν ἔχοντας ἀπολαμβάνειν ἐδελείν ὑπὸ τινὸς κακίστης ἀβελτερίας (τί γὰρ ἐν τις ἔτερον αἰτίσσατοτ), ἀλλὰ πάσην ἐκείνο τὸ μθηκόν καὶ ὁμέτερον, ἐν μέσῃ πηγῇ χαλεπῷ κολαζέσθαι δίψει.” The geographic proximity of the Law School in Constantinople, as opposed to those youths of Late Antiquity who had to travel to Beirut or Rome, is noticeable in this section and; see Marie Theres Fögén, “Modell und Mythos. Die Rechtsfakultäten von Konstantinopel, Neapel und Bologna im Mittelalter”, RJ 15 (1996): pp. 181-204, here pp. 184. For the sake of convenience, the Law School founded by Constantine IX Monomachos will be written without quotation marks, with the caveat that it is problematic to use the term law school for this particular foundation, as it implies that it shared characteristics with modern law schools, or even with the incipient law schools of Northern Italy at Pavia and Bologna. The nature and function of the Law School is discussed below.
In creating this new position for legal education in the capital, Constantine IX, he himself an emperor who had a legal rather than military background, hearkened back to the law schools of Late Antiquity, citing both Rome and Beirut as ancient centers of legal education. The desire of the students to learn about the laws is compared to erotic love (erōs) and madness (mania). This passionate zeal for legal learning permeates the *Novella constitutio*, the novel which describes the founding of the law school.

The historian of Byzantine law is likewise liable to compare the considerable legal achievements of the eleventh century with the Golden Age of post-classical Roman law in the sixth century. The present examination, which shall consider how Byzantine legal education changed from the latter point to the former, is no exception. Historians fortunately know a great deal about how legal education was constituted in the sixth century, as this was one of the areas which Justinian addressed in his codification effort. Consequently, legal education in Late Antiquity is, especially in comparison with the immediately following period of Byzantine history, relatively well-researched. On the other hand, from the beginning of the seventh century, during which time a number of legal teachers known as the *scholastikoi* were still active, until the time of the *Book of the Eparch*, composed during the reign of Leo VI (r. 886-912), almost nothing is known about Byzantine legal education. Thus this chapter, reflecting the relative abundance of sources describing legal education at the two termini of the period from the sixth to the eleventh century, shall first describe legal education in the sixth century, then briefly discuss what little is known about legal education from the seventh to the end of the ninth century before examining in detail Byzantine legal education during the time of the Macedonian dynasty.  

Like almost any other topic within Byzantine history, it is easy to fall into the well-worn narrative of

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3 For comments on jurists, lawyers and other legal professionals during the Middle Byzantine period, see Fausto Goria, “Il giurista nell’impero romano d’Orient (da Giustiniano agli inizi del secolo XI),” *FM* 11 (2005): pp. 147-211.
decline from a Late Roman apogee to a Byzantine nadir. Indeed, it would be misleading to completely dismiss any notion of decline or decay in Middle Byzantine legal education. Knowledge of the Latin language, for instance, which was indispensable for the interpretation of Roman law even in the Hellenized form which Byzantine jurists utilized it, was certainly considerably more exceptional in the Middle Byzantine Empire than it had been under Justinian. In fact, in Justinian’s time the Empire still included a sizable population of Latin-speakers in the Balkan provinces and, after Belisarios’ reconquests in the 530s, North Africa and Italy.

More relevant to the present inquiry is the function of Byzantine legal education as a component of Byzantine Legal Culture. This chapter will demonstrate the following important facts: 1) That the study of Latin was absolutely vital even for the Hellenized version of Roman law which Byzantine jurists utilized, and that until the process of exhellēnismos (“Translation into Greek”) was completed in the eleventh century, much of the Roman legal tradition remained either nearly or practicably inaccessible; 2) That legal education was not delineated as a separate course of study, but rather treated as a component of advanced general education; 3) That the Law School founded by Constantine IX Monomachos was not a public university in the modern sense of the term, being instead the site of a publicly-salaried official, the nomophylax didaskalos, who provided instruction and access to legal manuscripts. 4) Lastly and most importantly, this chapter shall address a number of claims made by the scholar who has written most extensively on the Byzantine legal education under the Macedonian dynasty, Wanda Wolska-Conus. Of these claims, the most relevant to the present project is that the curriculum introduced by John Xiphilinos into the law school represented a new and highly radical approach

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to the law, which in effect represented “une dernière reprise des études scientifiques de droit romain.” Moreover, she claims there existed two opposed schools of legal thought in the eleventh century: one, represented by Xiphilinos and his students, practiced a highly theoretical approach to the law which relied on the interpretation of Justinianic legal texts; the other represented the more established Byzantine jurists, who resented the meteoric rise of Xiphilinos and gave preference to the *Basilika* over older Justinianic texts. As shall be demonstrated below, while Wolska-Conus’ other points about eleventh-century education are valid (e.g. that most higher education was private with intermittent state support), there is not a credible case for her dichotomy of pro- and anti-*Basilika* camps. Furthermore, although Wolska-Conus is correct in considering the eleventh century the apogee of Roman “secular” law in Byzantium, this reflected a number of concurrent developments rather than a new curriculum supposedly introduced by John Xiphilinos.

II. Legal Education in the Sixth Century

Thanks to the codification efforts of Justinian which became the *CIC*, much is known about legal education in Late Antiquity. The most informative document from this period concerning legal teaching is Justinian’s *Constitutio omnem*, issued December 16th, 533, which announced the completion of the *Digest* and outlined a new legal curriculum. The *Constitutio omnem* acknowledges the existence of law schools in Constantinople and Beirut, while at the same time censoring legal teaching in Alexandria and Caesarea. According to *Cod. 2.19.1*, there

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6 *Constitutio omnem*, *CIC*, vol 1., part 2, pp. 10-2.  
7 *Constitutio omnem*, §7 (Scott trans.): “We wish that these three treatises which have been composed by Us shall be taught students not only in royal cities, but also in the most beautiful city of Berytus — which may well be designated the nurse of the law, as has already been ordained by former princes — but in no other places, to which this privilege was not granted by Our ancestors; and for the reason that We have learned that certain ignorant men have gone about in the magnificent city of Alexandria, as well as in a Caesarea, and have imparted spurious instruction to students, We intend to deter these from this undertaking by means of the above-mentioned warning, so that if they venture hereafter to perpetrate such acts outside the royal cities and the metropolis of Berytus, they shall
were two professors of law at Constantinople in 425 and 534, teaching *in publicis magistrationibus et cellulis*; at the same time an undetermined number taught *intra plurimorum domus*. The *Constitutio omnem* itself is addressed to eight *antecessores*, an honorific term of military origin which here designates law teachers at Constantinople and Beirut.

The *Constitutio omnem* set out a new curriculum of legal education, consisting of five years of study. The first year was to be devoted to the so-called “First Things” (*Gr. Prōta*) (*Dig.* 1-4), because “…nothing is before this, since one is unable to have a different introduction beforehand (qua nihil est anterius, quia quod primum est aliud ante se habere non potest).” The second year covered either *Dig.* 5-11 (*De iudiciis*) or *Dig.* 12-9 (*De rebus*) in addition to *Dig.* 23, 26, 28 and 30. In the third year the students were to study the *De iudiciis* or the *De rebus* (whichever of the two they had not studied the second year), as well as *Dig.* 20-22. The fourth year curriculum encompassed *Dig.* 24-5, 29, 31-6. The fifth and final year the students were to read the *Codex Justinianus* in its entirety, a very difficult undertaking on which more shall be said below. Sometime between the promulgation of the *Constitutio omnem* and the middle of the sixth century a sixth year of study, devoted to the *Novels*, was appended to the standard five-year legal curriculum; how precisely this happened remains poorly-understood.

be punished by a fine of ten pounds of gold, and shall be banished from that city in which they do not teach the laws, but violate them. (Haec autem tria volumina a nobis composita tradi eis tam in regiis urbis quam in Berytiensium pulcherrima civitate, quam et legum nutricem bene quis appellet, tantummodo volumus, quod iam et a retro principibus constitutum est, et non in aliis locis quae a maioribus tale non meruerint privilegium: quia audivimus etiam in Alexandrina splendidissima civitate et in Caesariensium et in aliis quosdam imperitos homines devagare et doctrinan discipulis adulterinam tradere: quos sub hac interminatione ab hoc conamine repellimus, ut, si ausi fuerint in posterum hoc perpetrare et extra urbes regias et Berytiensium metropolim hoc facere, denarum librarum aurum poena plectantur et reiciantur ab ea civitate, in qua non leges docent, sed in leges committunt.)”

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9 Chart comparing the older and new curricula in Scheltema, p. 8.
10 *Constitutio omnem*, §2.
11 *Constitutio omnem*, §3.
12 *Constitutio omnem*, §4.
13 *Ibid*.
14 Scheltema, pp. 48-9.
The main reason for giving the above overview is to demonstrate how the Late Antique legal curriculum prescribed in the *Constitutio omnem* changed over time. Of paramount importance for the Middle Byzantine developments is the question of language. Bilingualism in Greek and Latin was not unusual in Late Antiquity, and some competence in both languages was necessary in order to complete the legal curriculum. Most of the *CIC* was originally in Latin, with the *Novels* constituting the only component of the *CIC* composed mainly in Greek. Therefore a great number of Greek paraphrases, commentaries, and glosses of the Latin were made, as was a Latin translation of the Novels, the *Authenticum*. Justinian himself in the bilingual *Constitutio tanta/Δέδωκεν* made allowance only for so-called *kata podas* (κατὰ πόδας) or less commonly *kata poda* (κατὰ πόδα) translations, namely interlinear, word-for-word translations of the Greek or Latin original. ¹⁵ Whether Justinian intended that these *kata podas* translations should be the only type of translation included in manuscripts of the *Digest* (as the *Constitutio tanta* itself is one of the introductory constitutions to the *Digest*) or whether it was a more general prohibition against *ad sensum* translations is related to the question of the validity of the so-called “Kommentarverbot” found in the same passage. Scheltema’s interpretation, which is that the prohibition applied only to materials which could be included with manuscripts of the *Digest*, is the most plausible explanation. ¹⁶ Due to the bilingual nature of the *CIC* itself,

¹⁵ *Constitutio tanta/Δέδωκεν*, *CIC*, vol. 1, part 2, pp. 13-24; §21: “Hoc autem quod et ab initio nobis visum est, cum hoc opus fieri deo adnuente mandabamus, tempestivum nobis videtur et in praesenti sancire, ut nemo neque eorum, qui in praesenti iuris peritiam habent, nec qui postea fuerint audeat commentarios isdem legibus adnectere: nisi tantum si velit eas in Graecam vocem transformare sub eodem ordine eaque consequentia, sub qua voces Romanae posita sunt (hoc quod Graeci *kata poda* dicunt), et si qui forsitan per titulorum subtilitatem adnotare maluerint et ea quae paratilia nuncupantur componere. Alias autem legum interpretationes, immo magis perversiones eos iactare non concedimus, ne verborum coaquae aliquid legibus nostris adferat ex confusione dedecus.” For an overview of *kata podas* translations, see Nicolaas van der Wal, *Les commentaires grecs du code de Justinien* (Gravenhage: Uitgeverij Excelsior, 1953), pp.49-63.

commentaries and translations for the Greek-speaking students were vital tools of the legal curriculum.

III. The Greek Commentaries of the CIC, Legal Lexica, and the Process of Exhellenismos

While the rediscovery of Roman law in the West was accomplished through the reading of the original Latin of the CIC, Byzantine jurists instead utilized the extensive commentary and translation tradition in Greek of the CIC. The Late Roman legal scholars of the sixth century furnished the vast majority of these works. From these antecessores, only two works have survived in their entirety: the Paraphrase of Theophilos and the Epitome Novellarum of Ioulianos. The latter is a Latin translation of Justinian’s novels, and thus not relevant to the present discussion. The Paraphrase of Theophilos is a free reworking of the Latin Institutes into Greek, characterized by a lively classroom style. Its rich manuscript tradition means that it was clearly one of the most popular texts of the antecessores.

Among the other texts of the antecessores which have survived only in fragments were: for the Digest the translation of Dorotheos; the translation of Stephanos as well as his two

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17 For many centuries it was assumed that the medieval glossatores had somehow been influenced by contemporaneous Byzantine law to the point that it was even conjectured that Imerius (c. 1050-1130), who is credited with reviving the study of Roman law in the Latin West, had studied law in Constantinople. In the twentieth century Fritz Pringsheim dismissed this notion and redefined the extent of this interaction to the idea that perhaps the glossatores had been influenced by the writings of the antecessores; see Fritz Pringsheim, Beryt und Bologna (Leipzig: Bernhard Tauchnitz, 1921). Despite some similarities in methodology (e.g. the discussion of imaginary cases to illustrate particular legal principles) even this relatively limited scope of interaction is no longer maintained by the majority of legal scholars; see Wolfgang Kaiser, “Berytos and Bologna. Some remarks on Fritz Pringsheim” in Spirodon Flogaitis and Antoine Pantelis (eds.), The Eastern Roman Empire and the Birth of the Idea of the State in Europe, European Public Law Series 80 (London: Esperia Publications Ltd, 2005), pp. 344-52.


20 F. Brandsma, Dorotheus and his Digest translation (Groningen: Egbert Forsten, 1996).
and the translation of the so-called Elder Anonymus, known as the *Summa*, from which most of the *Digest* passages in the *Basilika* are derived. For the *Codex* there existed an anonymously-authored *kata podas* (which was later attached to the paraphrase of the Thalelaios but was not itself authored by him) and the paraphrase of Thalelaios. With regard to the *Institutes*, one should mention the commentaries of Anatolios, Isidoros, as well as Stephanos.

Most of the commentaries of the *antecessores* are structured according to how these materials would have been used in a sixth-century lecture on Roman law. Each legal text was read twice. During the first reading, the legal texts themselves (Gr. *ta rēta*) were translated or paraphrased line by line by the instructor. The purpose of this first reading was to ensure that the students, for the most part Greek-speaking, understood the mainly Latin legal texts they were examining. This first lecture was called the Index. The second lecture consisted of an elucidation of the text which had been translated or paraphrased during the first lecture. This explication of the text was conducted very much along the lines of the Socratic method, in the form of a question-and-answer session. The comments on the text stemming from this second lecture are known in Greek as *paragraphai*.

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22 Bernard H. Stolte jr, “The Digest Summa of the Anonymus and the Collectio Tripartita, or the Case of the Elusive Anonymi”, *SG* 2 (1985): pp. 47-58, here p. 47. This Elder Anonymus is not to be confused with the Younger Anonymus/Enantiophanes (the author of the *Nomocanon in 14 Titles*) nor with a third Anonymus who authored the *Collectio tripartita*.


24 Van der Wal, pp. 105-10.


26 Van der Wal, pp. 64-79.

Along with the *antecessores*, the so-called *scholastikoi*, a designation for jurists who flourished at the end of the sixth and beginning of the seventh century, also furnished a number of legal texts which were extensively consulted in the Middle Byzantine period. Theodoros Scholastikos\(^{28}\) composed a short paraphrase of the *Codex Justinianus*,\(^{29}\) but his most important work for Byzantine jurists was an abridged version of Justinianic and a few post-Justinianic novels, with references to both the *Codex* and the *Novels*.\(^{30}\) Athanasios of Emesa composed a thematically-organized paraphrase of Justinian’s *Novels*, a type of work which would become a model for later texts and is known as a *syntagma*.\(^{31}\) In fact a tenth-century summary of the text has survived.\(^{32}\) Additionally, the so-called Younger Anonymus or Enantiophanes, who wrote the *Nomocanon in 14 Titles*,\(^{33}\) the principal canon law collection of the Middle Byzantine period, composed *paragraphai* on the *Summa* of the aforementioned Elder Anonymus which are well-attested in the *Basilika*. Overall, for the majority of the Middle Byzantine period the work of these *antecessores* and *scholastikoi* served as the means by which Byzantine jurists examined and used the *CIC*.

Despite the fact that this commentary tradition was in Greek, it was not as accessible to Middle Byzantine scholars as it might appear at first glance. It is worth bearing in mind that although already by the end of the sixth century the *CIC* had been Hellenized, these translations

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had nevertheless been intended more as aids than as replacements of their Latin prototypes.

Moreover, much Latin legal terminology was either transcribed into Greek or left in the original language within the translation. As Marie Theres Fögen, who likewise has examined this phenomenon, remarked “The body of law, one could say, became Greek, but the soul remained Latin.”

An example will suffice to demonstrate this.

The *Paraphrase* of Theophilos contains excellent examples of just how Latinized the Greek texts of the *antecessores* actually were. Book I, Title 18 is a section on whether or not children who are minors require a guardian after they have been released from the power of the father, and if so, who exercises guardianship. Below is the Greek text, followed by an English translation:

**Greek Text of Theophilos’ Paraphrase, Book 1, Title 18**

Ἐποίησα τὸν ἐμὸν υἱὸν ἢ τὴν ἐμὴν θυγατέρα ἢ ἐγγυον ἀνήβους ὄντας ἘΜΑΝϹΙΠΑΤΟϹ. ἐπιτρόπου δέονται: τίς αὐτῶν ἐπιτροπεύσει; ΤΕΣΤΑΜΕΝΤΑΡΙΟΝ οὐκ ἔστιν ἐπιτρόπη. τὸν γὰρ ΤΕΣΤΑΜΕΝΤΑΡΙΟΝ καταλαμπάνει ὁ ἐχὼν τὸν ἄνηβον ὑπεξούσιον. ἄλλα ΑΔΓΝΑΤΟΝ; ἄλλα διέφθαρται τῇ ΕΜΑΝϹΙΠΑΤΩΝΙ τὰ ΑΔΓΝΑϹΤΙΚΑ δίκαια. τίς οὖν κληθῆσεται ἐπὶ τὴν ἐπιτροπήν; καθὰ καὶ ἐν τοῖς προλαβούσιν εἰρήκαμεν, ὅ πατὴρ ὁ πάππος οἱ ἐλευθερώσαντες αὐτοὺς καὶ ἐπιτροπεύσουσι κατὰ μίμησιν τῶν πατρόνων, λεγόμενοι καὶ αὐτοὶ ΛΕΓΙΤΙΜΟΙ ἐπιτροποί.

**English Translation**

[Let’s say] I have granted freedom [lit. made someone an *emancipatus*] to my underage daughter or offspring. They require a guardian; who shall serve as their guardian? For this is not at all a testamentary guardian. For one who has the property a minor under his power leaves behind testamentary guardian. But it is *adgnastos* [i.e. a testamentary guardian of male relatives]? But the validity of *adgnastica* provisions is destroyed by the act of *emancipatio*. Then who shall inherit the guardianship? Just as we have said in the preceding [sections], the father [or] the grandfather who freed them shall serve as a guardian in imitation of patrons. And they themselves are called the lawful guardians.

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This relatively short and simple section contains a total of six Latin legal terms
(\textit{emancipatus}, \textit{testamentarion}, \textit{adgnaton}, \textit{adgnastica}, \textit{emancipatio}, \textit{legitimoi}).\textsuperscript{35} Although the \textit{Paraphrase} is in Greek, without a knowledge of Latin it would be have been difficult if not impossible to use Theophilos’ text effectively.\textsuperscript{36} In modern legal cultures it is of course not unusual to have remnants of another language in legal formulae, like the Latin terms \textit{habeas corpus} and \textit{noli contendere} in the English common law tradition. Yet the frequency and prevalence of Latin terms in Greek did present some special problems for Byzantine jurists, and we know this because of the numerous bilingual Latin-Greek legal lexica which were compiled in the Middle Byzantine period, a point which shall be expounded on below.\textsuperscript{37}

The example above from the \textit{Paraphrase} of Theophilos was a free reworking of a Latin legal textbook, the \textit{Institutes}, included in the \textit{CIC}. The \textit{Paraphrase} was an immensely important text, used extensively both in the creation of the \textit{Basilika} as well as compositions like Psellos’ \textit{Synopsis legum}. However, there also existed extremely literal \textit{ad verbum} translations, the so-called \textit{kata podas} translations.\textsuperscript{38} One of the most important of these translations was affixed to Thalelaios’ commentary of the \textit{Codex Justinianus}. The \textit{Codex} would have been, at least from a linguistic standpoint, the most difficult text to read within the \textit{CIC}. This is because the \textit{Codex}, as a compilation of imperial constitutions, was written in the highly recondite, flowery Latin of the imperial court. Even in Late Antiquity, at a time when bilingualism in Latin and Greek was far

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\textsuperscript{35} \textit{Legitimoi} (\textit{λεγίτιμοι}) being a Hellenized form of \textit{legitimi}.

\textsuperscript{36} On the Latin terms in the text see Theophilos Antecessor, \textit{Paraphrase}, pp. xxiii-xxvi.

\textsuperscript{37} For an overview of the way Latin loanwords were written by the \textit{antecessores}, see Nicholas van der Wal, “Die Schreibweise der dem Lateinischen entlehten Fachworte in der frühbyzantinischen Juristensprache”, \textit{Scriptorium} \textbf{37} (1983): pp. 29-53. See also the more general remarks about the presence of Latin in Byzantine juridical texts in N. van der Wal, “Problèmes linguistiques rencontrés par les juristes byzantins” in Martin Gosman and Jaap van Os (eds.), \textit{Non nova, sed nove. Mélanges de civilisation médiévale dédiés à Willem Noomen} (Groningen: Bouma’s Boekhuis bv, 1984), pp. 279-283.

\textsuperscript{38} On Thalelaios himself, see Andreas Schminck, “Thalelaios” in \textit{ODB}, vol. 3, p. 2030. On his commentaries and the \textit{kata podas} translation affixed to his \textit{Codex} commentary, see van der Wal, \textit{Les commentaires}, pp. 64-104. The date that the \textit{kata podas} commentary/translation was affixed to Thalelaios’ codex commentary, was, in van der Wal’s view, likely the beginning of the seventh century; p. 103.
more common than in the Middle Byzantine period, this text would have presented considerable
difficulties for Greek-speakers. Thus Thalelaios’ Codex commentary, as well as the kata podas
translation affixed to it, played a crucial role in the incorporation of the Codex Justinianus into
the Basilika. Although the Codex commentary of Thalelaios cum kata podas translation has not
survived, the scholia to the Basilika make extensive use of it, and by referring to these scholia it
is possible to see how Middle Byzantine jurists made use of both commentaries and translations
in making sense of the Codex. The example below is of a scholion from the Basilika which
shows how these tools were used:

Scholion 2 to Bas. 29.5.31 = Cod. 5.14.1

Greek Text of Bas. 29.5.31
Τὰ ἐπὶ τῇ προκή γινόμενα σύμφωνα περὶ τῆς ἁναδόσεως ἰσχύουσιν· οὐδὲ
γάρ ἐστὶ ψιλὸν πάκτον τὸ τοιοῦτον, ὅτε περὶ ἁναδόσεως τῶν ἐπιδιδομένων γίνεται
πραγμάτων.

English translation of Bas. 29.5.31
Agreements which take place
with
in the dowry about the exchange [of
goods
or money]
are valid. For this is not some sort of open pact [i.e. a pact which
resulted in no obligations], when [something] about the exchange of
things which
are given occurs.

Greek Text of Scholia 2 to Bas. 29.5.31
Τὸ κατὰ πόδας. Τὸ σύμφωνον, ὅπερ εἴπας, ὅτε τὴν προῖκα ὑπὲρ τῆς
ἀλούμινας παρεῖχες, φιλάττεσθαι χρή, καὶ οὐκ ὀφείλει σοι ἀντικείθησαι ἐκεῖνο,
ὅπερ εἶσθε λέγεσθαι ἀπὸ συμφόσιν ἀγωγῆν μὴ τίκτεσθαι· τότε γὰρ τούτῳ
λέγομεν, ἣνικα τὸ σύμφωνον γνημὸν ἐστὶν· ἐπεὶ ἣνικὰ χρήματα δίδοται καὶ
τίποτε περὶ τῆς τούτων ἁναδόσεως συμφωνεῖται, χρήσιμὸς ἐστὶν ὁ κονδικτίκιος.
Ἠν τούτως τὸ κατὰ πόδας. Ἐρμηνεύον δὲ τὸ τέλος τῆς διατάξεως <φησιν> ὁ
Θαλέλαιος· τὸ ‘χρήσιμὸς ἐστὶν ἡ ἀπαίτησις’ εἰρήνηται, διότι δύναται ὡς δόσεως
ἐπὶ αὕτη γενομένης τὴν πρασκερίττες βέρβις κινῆσαι.

English Translation of Scholia 2 to Bas. 29.5.31
The kata podas [translation]: The agreement that you mentioned, which is
when you offer a dowry on behalf of a foster-daughter, it is necessary to take care,
that you should not oppose it, since it is customary to say that an obligation does
not arise from an agreement. For we then say this, whenever a pact is open. For
since money is given and at some point an agreement is made concerning the
exchange of this money, the kondiktikios is invoked. The kata podas [says this] concerning these matters. And Thalelaios, interpreting the goal of the constitution, says: “The ‘demanding back’ can be invoked”, he says since one can bring suit such as when a gift occurred and therefore incurred the praescriptio verbis.

Latin Text of Cod. 5.14.1

Legem, quam dixisti, cum dotem pro alumna dares. servari oportet, nec obesse tibi debit, quod dici solet ex pacto actionem non nasci: tunc enim hoc dicimus, cum pactum nudum est: aliquin cum pecunia atur et alicquid de reddenda ea convenit, utilis est condictio.

As the above demonstrates, the commentator on Bas. 29.5.31 used both a kata podas translation and the Codex commentary of Thalelaios to interpret this particular passage. No recourse to the original Latin text of Cod. 5.14.1 was necessary, and this example demonstrates how Byzantine jurists coped with the CIC. Likewise, the above example also demonstrates an important but poorly-understood process by which writings of the Late Antique antecessores and scholastikoi were gradually purged of their remaining Latin content and edited into a more comprehensible and accessible form: namely, the process of exhellēnismos.

The introduction to the Prochiron, in detailing how this recapitulation of Justinianic law was compiled, states that “…we translated the collection of Latin terms into the Greek tongue.”

This statement describes the process of exhellēnismos. Exhellēnismos is a term used in the secondary literature to denote how the Greek commentaries and translations of the antecessores and scholastikoi were purged of their Latin legal terms and either transcribed or translated into Greek. Evidence of the progress of exhellēnismos can be found in the bilingual Latin-Greek legal lexica of the Middle Byzantine period. These legal lexica enabled Byzantine jurists to translate the termini technici of Roman law from Latin into Greek. Unfortunately, these traces of the

39 Prochiron, proem, lines 52-3: “…τὸν δὲ ρωμαϊκὸν λόγον τὴν συνθήκην εἰς τὴν ἑλλάδα γλῶσσαν μεταφοίησαμεν…”

process of *exhēlēnismos* do not indicate how or by whom this process was accomplished. That there was some connection between *exhēlēnismos* and the ongoing codification of Roman law started by Basil I and continued by his successors seems to be a valid assumption, as the latter could not have been accomplished without the former. The crowning achievement of this process was the completion of the *Basilika*. The *Basilika*, although based on the *CIC*, represented in many respects not so much a translation of Roman law as a reworking of it.

Although *exhēlēnismos* allowed Byzantine jurists to fully utilize the Roman legal tradition without resorting to Latin, sometimes these *exhēlēnismoi* were vague or simply incorrect, and thus caused problems in legal interpretation.\(^1\) One of the reasons that Eustathios Rhomaios was such an accomplished judge was that he appears to have been able to consult the Latin originals when there was uncertainty regarding the meaning of *exhēlēnismoi*, an extraordinarily rare ability at the time. Within *Peira* 11 “Concerning Guarantees (Gr. Περὶ ἔπερωτήσεων), for example, there is some ambiguity regarding a passage which mentions two people subject to a guarantee (Lat. *stipulatio*). The *stipulatio* was part of a formulaic oral agreement, usually in the context of a gift, sale, or especially loan, which obligated the person subject to the *stipulatio* to perform the deed promised.\(^2\) Naturally, this was only a one-way obligation. In *Peira* 11.1, Eustathios is able to make sense a passage translated into Greek involving a *stipulatio* mentioning two people subject to it, which was baffling given that the *stipulatio* was only a one-way obligation.\(^3\) Eustathios refers to the original Latin of the passage

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\(^1\) Fögen, “Reanimation of Roman law in the ninth century”, p. 15.
\(^3\) *Peira* 11.1: “The patrikios interpreted a passage which mentioned two [people] subject to a guarantee (Lat. *stipulatio*) thus, saying: The Latin has two *promitendo* and two *stipulando* and two *rheous* [for the people] subject to a guarantee. Therefore the two *reous* does not indicate the recipients of the action alone, but also the initiators of the action, and the Latin must be interpreted this way. The two men being subject to guarantees could be both the initiators of the action and recipients of the action alone. Those who translated the passages into Greek were unable to translate the term and indicate both the initiators of the action and recipients of the action alone, [but instead] they said two [people] are subject to a guarantee, which has the meaning both of requesting the guarantee and the one
to prove that the two people supposedly subject to the *stipulatio* must in fact be both parties involved in the transaction, and not just the one subject to the *stipulatio*. He states that the translators of this passage had incorrectly translated the word for someone subject to a stipulation, and thus an apparent paradox is solved. Of course, while a jurist of Eustathios’ ability was able in this instance to resolve a problem presented by the translation of the *exhellēnismoi*, Eustathios himself was a judge of exceptional ability; for the typical Latin-less thematic judge, such a passage would have been almost impossible to interpret correctly.

As the preceding section has demonstrated, Roman law in its Late Antique iteration, consisting of the *CIC* as well as the numerous commentaries and translations of the so-called *antecessores*, presented numerous problems to Byzantine jurists and lawyers. Foremost among these problems was the problem of language: by the Middle Byzantine period knowledge of Latin, still vital to an understanding of Roman law, had decreased considerably. Interestingly, it is the period from the beginning of the seventh century until the beginning of the “Recleansing of the Ancient Laws” under Basil I that legal collections with non-*CIC* origins, such as the *NG*, *NM*, and *NN* came into use. As argued elsewhere in this dissertation, these legal collections represented a kind of “stopgap” measure, laws which were able to be used by Byzantine legal officials before the completion of *exhellēnismos* and the Macedonian codification efforts.44 This interpretation would correspond to what little we know about Byzantine legal education from the

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44 See Ch. 5.
beginning of the seventh century; namely, a long period of silence before a revival at the end of
the ninth and beginning of the tenth century.

IV. Legal Education from the End of the Sixth to the Middle of the Ninth Century

The period of the *antecessores* is generally acknowledged to have ended in the second
half of the sixth century after the death of the last jurist designated as an *antecessor*, Ioulianos.
Thereafter, jurists active at the end of the sixth and into the seventh century such as Athanasios,
Theodore Scholastikos (of Hermopolis) and Enantiophanes/Anonymous the Younger were
designated as *scholastikoi*. Scheltema has characterized this period as one in which the
theoretical legal teaching of the *antecessores* gave way to the more vocational and practical legal
training of the *scholastikoi*. Scheltema, pp. 61-4. For comments about the role of law in the seventh century, including some remarks about
legal education, see John F. Haldon, Byzantium in the seventh century: the transformation of a culture, rev. ed.

“Teachers of the civil laws” are mentioned in Canon 71 of the Council in Trullo, which
took place in 691-2. The canon forbade them from following “pagan customs”, which included
going to the theatre, wearing their clothes in a bizarre fashion and holding what were processions
or festivals of some sort associated with the academic terms of study. Thus as late as the end of

45 Scheltema, p. 61-4. For comments about the role of law in the seventh century, including some remarks about
legal education, see John F. Haldon, Byzantium in the seventh century: the transformation of a culture, rev. ed.
46 Ibid., p. 62. There is however little reason to suppose, as Scheltema does, that the educational curriculum of the
*scholastikoi* somehow corresponded to the regulations for legal knowledge required of *taboullarioi* in the BoE. The
writings of the *scholastikoi* would have likely been used mainly to train lawyers, after all, and not necessarily
notaries, whereas there are no corresponding regulations in the BoE regarding the legal knowledge which lawyers
were expected to have.
not follow pagan customs, neither going to the theatre, nor having so-called “*kylistras*”, or wear their clothes
contrary to the common use, neither at the time which their studies begin nor when they bring them to their
conclusion, nor are they to appear at all in the middle of the curriculum. And if someone from now on dares to do
this, let him be cast out. (τοὺς διδασκομένους τοὺς πολιτικοὺς νόμους μὴ δεῖν τοῖς Ἑλληνικοῖς ἔθει κεχρήσθαι, μήτε ἐπὶ
θεάτρων ἀνάγεσθαι, ἢ τὰς λεγόμενας κυλίστρας ἐπιτελεῖν, ἢ παρὰ τὴν κοινὴν χρῆσιν στολὰς ἑαυτῶς
περιτιθέναι, μὴτε καθ’ ὀν καρόν τοῦ μαθημάτων ἐνάρχονται, ἢ πρὸς τὸ τέλος αὐτῶν καταντῶσιν, ἢ καθόλου φάναι,
διὰ μέσου τῆς ταυτῆς παιδεύσεως· εἰ δὲ τις ἀπὸ τοῦ νόμον τοῦτο πράξῃ τολμήσῃ, ἀφοριζέσθω.)”
48 H.J. Scheltema, relying on the later testimony of the canonist Balsamon, notes that it is possible that these κυλίστραι
had been mock combats between incoming law students, which later become a lottery in which these students were
divided into sections; see H.J. Scheltema, “*Κυλίστρα*”, EESB 29 (1959): pp. 78-80 (Reprinted in idem, Opera
minora ad iuris historiam pertinencia [Groningen: Chimaira, 2004], B17).
the seventh century there appears to have remained some vestiges of organized legal education, at least in Constantinople, and it also appears to have been taught as a separate course of study rather than as a component of a general higher-level education.

After the seventh century there is no substantive information on legal education until the end of the ninth century. The Ecloga contains no information on the educational background which a judge was supposed to possess; of much greater import was the moral integrity of the judge.\textsuperscript{49} Indeed those judges who “…know the law but falsify the truth…” are explicitly warned against judging unjustly.\textsuperscript{50} In any case, it is interesting to note that a half-century after the mention of the continuance of legal education in the capital, it is stated in the Ecloga that Roman law was difficult to interpret, particularly for those outside of Constantinople.\textsuperscript{51}

In the ninth century, when more is known about education in general, there is no indication that law existed as a subject of study apart from a general education (\textit{enkyklios paideia}).\textsuperscript{52} This is true as well for the “university” founded by the Caesar Bardas at Magnaura in Constantinople during the reign of Michael III (r. 842-67).\textsuperscript{53} In the absence of any sort of evidence that a separate legal curriculum existed after the end of the seventh century, it is to be assumed that the legal education became primarily vocational. This is in stark contrast to the five- and then six-year legal curriculum of the sixth century.

\textsuperscript{49} Ecloga, proem, lines 52-68.
\textsuperscript{50} Ibid., lines 69-70.
\textsuperscript{51} Ibid., lines 34-40.
\textsuperscript{53} On the school at Magnaura, see Friedrich Fuchs, \textit{Die höheren Schulen von Konstantinopel im Mittelalter}, Byzantinisches Archiv 8 (Leipzig: Berlin: B.G. Teubner, 1926). Paul Speck convincingly proved that this school at Magnaura was not essentially different from other schools of higher learning in the capital in \textit{idem, Die Kaiserliche Universität von Konstantinopol}, Byzantinisches Archiv 14 (Munich: C.H. Beck’sche Verlagsbuchhandlung, 1974); see as well the comments in Lemerle, pp. 242-66, who assigns much greater importance to the founding of these schools and the effect which they had on Byzantine intellectual life in general.
V. Legal Education according to the Book of the Eparch

There is no concrete information on legal education in the Byzantine Empire from the end of Late Antiquity until it is mentioned again in the Book of the Eparch (BoE). The BoE, authored sometime during the reign of Leo VI but probably more exactly during the first part of the tenth century, is a collection of regulations for the guilds in the city of Constantinople. The intended reader of this work was the Eparch of Constantinople, who held the highest administrative authority in the capital outside that of the emperor himself.\(^{54}\)

The first section of the BoE is concerned with notaries (taboullarioi). In the Middle Byzantine period notaries were basic civil or church functionaries, and constituted a portion of the staffs which surrounded higher-ranking officials like judges and military governors. As such they were required to have a basic familiarity with the law.\(^{55}\) More specifically a notary “… who is to be appointed should have the forty titles of the law ready-at-hand on his tongue and a knowledge of the sixty books, and to have been taught a general education.”\(^{56}\) The “forty titles of the law ready-at-hand” refers to the Prochiron, while the “sixty books” are of course the Sixty Books of Leo VI. Thus while notaries were required to be familiar with Byzantine law, from the passages in the BoE there is no indication of any organized system of formal legal education.

Within the same chapter “On Notaries”, however, there are a number of references to otherwise-unknown teachers of law.\(^{57}\) These are the so-called “law teachers” (paidodidaskaloi nomikoi). §13 of the same chapter mentions a “legal teacher and a teacher en nomē archaia”

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\(^{54}\) See Alexander Kazhdan, “Eparch of the City” in ODB, vol. 1, p. 705. Andreas Schminck has advanced an argument that the BoE is an unfinished work of the Eparch Philotheos and Leo VI which stems from after the year 907, and which, after Leo’s VI death, was preserved by a member of the emperor’s inner circle and that it remained a literary text rather than promulgated law; see idem, “Novellae extravagantes’ Leons VI”, SG 4 (1990): pp. 195-209.

\(^{55}\) BoE, Ch. 1, §1: “Ὁ μέλλων προχειρισθῆναι ταβουλάριος…ὁς ἄν γνώσιν καὶ νόμων εἵδησιν ἔχη…”

\(^{56}\) BoE, Ch. 1, §2: “Ὁ προχειρισθησάμενος ὑπέλει ἐπὶ στόματος ἔχειν τοὺς τεσσαράκοντα τίτλους τοῦ ἐγχειρίδιου νόμου καὶ τῶν ἔξηκοντα βιβλίων τὴν γνώσιν, παιδευθῆναι δὲ καὶ τὴν ἐγκύκλιον παιδευσιν…”

\(^{57}\) BoE, Ch. 1, §13,15 and 16.
(παιδοδιδάκαλος νομικός και διδάσκαλος ἐν νομῇ ἀρχαίᾳ).\textsuperscript{58} It is unclear from the context what en nomē archaia means, and this phrase has been the subject of an article by Wanda Wolska-Conus.\textsuperscript{59} According to her interpretation, the en nomē archaia was a privilege accorded to a particular legal teacher to teach in a public space designated for the exercise of their profession.\textsuperscript{60} Wolska-Conus in the same article posits an essential continuity of legal education from the disappearance of the law schools in Beirut and Constantinople until the Macedonian Dynasty. Although Wolska-Conus’ interpretation of the term en nomē archaia is the most convincing so far offered, she definitely overstates the case for continuity of legal education. As discussed below, legal education in the eleventh century, when there is again significant information as to how legal education was conducted, bore little resemblance to its Late Antique antecedent. Moreover, her argument is based on similarities in titles and terminology more than anything else, and if Wolfram Brandes’ recent work on the Byzantine administration from the seventh to ninth centuries is any indication, then this similarity could be the result of a legal educational “Proto-Renaissance” rather than actual evidence of continuity—that is, a reintroduction of Late Antique names for legal teachers around the time of the composition of the BoE.\textsuperscript{61}

VI. The Novella constitutio and the Founding of the Law School of Constantine IX Monomachos

The so-called Novella constitutio was a novel issued by Constantine IX Monomachos which announced the creation of the new position of nomophylax didaskalos along with a Law

\textsuperscript{58} Koder translates this part of the sentence (BoE, p. 81): “Der juristische Aspirantenlehrer und der Lehrer sollen auf Weisung des überaus ruhmreichen Eparchen den altherbegrachten Amtssitz einnehmen…”

\textsuperscript{59} Wanda Wolska-Conus, “Les termes νομή et παιδοδιδάσκαλος νομικός du ‘Livre de l’éparque.’”

\textsuperscript{60} Ibid., p. 541.

School. Most probably the author of the *Novella constitutio* was John Mauropous, as it is included in the manuscript which contains his self-selected literary oeuvre, *Vaticanus graecus* 676, although the case has been made (less plausibly) for John Xiphilinos as well. Probably promulgated between the very end of 1047 or more likely sometime in 1048, the *Novella constitutio* proclaimed to augur a new era of legal education. The *Novella constitutio* is a fascinating document not only as evidence of legal education at the time of the Macedonian dynasty, but also as perhaps the most complete articulation of the justification for law, law’s function, and the relationship of the state and the law in the entire Middle Byzantine period. The first two sections of *Novella constitutio* stress the importance of law to the emperor and that it is his duty to regulate it. Although law’s divine origin as God’s gift to mankind is mentioned, the articulation of the justification for the law and the state’s relationship with it is much more philosophical than the preface to the *Ecloga*, where the law and the emperor’s duty to preserve it are presented in stark Biblical terms.

In the third section reference is made to previous emperors. They had devoted a great deal of attention to the laws “…so that through [their] many pains and toils they made the laws immense, and they labored a great deal with the interpretation of the Latin, in which language the antiquity of the laws was written, and endured much hardship in making them clear, and still they thought their recleansing was worthy of much attention and effort, a magnificent deed, most

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62 Paul de Lagarde’s edition and Latin translation in A. Salač’s version of the *Novella Constitutio*. The founding of the Law School is most thoroughly examined by Wolska-Conus, “L’école de droit”; *eadem*, Les écoles de Psellos et de Xiphilin sous Constantin IX Monomaque.”
64 More on the dating below.
66 *Novella constitutio*, §1-2.
beneficial to the commonweal; I do not know how or why they left it unmanaged.” The particular emperors in question are left unnamed, as is normally the case when critiquing past emperors in new legislation, e.g. the proem to the Prochiron. The reference to a “recleasings” (anakatharsis) of the laws points strongly to the recapitulation of Justinianic law initiated by the first two Macedonian emperors, Basil I and Leo VI. The critique of these past emperors, now centering on legal education, continues in the fourth section. Specifically, these emperors neither selected a teacher of the laws, nor did they designate a public space for legal teaching, nor did they allocate public allowances for teachers. Employing a dramatic nautical metaphor, these negligent rulers “…left the divine legal education like a ship without a helmsman in the middle of the sea of life, though with it they would together be shipwrecked, wander astray and be carried off.”

The state of legal education is described in section five of the Novella constitutio. Since there was no centralized system of education and standardized curriculum, legal teaching was conducted by individual teachers. Thus the quality of legal education was highly dependent on the knowledge of the teacher, so that “…though he [the teacher] be more imperfect than all [others] in the practice of teaching, nonetheless what is said by him is received with certainty, [even though] it oftentimes differs from what the laws prescribe, but rather corresponds to what the teacher says, [with the student] receiving it in his memory and soul.” Overall the Novella

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67 Novella constitutio, §3: “...πολλὰ δὲ καμείν περὶ τὴν ἐρμηνείαν τῆς Ἰταλίδος, καθ’ ἣν ἡ τῶν νόμων ἀρχαιότης συνέκεισθαι, οὐκ ὁλίγα δὲ πρὸς τὴν τούτων ταλαιπωρῆσα σωφήνες, ἐτί δὲ καὶ τὴν ἀνακάθαρσιν ὅτι πλειστῆς φροντίδος καὶ σπουδῆς ἀξίωσαι, ἐν τῷ κάλλιστον πράγμα καὶ τῷ κοινῷ συμφόρωται οὐκ οἶδα πόθεν οὐδ’ ὅπως παρέλιπον ἀδιοίκητον.”
68 See Ch. 1.
69 Novella constitutio, §4: “...ἀλλ’ ὡς ἀκυβέρνητον πλοῖον τὴν ἑρανν νομομάθειαν ἐν μέσω τῷ πελάγει τοῦ βιῶ κατέλιπον, ὡς ἄν συμπέσοι καὶ τούχῳ πλανάσθαι καὶ φέρεσθαι.” The ship in the sea of life metaphor occurs frequently in Byzantine literature, e.g. the introduction to the History of Leo the Deacon.
70 Novella constitutio, §5: “...κἂν πάντων ἀπελέστερον ἔχοι περὶ τῆς τοῦ μαθήματος ἀσκησιν, ὅμως τὸ ῥηθὲν ὅπ’ ἐκείνου βεβαιότας παραδεξόμενος, ἀπήλθε πολλάκις οὐχ ἂ τοῖς νόμος ἐδόκει, ἀλλ’ ἂ τῷ διδάσκαλῳ ἐπήλθεν εἰπεῖν, εἰς τὴν ἑαυτοῦ ψυχὴν τε καὶ μνήμην παραλαβὼν.”
*constitutio* characterizes legal education in the eleventh century as chaotic: toward the end of the novel the author derides the old system of legal learning, stating “for no longer like those before you shall you chance upon an exegesis through bare enigmas and riddles (I mean with legal terminology), nor shall you give ear to misleading [readings] because they are useful, so that they require an oracle to interpret, nor shall you prophesy ambivalently concerning their [the laws’] intent.”\(^7^1\)

Although some of this characterization is clearly topos, nonetheless it is possible to discern a number of important characteristics of Byzantine legal education in the eleventh century. First, it is clear, notwithstanding some rhetorical exaggeration, that legal education in the eleventh century was conducted by private teachers and that there existed no official, state-sanctioned legal regime. Of the five-year curriculum for law students outlined in the *Constitutio omnem* there is no trace whatsoever. Wolsku-Conus postulates a system of private legal education sporadically supported by the state; indeed, she believes that the law school itself had once been a private school founded by Psellos and Xiphilinos before it attained state sponsorship. Psellos, specifically in his capacity as “president of the schools” or “proedros of the philosophers”, may have disbursed state money to private teachers.\(^7^2\) Overall, Wolska-Conus presents a convincing picture of eleventh-century legal education as a mainly private enterprise with occasional state support.

The provisions contained in the *Novella constitutio* which were to rectify this situation included the demarcation of a school (described variously as *didaskalia, paideutērion* or *phrontistērion*) and the creation of the office of *nomophylax didaskalos*. The designation of

\(^7^1\) *Novella constitutio*, §23: “οὐκέτ’ γὰρ ὑμᾶς ὑπέρ τῶν πρότερον αἰνήγματι καὶ γρήγορως ἐνεπύργησαν γυμνοὶ ἔξηγησεις (τοῖς νομικοῖς λέγοντι ρήμασιν), οὐδ’ ἄσπερ χρησμὸν τινὸς λοξὸν ἐπακούσασθε, ἄλλου χρηστηρίου δεομένων εἰς τὴν σαφήνειαν, οὐδε τῆς αὐτῶν διανοίας ἀμφιβόλους καταμαντεύσασθε...”

nomophylax didaskalos was fitting for two reasons, according to the Novella constitutio: First, because he was to inculcate in his students knowledge of the law, and second, he was to have his pick of law books necessary for teaching and interpretation deposited at the school by the imperial librarian.\footnote{Novella constitutio, §10.} The nomophylax was not to take into consideration the family or social status of his students, but only their ability. Further, he was forbidden to take bribes, although genuine gifts were encouraged.\footnote{Novella constitutio, §14.} In addition to senatorial rank, the nomophylax himself was to be given a yearly stipend (rhoga) of four litrai, purple-dyed silks, and a gilded staff.\footnote{Novella constitutio, §11.}

Interestingly, the Novella constitutio was not addressed to all legal officials. The only two groups mentioned in the Novella are lawyers (synēgoroi) and notaries (symbolaiographoi or taboullarioi). The nomophylax was to test each member of these groups in his knowledge of the laws, both written and oral, as well as his general moral rectitude.\footnote{Novella constitutio, §20.} Higher-ranking legal officials, such as thematic judges, are not mentioned at all: a fact which testifies to the principle of Late Roman legal administration, which continued throughout Byzantine history, that legal officials were usually first and foremost administrators. Of course, many high-ranking legal officials began their careers as notaries, but this certainly wasn’t the case for other officials with juridical powers, such as military governors (stratēgoi).

Unfortunately, the Novella constitutio gives no information on the legal curriculum. There is no information in the Novella about which texts were read or the style of teaching which was employed. Nonetheless, there are a couple of passages which add perhaps peripheral but still important information to the picture of Byzantine legal education in the eleventh century.

Although knowledge of Latin in Constantinople, particularly the sophisticated Latin necessary to

\footnotesize{\textsuperscript{73} Novella constitutio, §10.\textsuperscript{74} Novella constitutio, §14.\textsuperscript{75} Novella constitutio, §11.\textsuperscript{76} Novella constitutio, §20.}
read Late Roman legal texts, was practically non-existent, the *Novella* does insist that the *nomophylax* possess a knowledge of the language.\(^{77}\) Another important and perhaps related point which the *Novella* emphasizes is that older laws, which were not being used, again have their validity and should be consulted.\(^{78}\)

An aspect of the *Novella constitutio* which has been neglected in the secondary scholarship and is extremely important with regard to how the text should be interpreted is the novel’s *raison d’être*: why did Constantine IX create a law school and the office of *nomophylax didaskalos*? Scholars usually accept without question the reasoning given in the novel itself, that the state of legal education was in considerable disarray and required correction. Though this may indeed have been the case, it seems that a better explanation would incorporate the political context of the reign of Constantine IX. The novel likely served two political purposes. First, as an emperor who by some accounts supported the civil administration at the expense of the military, the novel allowed Constantine IX to present himself as a reformer of two groups of legal functionaries in the capital, the lawyers and notaries. Though the novel attacks the inconsistent legal education of these groups, by requiring that the newly-created *nomophylax didaskalos* test their legal knowledge and general moral rectitude Constantine IX legitimates the professionalism of these guilds. Secondly, to a certain extent dynastic concerns are reflected in the novel. Constantine IX only had a tenuous connection to the ruling Macedonian dynasty through his wife, Zoe, daughter of Constantine VIII (r. 1025-8).

Apropos of the political context, Jacques Lefort has convincingly demonstrated the way in which the political events of 1047, including a Pecheneg invasion and the revolt of Leo

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\(^{77}\) *Novella constitutio*, §16. Van der Wal, among others, doubts that Byzantine jurists in the eleventh century, even the *nomophylax*, would have been able to consult juridical texts in Latin; see idem, “Problèmes linguistiques”, p. 280.

\(^{78}\) *Novella constitutio*, §20.
Tornikios, are detailed in three discourses of John Mauropous.\textsuperscript{79} Lefort’s chronology of the events of 1047 and his dating of the \textit{Novella constitutio} to April, 1047 allow a much clearer reading of the rationale for the founding of the Law School. Clearly, the revolt of Leo Tornikios and his “Macedonian” supporters presented a serious threat to Constantine’s rule. However, Lefort’s dating of the \textit{Novella constitutio} to April of 1047, generally accepted by modern scholarship, is impossible if one takes into account the critique of previous Macedonian emperors in the first few sections of the \textit{Novella}.

Leo Tornikios was born in Adrianople but was from a distinguished Armenian family originally from Taron, the Tornikioi.\textsuperscript{80} He was in some way related to Constantine IX, probably as a first cousin once-removed.\textsuperscript{81} He was favored by Constantine IX and was granted a governorship, either of Melitene or of Iberia. However, as governor he was induced to revolt against the emperor by his “Macedonian” supporters.\textsuperscript{82} He was forced to become a monk in the capital, but was not kept under guard. In September of 1047 he rose in revolt again against Constantine IX, and nearly succeeded in taking Constantinople. Constantine’s forces rallied and defeated the rebels, and Leo Tornikios was blinded on Christmas Day 1047.


\textsuperscript{81} Leo Tornikios was not necessarily, as is stated in Charles M. Brand, “Leo Tornikios” in \textit{ODB}, vol. 2, p. 1216, the nephew of Constantine IX. Although Psellos does describe Leo as an “ἐξανέψιος ἐκ μητρικῆς ρίζης”, he probably used “ἐξανέψιος” in this context as the general term for a cousin, rather than a nephew; Adontz, p. 254.

\textsuperscript{82} Michael Attaleiates, \textit{Historia = Historia/ Miguel Ataliates; introducción, edición, traducción del griego y comentario de Inmaculada Pérez Martín}, Inmaculada Pérez Martín (ed. and trans.), Neuva Roma 15 (Madrid: Consejo Superior de Investigaciones Científicas, 2002), p. 18. Attaleiates is also the only contemporary historian who mentions the founding of the law school (p. 17).
Although Leo himself was not related to the Macedonian dynasty, his supporters are consistently described in Mauropous’ discourse no. 186, probably read in December 1047, as “Macedonians”; Leo is twice described as a Macedonian. The rebels were primarily military men from Macedonia unhappy with the policies of Constantine IX, which favored the central administration in the capital. The Novella can thus be read as an affirmation of Constantine’s rule in the face of these rebels. The degree to which these rebels hearkened back to earlier rulers of the Macedonian dynasty is difficult to say, but their geographic origin unmistakably connected them with the founder of the Macedonian dynasty, Basil I, who himself hailed from the same region. Lefort correctly notes the contrasting ways in which a tyrant, who reigns through brute force, and an emperor, who reigns lawfully, are presented in the Novella; clearly, this section is directed against usurpers. Lefort believes this passage refers to a revolt of the disaffected “Western” armies in the Spring of 1047.

Yet, the rebellion of dissatisfied troops, even if it was done in Tornikios’ name (which is possible but unclear), probably would not have warranted the condemnation of tyrannical rule in the Novella, especially as Tornikios was granted a quite lenient pardon. Furthermore, Lefort makes no connection between the criticism of past emperors’ efforts at legal reform in the Novella and the later, and far more serious, rebellion of Tornikios which began in September of 1047. This rebellion, which nearly toppled Constantine IX from the throne, is a far more likely candidate for the condemnation of tyrants in §3 of the Novella. Thus the hitherto puzzling critique of the Macedonian dynasty’s attempt at legal reform must also be interpreted in the light

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83 Lefort, p. 287, footnote 106; John Maouropous, no. 186, §47, 1. 4: “For what is impossible for men is possible for God, who works miracles against the present Macedonians or against the Egyptians of long ago (tà γὰρ παρ’ ἀνθρώπων ἀδύνατα θεὸ δυνατά, ὥς τάντια τότε τοῖς Μαδεδόσιν ἢ τοῖς Αἰγυπτίοις πάλαι περιστομοίγεί).”
84 Novella constitutio, §3; Lefort, pp. 290-1.
of Tornikos’ “Macedonian” insurrection.\textsuperscript{85} By undercutting the legal reforms of the first Macedonian emperors in the \textit{Novella}, Constantine IX attempted to reinforce the legitimacy of his own reign against Tornikios and his pro-Macedonian partisans. In conclusion, a date of April 1047 for the promulgation of the \textit{Novella} is highly unlikely. More convincing is a date sometime after the blinding of Tornikios at Christmas in 1047 and before the incursions of the Seljuk Turks in Armenia and Eastern Asia Minor later in 1048. The latter date serves as a \textit{terminus ante quem} because the \textit{Novella} states that the empire was at peace both within and without its borders.

The above discussion of the founding of the Law School has demonstrated that the content of the \textit{Novella constitutio} was more crafted to fit the political context of 1047 than a reflection of the actual state of legal education or a document which attempted to genuinely reform legal education.\textsuperscript{86}

\textbf{VII. Legal Education in the Juristic Didactic Writings of Michael Psellos and Michael Attaleiates}

Overall then, while the \textit{Novella constitutio} is unsurpassed as a statement of the rationale for and purpose of law in the Middle Byzantine Empire, and it contains much useful information about the creation of the office of the \textit{nomophylax didaskalos}, one must turn elsewhere to find out how lawyers and legal functionaries were educated. A valuable set of texts which reveal a great deal about legal education in the eleventh century consists of the juristic writings ascribed to the Byzantine polymath Michael Psellos. The major juristic text ascribed to Psellos which has survived is the \textit{Synopsis legum}, a didactic poem written for Psellos’ pupil, the emperor Michael VII Doukas (r. 1071-8).\textsuperscript{87} Along with the \textit{Synopsis legum}, there are a total of eight didactic texts

\textsuperscript{85} \textit{Novella constitutio}, §4.
\textsuperscript{86} In her comparative analysis of the founding of the Law School, Marie Theres Fögen (“Modell und Mythos”, p. 186) has also downplayed the role of the Law School as a vehicle for legal reform or as the impetus for a supposed eleventh-century revival of legal studies.
ascribed to Psellos, seven shorter and one longer. Another set of texts, perhaps the work of Psellos’ students, is a collection of about 45 commentaries of the Synopsis legum found in Cod. Par. gr. 1355.

Compared to the Novella constitutio, these didactic juristic texts present a much clearer picture of legal education, and are invaluable in that they represent the work of a practicing lawyer. From these writings a picture of legal education emerges which is utterly different from that of Late Antiquity, at which time lawyers received five and later possibly six years of specialized legal instruction. Unlike its Late Antique forebear, Byzantine legal education appears to have been much more generalized, and advanced training in the law was merely part a necessary component in the education of highly-educated person, much as Blackstone could say in the eighteenth century that no continental gentleman could consider his education complete without having attended a course or two on Justinian’s Institutes.

Employing an analysis of texts cited in the Synopsis legum and other works of Psellos, Günter Weiss has compiled a list of 31 individual juristic works to which the Byzantine polymath had access. Especially noteworthy is that Psellos himself did for the most part not directly consult the supposedly main source of law during this period—the Basilika or any of its

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91 William Blackstone, Commentaries on the Laws of England, 4 vols. (Oxford: Clarendon Press, 1765-9); vol. 1, p. 4: “In most of the nations on the continent, where the civil or imperial law under different modifications is closely interwoven with the municipal laws of the land, no gentleman, or at least no scholar, thinks his education is completed, till he has attended a course or two of lectures, both upon the institutes of Justinian and the local constitutions of his native soil, under the very eminent professors that abound in their several universities.”

various antecedents. Indeed, Psellos himself says as much in his *Synopsis legum*, describing Leo VI’s *Sixty Books*, the predecessor to the *Basilika*, as follows: “Then [comes] the summary book of [the emperor] Leo./ So that the entire sixty-book [compendium] contained all the laws./ The *Codex*, the *Digest*, and the *Novels*. They are related and breathe together the different laws./ Thoroughly examined, indexed properly and legitimately;/ But it is difficult to interpret, and extremely unclear.” Instead, he relied almost exclusively on commentaries, lexica, and paraphrases. The importance of the antecessor Theophilos’ *Paraphrase* is especially noticeable, as Psellos cribbed extensively from it in the *Synopsis legum*. The *Paraphrase* may have served as a primary introductory text, given its collection of legal norms and concise explanations of legal terminology.

With regard to subject matter, the *Synopsis legum* and the other juristic didactic writings of Psellos are an admixture of practical legal material and antiquarianism. One of the primary and apparently most difficult tasks of the Byzantine jurist was the categorization of a suit [*dikē*]. This necessitated identification of an action [Gr. *agōgē*, Lat. *actio*] under which the suit was brought forward by the plaintiff and then its corresponding obligation(s) [Gr. *enochē*, Lat. *obligatio*]; a number of treatises on actions from the Middle Byzantine period have survived. One of the most prominent jurists of the eleventh century, one Garidas, authored a treatise on actions which has not survived but traces of which can be found in scholia to the *Basilika*. In the *Synopsis legum* Psellos describes this process by using a metaphor, likening actions to

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97 On Garidas see Fögen, “Byzantinische Kommentare”, pp. 244-6.
mothers and their attendant obligations to daughters: it fell to the student to correctly match the
two. Many of Psellos’ smaller juristic didactic texts are likewise devoted to correctly naming
actions and their obligations. One of the reasons that the actions/obligations identification
process was difficult for students is again the problem of the legacy of Latin in Byzantine law.
The names of actions and obligations in the Middle Byzantine period remained in Latin,
although transliterated into Greek. Thus much ink was spilled in explaining what these Latin
legal terms meant in Greek.

Yet this quite practical training came side-by-side with obscure antiquarian quiddities. In
his text “To His Students on the Names of Suits”, Psellos remarks that he has noticed that his
students have trouble identifying the Greek and Latin names of suits. He then states that “For
though the Greek [legal terms] are mentioned with Greek words, unless one untangles the
intention and shall proclaim the cause of the placement of [these terms] through etymology, in
which they dwell, then they won’t be well-understood by the readers.” Psellos then proposes
to compile a lexicon of Latin legal terms set alongside their Greek equivalents for the benefit of
his students. Instead of completing what he suggests be done, this serves as a point of departure
for a discussion of the offices and legal institutions of Ancient Athens, with the original problem,
of the students incorrectly identifying suits, probably unsolved. An emphasis on antiquarian and
peripheral information is evident as well in the commentaries of the Synopsis legum, perhaps
written by Psellos’ students. This confirms in Fögen’s opinion the notion that Byzantine legal
education was merely a part of a more advanced schooling and did not constitute a specialized
field of study in and of itself: “Der juristische Unterricht des Psellos erscheint—wie lange schon

98 Psellos, Synopsis legum, lines 96, 124.
99 e.g. Psellos, Synopsis legum, lines 106-7.
100 Psellos, “To His Students on the Names of Suits”, p. 196.
Finally, these juristic didactic texts shed some light on what exactly was considered law in this period. While the Basilika as a reappropriation of Justinianic law assured that Roman law up until the time of Justinian was enforced and valid, these texts of Psellos demonstrate whether legal texts from the seventh to the eleventh centuries were incorporated into legal teaching. Conspicuously absent are any of the more important legal texts from that period of time, including the Ecloga, Nomos Georgikos, and the Nomos Nautikos. Post-Justinianic imperial legislation is only haphazardly referenced: the most prolific legislator after Justinian, Leo VI, seems to have had only a mixed impact on the legal curriculum; Leo VI’s novels are the basis for 34 lines of the Synopsis legum.¹⁰²

Legal education of a different sort is evident in the Legal Textbook of Michael Attaleiates. Attaleiates had extensive legal experience as a judge, including occupying the somewhat-mysterious position of kritēs tou stratopedou.¹⁰³ His Legal Textbook, issued in 1073/4, is of a very different character than the didactic juristic writings of Psellos. After a brief survey of Roman law from its origins to the time of the composition of the Sixty Books,¹⁰⁴ the majority of the rest of the Legal Textbook consists of thematically-grouped quotations from the Basilika. Toward the end of the work there is a brief description of some post-Macedonian legislation as well as a reproduction of Leo VI’s novel 116.¹⁰⁵ Thus it appears as though at least some of the more recent legislation was taught to Byzantine jurists, judging from the educational texts of the

¹⁰² Synopsis legum, lines 839-72.
¹⁰⁵ Michael Attaleiates, Legal Textbook, pp. 491-3, 497.
period. A caveat to this statement is that Attaleiates himself states in the *Legal Textbook* that a great deal of Leo VI’s legislation was no longer in force: “The blessed lord emperor Leo issued many novels, but they were not in use, excepting only those which were written without other laws already existing, or which were a supplement to the novels enacted by Justinian.”

Wolska-Conus has advanced the thesis that the *Legal Textbook* of Attaleiates was written in response to the *Synopsis legum* of Psellos. This would fit her notion of an eleventh-century dichotomy of Byzantine legal teaching, with one camp representing Xiphilinos and Psellos, who advocated a more “philosophical” form of legal teaching and reference to the Late Antique legal commentary tradition, and another camp which promoted the exclusive use of the *Basilika*. As shall be seen below, there probably was not such a division among Byzantine jurists.

**VIII. Legal Education According to the *Meditatio de nudis pactis***

Besides looking at texts used in legal education, information can also be gleaned from the eleventh-century legal treatises on special subjects, in particular the *Meditatio de nudis pactis* (“Treatise on open pacts”). The text concerned a case between a monastery and a protospatharios, and hinged around the definition of *pacta nuda*, which in Roman law denoted agreements which did not result in obligations. Its authorship was ascribed by H.J. Scheltema to the scholiast Constantine of Nicaea. The *Meditatio* is relevant to this chapter on Byzantine legal education because its author clearly champions the consultation of legal texts from Late Antiquity, particularly the writings of the sixth-century jurist Stephanos and the *Digest*, over the *Basilika*. The author of the *Meditatio* declares at the beginning of the tract that his aim is to

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106 *Legal Textbook*, p. 491: “Ὁ δὲ μακαρίτης βασιλεὺς κύρις ΛΕΩΝ νεαρὰς μὲν ἔκτεθεικε πολλὰς, οὐκ ἐκράτησαν δὲ, εἰ μὴ μόναι, αὕτης ἐπέριν νόμων μὴ ὑπόντων ἐγράφησαν, ἢ εἰς προσθήκην τῶν παραλειψθέντων ταῖς νεαραῖς τῶν Ἰουστινιανοῦ ἐγένοντο.”


“…follow the methods and legal writings of the great and most-renowned teacher and jurist Stephanos.”\textsuperscript{110} With regard to his opponents, who only employ the \textit{Basilika} in their argumentation, he states that “They who occupy themselves with the \textit{Basilika} alone are hardly able to perceive what they are studying, and so one must depart from their knowledge of [the \textit{Basilika}].”\textsuperscript{111} He states the superiority of “his Digest” over “your Basilika”; the \textit{Digest} is more praiseworthy because it “contains something more than the \textit{Basilika}.”\textsuperscript{112} In closing, he declares that “Thus concerning these matters, I and those with me are more confident to dwell in the breadth of the ancient [legal texts] than to cast about in the confines of the \textit{Basilika}; we are in agreement and are of the same mind concerning what I have said.”\textsuperscript{113}

Whether or not this predilection for texts which predated the \textit{Basilika} was peculiar only to the author to the \textit{Meditatio} or reflected some deeper philosophical divide among Byzantine jurists is a difficult question to answer. Wolska-Conus believed that Xiphilinos must have been the author of the tract, and that it served as a defense of his new curriculum. In her view the text “n’est pas un votum, mais une apologie où l’accusé expose sa situation personelle…L’enjeu secret des débats, c’est l’enseignement même de Jean Nomophylax, trop théorique et passéiste au goût des corporations de juristes, auxquelles on vient de retirer le contrôle de l’enseignement du droit.”\textsuperscript{114} The \textit{Meditatio} is thus in her view a defence of Xiphilinos’ new curriculum against older jurists in Constantinople, who resented Xiphilinos’ sudden and meteoric rise to prominence.

\textsuperscript{110} \textit{Meditatio de nudis pactis}, Preface, §2: “…άλλα ταὶς τοῦ μεγίστου καὶ διασημοτάτου διδασκάλου καὶ νομοθέτου Στεφάνου μεθόδοις κατακολουθῶν, καὶ νομοθεσίας.”
\textsuperscript{111} \textit{Meditatio de nudis pactis}, Title 6, §27: “Οἱ δὲ τοῖς βασιλικῶς ἐνήχυρουμένοι καὶ μόνοις οὐ ταῦτα σχεδόν καλῶς καταρθοῦσι τὰ σπουδάζομενα, καὶ ἀνάγκη πάντως αὐτοῦς τῆς ἐκείνων ἐκπίπτειν γνώσεως.”
\textsuperscript{112} \textit{Meditatio de nudis pactis}, Title 6, §25-6.
\textsuperscript{113} \textit{Meditatio de nudis pactis}, Title 8, §3: “Ἐχομεν οὖν περὶ τούτων οὕτως ἐγὼ τε καὶ ὅσοι μετ’ ἐμοῦ τῷ πλάτει τῶν παλαιῶν ἐμφιλοχορωδοῦτες ἐνεπειθέν θαρραλεωτέρον τοῖς στενοῖς ἐπιβάλλουσι τῶν Βασιλικῶν, καὶ σύμπνοες ἐπὶ τοῖς εἰρήμενοις ἔμοι καὶ σύμφρονες.”
\textsuperscript{114} Wolska-Conus, “L’école de droit et l’enseignement du droit à Byzance au XI\textordmasculine{e} siècle: Xiphilin et Psello,” p. 41.
IX. Conclusion

A number of eleventh-century events lend credence to the supposition that there was a renaissance in legal education: the founding of the Law School of Constantine IX Monomachos, the numerous special-subject legal treatises which were written, the quantity and quality of scholia to the Basilika, and the substantial number of Byzantine intellectuals, such as Michael Attaleiates, Michael Psellos, and John Xiphilinos who were interested in legal teaching. In summation, there is no reason to doubt the occurrence of a considerable revival of legal studies under the Macedonian dynasty. The more pertinent question is what occasioned this legal renaissance: was it, as Wolska-Conus claims, the innovative curriculum introduced by Xiphilinos and Psellos?

Xiphilinos, according to Wolska-Conus, in contrast to the predominant legal thinking of his day, believed in turning to the writings of the antecessores and the Justinianic corpus which served as the base of the Basilika. However, reference to the didactic writings of the antecessores is already well-attested in the jurisprudence of Eustathios Rhomaios, as recorded in the Peira. Wolska-Conus’ articles on Byzantine legal education do not reference this work. An examination of the Peira, itself not directly relevant to Byzantine legal education, nonetheless helps to clarify some of the arguments she makes.

The author of the Meditatio de nudis pactis, who is Xiphilinos according to Wolska-Conus, expresses a great deal of admiration for the antecessor Stephanos—this fits her interpretation of the innovative nature of Xiphilinos’ legal curriculum, which supposedly

116 And in any case the Peira is no less related to Byzantine legal education than some of the legal treatises Wolska-Conus examines, such as the Meditatio de nudis pactis.
emphasized legal writings predating the Basilika.\textsuperscript{117} Yet invoking the writings of Stephanos is practiced repeatedly in the Peira.\textsuperscript{118} So are other antecessores: Thalæaios,\textsuperscript{119} Theophilos,\textsuperscript{120} and Cyril.\textsuperscript{121} Naturally, the Basilika are repeatedly referenced as well, but scholars agree that most of these Basilika citations were the work of the Peira’s anonymous redactor rather than that of Eustathios himself.\textsuperscript{122}

Besides the Peira, another eleventh-century legal treatise which was probably authored by Eustathios Rhomaios, the Tractatus de peculiis, likewise demonstrates that this dichotomy between pro- and anti-Basilika camps did not exist.\textsuperscript{123} In this text Eustathios makes heavy use of “old” scholia to the Sixty Books/Basilika, including possibly complete works of the antecessores, such as the Codex commentary (Paragraphê) of Thalæaios.\textsuperscript{124}

A similar tendency to reference both the work of the antecessores as well as the Basilika can be found in the edicts of the Patriarch Alexios Stoudites (1025-43).\textsuperscript{125} While it is true that these edicts are somewhat outside the scope of this study, since they belong to more to the realm of canon than civil or secular law, nonetheless they are relevant insofar as a number of these edicts hinge upon the interpretation of particular passages in the Basilika. Edict 5, in which Alexios sought to bring Justinianic regulations directed against heretics back into force against

\begin{footnotesize}
\textsuperscript{118} Peira 15.3, 16.9-10, 26.12, 36.15.
\textsuperscript{119} Peira 7.1, 36.2, 41.23, 59.3, 56.8-10.
\textsuperscript{120} Peira 36.15.
\textsuperscript{121} Peira 26.12, 36.15, 41.15.
\textsuperscript{122} With regard to separating the jurisprudence of Eustathios from the additions of the Peira’s anonymous redactor, see Boudewijn Sirks, “Peira 45.11, a presumed succession pact, and the Peira as legal source” in Christian Gastgeber (ed.), Quellen zur byzantinischen Rechtspraxis; Aspekte der Textüberlieferung, Paläographie und Diplomatik, Akten des internationalen Symposiums, Wien, 5.-7.11.2007, Veröffentlichungen zur Byzanzforschung 25 (Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 2010), pp. 189-99.
\textsuperscript{124} On the sources Eustathios uses in the Tractatus de peculiis, see pp. 296-8; the editors doubt that Eustathios in fact used a separate Thalæaios commentary.
\end{footnotesize}
the West-Syrian/Jacobite population of Melitene, demonstrates how regulations from the 
*Basilika* and the writings of the *antecessores* were used together, primarily with the latter serving to clarify or elucidate the former. In fact, it has been suggested that the future *nomophylax* John Xiphilinos helped formulate or even authored this edict.\(^{126}\) For instance, when addressing the issue of mixed-faith marriages, i.e. between Orthodox and Jacobites or Nestorians, the writings of the *antecessor* Stephanos are invoked.\(^{127}\) Stephanos is described as “…a man being sufficiently learned in other teaching and most learned in legal matters.”\(^{128}\) Whether or not John Xiphilinos authored or helped formulate this edict, since it is dated to the year 1040 it definitely predates by some eight years the founding of the Law School and therefore also significantly predates the supposed conflict between pro- and anti-*Basilika* jurists posited by Wolska-Conus.

These references to the works of the *antecessores* do not fit Wolska-Conus’ schema of a divide between jurists who preferred the *Basilika* over older legal writings; on the contrary, all extant texts of the Byzantine-Roman legal tradition could be validly consulted with regard to legal arguments. The entire canon of legal texts was normally referred to as “The Breadth [of the Laws]” (τὸ πλάτος τῶν νόμων).\(^{129}\) Though jurists might argue for the merit of one text over the other, this does not appear to have been a reflection of different schools of thought.

The preceding examination has narrated the changes undergone by Byzantine legal education from Late Antiquity to its revival in the eleventh century. Points of emphasis were the role of a declining knowledge of Latin in legal education; the importance of *exhellēnismos*; and

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\(^{127}\) Alexios Stoudites, *Edict 5*, pp. 30-1.


\(^{129}\) *Peira* 16.9, 19.15, 31.10, 34.1, 38.21, 26, 33, 42.8. It has been argued elsewhere that this expression referred to a Greek version of the CIC; see Juan Signes Codoñer and Francisco Javier Andrés Santos, *La introducción al derecho (eisagoge) del patriarca Focio*, Nueva Roma 28 (Madrid: Consejo Superior des Investigaciones Científicas, 2007): pp. 246-67. See also Introduction Part II.
the exaggerated importance of the Law School of Constantine IX Monomachos, which reflected rather than initiated an increasing interest in legal education.

In concluding it must be stressed that the Law School was a result of an increased emphasis upon legal education, rather than being the catalyst for it. The jurisprudence of Eustathios Rhomaios demonstrates that Byzantine legal thought had already demonstrated the classicizing tendencies ascribed to it by Wolska-Conus at least a quarter-century before the foundation of the law school. The processes which led to the flowering of secular legal thought in the late tenth and eleventh centuries were the final phase of exhellēnismos, the composition of numerous scholia to the Basilika and legal treatises, and the legal-political ideology of the Macedonian dynasty, which emphasized its role as a steward of the laws.
Chapter Five

Challenges to the Basilika? The Function of “Private” Law Collections in the Byzantine Empire and Neighboring Cultures

I. Introduction

The topic of this chapter is inspired by one of the classic works of scholarship on Roman law, Ludwig Mitteis’ *Reichsrecht und Volksrecht in den östlichen Provinzen des Römischen Kaiserreichs*.\(^1\) Mitteis, writing at the end of the nineteenth century, felt compelled to author a book on the gap between imperial law (*Reichsrecht*) and provincial law (*Volksrecht*) because of the discovery of many new sources that did not fit neatly within the received canon of imperial novels and constitutions. In addition to the finds which were accumulating in the new field of papyrology, the re-discovery and publication of the *Syro-Roman Lawbook* by the Dutch theologian and Orientalist Jan Pieter Nicolaas Land in 1858 in a manuscript of the British Museum radically changed how legal historians viewed Roman law.\(^2\) The work contains regulations on slave, family, and inheritance law and does not correspond to the supposedly dominant Roman legal precepts of the time when it was authored, perhaps in the fourth or fifth century CE, and it confounded the contemporary legal-historical community.\(^3\) Above all, these

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2 Previous to the mid-nineteenth century, the *Syro-Roman Lawbook* had been mentioned, edited and translated by orientalists and church historians who nonetheless did not realize what the work actually was. Land edited and translated the work into Latin in his *Anecdota Syriaca* in 1862, giving the text the title *Leges saeculares e lingua Romana in Aramaeam versae*. On the history of the Syro-Roman Lawbook in Modern scholarship, see *Das Syrisch-römische Rechtsbuch*, Walter Selb and Hubert Kaufhold (eds. and trans.), Veröffentlichungen der Kommission für Antike Rechtsgeschichte 9, 3 vols. (Vienna: Verlag der Österreichischen Akademie der Wissenschaften, 2002); here vol. 1, pp. 27-32.
3 Mitteis, p. 1. Edition and German translation in Selb and Kaufhold. English translation in Arthur Vööbus (trans.). *The Syro-Roman lawbook: the Syriac text of the recently discovered manuscripts accompanied by a facsimile edition and furnished with an introduction and translation* (Stockholm: ETSE, 1982). However, Vööbus’ translation is to be used with caution as it is very free and does not for instance consistently translate legal terms in Syriac using the same English word; see Selb and Kaufhold, p. 41. Among other literature, see commentary in Selb and Kaufhold as
newly-discovered legal texts forced Mitteis and his contemporaries to reevaluate just how influential the law of the land, namely Roman law, actually was in places where there obviously existed private legal collections.

Mitteis’ dichotomy of the terms *Reichsrecht* and *Volksrecht* has had a long, powerful and not always unproblematic resonance. Nonetheless, Mitteis’ understanding of *Volksrecht* can still profitably be understood as a deviation in law or legal practice from normative Roman law. Among more recent work, Dieter Simon has demonstrated how provincial norms, very much *Volksrecht* in the way Mitteis used it, may have been incorporated into “official” legal collections, not only in the *Ecloga*, which has long been thought to have been substantially influenced by eighth-century customary law, but also the *Prochiron*. One of course need not insinuate connotations of decline or decay when using this definition of *Volksrecht*; the merit of this concept is that it recognizes that manifestations of “unofficial” law or legal practices do not

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4 An example would be the much-criticized reappropriation of Mitteis’ concept over half a century later by the legal historian Franz Wieacker, who posited that throughout the history of Roman law there existed two oppositional “styles” of law, *Vulgarismus* and *Klassizismus*; see Franz Wieacker, *Vulgarismus und Klassizismus im Recht der Spätantike* (Heidelberg: Carl Winter, Universitätsverlag 1955). On the history of this debate, see Dieter Simon, “Marginalien zur Vulgarismusdiskussion” in Okko Behrends et al. (eds.), *Festschrift für Franz Wieacker zum 70. Geburtstag* (Göttingen: Vandenhoeck & Ruprecht, 1978), pp. 154-74. H.J. Scheltema’s observation that the essential conflict of legal authority in the Byzantine Empire seems not to have been between *Reichsrecht* and *Volksrecht* but rather between didactic juristic writings and valid law is acknowledged here, but the way the dynamic of *Reichsrecht* and *Volksrecht* is treated in this chapter demonstrates their complementary rather than antagonistic relationship; see H.J. Scheltema, “Korreferat zu P. Zepos, Die byzantinische Jurisprudenz zwischen Justinian und den Basiliken” in *Berichte zum XI. internationalen Byzantinistenkongress, München, 1958* (Munich: In Kommission bei C.H. Beck, 1958) (Reprinted in idem, *Opera minora ad iuris historiam pertinentia* [Groningen: Chimaira, 2004], B16), pp. 35-41.

5 Mitteis, p. 4: “…ein Recht römischer Ursprungs; es ist das römische Recht, wie es sich auf dem flachen Lande in Italien sowie innerhalb des Provinzialgebiets theils durch missverständliche Auslegung, theils in Folge des Drucks praktischer Bedürfnisse, theils allerdings auch in Folge besonderer provincialer Rechtsanschauung in einer von der römischen Rechtstheorie abweichende Weise gestaltet hat…ist daher entartetes römisches Recht.” This was actually Mitteis understanding of an earlier scholar’s (Brunner’s) conception of *Vulgarrecht*, but it corresponds to the way *Volksrecht* is used in his work: see Wieacker, p. 10.

draw upon an entirely different system of legal values. Rather, Volksrecht at its core, as Mitteis defined it, is still based on Roman law. Within the framework of Byzantine law, and more specifically Byzantine Legal Culture, Volksrecht can be understood not simply as the later development of Roman law, but rather as instances in which law was formulated or applied outside of the framework of what we, as well as most Byzantine jurists, would have understood as valid law. Valid law in this sense would have corresponded to “the breadth of the laws” (to platos tôn nomôn), a fluid term which in any case likely referred to, at the least, the Justinianic corpus as well as the writings of the various Justinianic and post-Justinianic jurists, such as the antecessores and scholastikoi.

At first glance, the various redactions of Justinianic law which were written at the end of the ninth century would indicate that Reichsrecht was steadily growing in importance. The Basilika, particularly from the middle of eleventh century onward, started to be consulted as the standard collection of Justinianic law, at least from the standpoint of the legal textbooks stemming from this period. The Peira as well as the Legal Textbook of Michael Attaleiates, for instance, when providing justification for the rendering of a particular case merely state “ὁ νόμος [the law (says)]”, the law being the Basilika. Even an aide to finding where particular topics are treated in the Basilika, entitled Tipoukeitos (“What is found where?”), attributed to a judge

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7 Indeed, for the period which Mitteis and Wieacker examined, Late Antiquity, there is no basis for postulating a decline in legal practice or thinking, as has been proven by Caroline Humfress, Orthodoxy and the courts in late antiquity (Oxford; New York: Oxford University Press, 2007). Yet the idea of Volksrecht as a degradation of Roman law in its classical iteration can still be found among some scholars, e.g. Danuta M. Görecki, “Constantine VII’s Peri ton stratiotion”, Greek, Roman and Byzantine Studies 49.1 (2009): pp. 135-54, here p. 140: “The subsequent surge and rapid spread of vulgar law, during post-classical times, became a menace to the integrity of the official Roman legal system…Law and customs of peoples inhabiting the Roman provinces found their way into official legislation through judicial verdicts, which eventually became part of official law. The continuing accumulation of such verdicts, being in conflict with the philosophy and objectives of the official legal system, gradually distorted and degraded that system.”

8 See Introduction Part I, section IV.

9 Note however that even though while the relevant references to the Basilika were added to the rulings of Eustathios Rhomaios, there is reason to believe that Eustathios himself utilized the Synopsis Basilicorum Major (SBM).
named Patzēs who lived toward the end of the eleventh century, has survived. In summation, an examination of the official legal sources alone would indicate that Roman law (Reichsrecht) survived relatively unchallenged into the eleventh century, after which the golden age of Byzantine canon law begins, or to use the words of Nicholaas van der Wal and J.H.A. Lokin, “Le grand siècle de la science du droit canonique (1110-1204).” Nor is the predominance of Reichsrecht in this period necessarily confined to the official legal sources; Peter Sarris has argued that the surviving monastic records demonstrate an increasing predominance of “official” law.

On the other hand, some historians, notably Alexander Kazhdan and Nicholas Oikonomides, have drawn attention to the obsolescence of the Justinianic corpus in the Middle Byzantine period and have tried to explain how Middle Byzantine society coped with what were antiquated, essentially sixth-century laws. The Basilika and its antecedents, being almost entirely composed of extracts from the CIC, contained provisions and regulations which were definitely obsolete by the time of the Macedonian dynasty. For example, Peira 16:10 discusses the validity of a guardian (Gr. epitropos) managing the affairs of his ward in Africa or Syria:

> There is a law which says “A guardian [epitropos] is able to be validly granted with matters in Syria or Africa of the ward.” And [this] appears to contradict what is said earlier. But Stephanos and the magistros interpreted it [thus], that the property of the ward in Africa and Syria is inviolate. At the same time a guardian

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of a child [i.e. ward] in Byzantium is unable to competently look after the ward’s affairs in Africa because of the length of the road [to there]. And for this reason although a testator knows that he can allow another guardian for the property in another territory, it is granted validly to the new youth [i.e. ward].

The law cited is Bas. 37.2.16, in a section entitled “Concerning Guardians [epitropoi] by Testament.” Unfortunately, 37.2 one of the restituti and therefore extremely fragmented. Interestingly nonetheless is that Africa and Syria, two provinces which had not belonged to the Byzantine Empire for centuries, are mentioned in the law, and Eustathios is able to interpret it validly for his own period, stating that although a guardian can be entrusted with matters in Syria or Africa, clearly he cannot do so effectively given the distances involved. As this example demonstrates, the Basilika, although it was a remarkable achievement in its own right of legal scholarship, was in many ways outdated, representing the milieu of the sixth-century Empire of Justinian rather the very different needs and circumstances of the Byzantine Empire under the Macedonian dynasty.

Yet even within the normative legal sources there exist indications that point to the use of laws and customs outside of Roman law in its Byzantine iteration. Particularly with regard to family and marriage law the Macedonian period was a time of considerable change, as the number of times one could be married as well as the rules for marital consanguinity were repeatedly revised. In Peira 14.16, a patrikios deprived a daughter from a first marriage of her full due under Roman law, according to the custom of his unnamed people, and was subsequently chastised for it:

14 Peira 16:10: “Ὅτι ἐστι νόμιμον λέγον ὅτι ἐπίτροπος καλῶς δίδοται τοῦ ἐν συρίᾳ ἢ ἀφρικῇ πράγματα τοῦ ἀνήβου, καὶ φαίνεται πως ἐναντίων τοῖς προηγηθέσιν. ἀλλὰ τοῦτο καὶ ἐπίτροπος καὶ ὁ μάγιστρος ἢρμηνεύει, ὅτι ἰκαρία ἐστὶν ἢ ἐν ἀφρικῇ καὶ ἐν συρίᾳ ὑπόστασις τοῦ ἀνὴβου· καὶ ἀμύστο αὐτὸ ἐν βυζαντίῳ ἐπιτροπεύει παιδός, καὶ τῶν ἐν ἀφρικῇ ἀυτοῦ πραμάτων τυχόν φροντίζειν καλῶς· διὰ τὸ τῆς ὀδοῦ μήκος· καὶ διὰ τοῦτο εἴπερ ὁ διαθέμενος εἴδος έάσει καὶ ἐπέρι ἐπίτροπον ἐν τῇ ὑπόστασις τῆς ἐπάρχειας, τῷ νέῳ καλῶς δίδοται.”

15 The classic study on the subject of marriage in the Orthodox Church is Jos Zhishman, Das Eherecht der orientalischen Kirche (Vienna: Wilhelm Braumüller, 1864), which despite its age is still very useful.
A certain patrikios made a will, and wrote that the wife of his second marriage should be the possessor of all his fortune. But he had a daughter from his first marriage, who was found to have taken much less from [her father’s estate] than from her mother’s estate.

And the Magistros ruled thus: For someone who makes a will, even if he is from a foreign people, but has come to the Roman Empire and been honored with a great rank and showered with many gifts, it is necessary than he follow the laws of the Romans and [therefore] not make a testament according to ethnic customs. For although he does not know the truth of the laws, however he is able to ask those who ought to teach him what is necessary. And on account of this, in regard to its legal accuracy and [his] decision the provisions of the testament were corrected.16

This patrikios was not Greek and had made a will according to the customs of his own people, which apparently allowed for a daughter to receive less than a half-share of her father’s estate. Eustathios had his will corrected so that its provisions would instead follow the inheritance practices prescribed by Roman law.

Yet another case from the Peira, 54.6, finds Eustathios Rhomaios allowing unusual provisions in a will to stand because a potential heir was a foreigner (ethnikos).17 The Patrikios David the Iberian made a will which stated that his only son would inherit his whole estate, but that if the son died childless and made no will, then his uncles (presumably the brothers of the

16 Peira 14.16: “Ὅτι ὃ δείνα οἱ πατρίκιοι διέθετο, καὶ ἔγραψε τὴν δευτέραν αὐτοῦ γαμήτην κυρίαν καὶ ἐξουσιαστριαν τῆς πάσης αὐτοῦ περιουσίας. ἐξῆς δὸς οὗτος ἐκ πρώτου γάμου θυγατέρα, ἢτις εὑρίσκεται πολλῷ ἐλάττων λαβοῦσα τῆς μητρίας, καὶ ἐπημείωσε τὸ μάγιστρος οὗτος—ὅτι ὁ διαθέμενος, εἰ καὶ βαρβαρικῶν γένους ἦν, ἀλλὰ τῇ ῥωμαϊκῇ βασιλείᾳ προσφέρεται καὶ ἀξιόματι μεγάλῳ τιμηθεὶς καὶ πολλῶν ὀφείλων ἀξιωθεὶς, ἀνάγκην ἔχε τοῖς ῥωμαίοις ἐπέστη ἡμῖν καὶ μὴ ἐθνικὸς διατίθεθη. ἐὰν γὰρ καὶ μὴ ἐπεί τῶν νόμων ἄκριβεσθαν, ὅμως ἐχε τοὺς ὀφείλοντας ἐνεργεῖσθαι καὶ διδάκτην τὸ δέον αὐτῶν. καὶ διὰ τοῦτο πρὸς τὴν νομικὴν ἄκριβεσθαν καὶ γνώμην τὰ τῆς διαθήκης ἰθύνθη.” On this passage as well as Peira 54.6, which also deals with a foreigner, see Angeliki Laiou, “L’étranger de passage de l’étranger privilégié à Byzance, XI-XII siècles” in Laurent Mayali (ed.), Identité et droit de l’autre (Berkeley, CA: University of California at Berkeley, 1994), pp. 69-88.

17 Peira 54.6: “The Patrikios David the Iberian left behind a child, and wrote [in his will], that if the child should die childless and without a will, then his uncles should be substituted as heirs. And once the child died and his uncles came into the inheritance, a suit was brought forth and the Bestès ruled, that since the son had died at the age of twenty, the mother should receive one-third of the estate, and the uncles should receive the rest. He said that a substitution is prevented by minority status according to the law which says “If there is substitution it ought to be given to the furthest extent, unless it is prevented by minority status.” [He also said] that the son was able to inherit the entire inheritance, since he was no longer a minor. Since the son was a foreigner, he made an accommodation for this. (Ὅτι τοῦ πατρικίου δαβίδ τοῦ ἤληνος καταλιπόντος παιδί, καὶ γράφαντο, ἐπελευσθεὶς ὡς παῖς ἀρκεν καὶ ἀδίθετος, ἀποκαθίστασθαι τοῦ κληρὸν πρὸς τοὺς θείους αὐτοῦ· καὶ ἀποκαθίστασθαι τοῦ παιδί καὶ τῶν θείων αὐτοῦ κατασχόντων τοῦ κληρὸν, καὶ κνηθείσης τῆς δίκης ἐκρίνεν ὁ βέστης, ὅτι ἐπεὶ ὁ υἱὸς εἴκοσι χρόνων ἐπελευσθείς, τὸ τρίτον τῆς ὑποστάσεως ἴνα λάβῃ ἢ μὴγὰρ, τὸ δὲ λοιπὸν οἱ θείοι· εἰπὼν, ὅτι ἡ ὑποκατάστασις τῇ ἠβῇ παύεται κατὰ τῶν νόμων, ὡς φησιν· ὡς ὑποκατάστασις εἰ καὶ εἰς μακρότητα δοθῇ, ὅμως τῇ ἠβῇ παύεται, καὶ ὅτι ὁ υἱὸς ἐδόθη διατίθεθαι καὶ εἰς ὅλον τὸν κληρὸν, ἐπεὶ ἤπερεβή τῆς ἠβῆς. διὰ δὲ τὸ εἶναι τὸν υἱὸν ἐθνικόν, τούτῳ ἐκονόμθη.)”
patrikios) would inherit his estate. When his son died childless and without a will, the uncles came into the inheritance, but a suit was brought (probably by the mother of the deceased son), and Eustathios ruled that the mother was entitled to a one-third share of the estate, and the uncles were allowed to have the rest. Yet according to Roman inheritance law, the uncles would not have been entitled to a share of the estate since the son died at the age of twenty, and thus was no longer a minor.\(^\text{18}\) It is then stated that this arrangement was made because the son was a foreigner. Thus in this instance non-Roman inheritance customs were allowed to be realized.

Outside of the Peira, there are few but nonetheless tantalizing clues that Roman/Byzantine law was not always followed to the letter. The Edicts of the Patriarch Alexios Stoudites (1025-43), for instance, note that at least in Melitene Justinianic provisions against heretics were ignored by the judges there, practices which included the omission of Orthodox heirs in the wills of non-Orthodox, allowing non-Orthodox to testify against Orthodox in court and even the intermarriage of Orthodox and non-Orthodox.\(^\text{19}\) A somewhat different area where the hold of Roman law appears to have not been absolute are the Russo-Byzantine treaties preserved in the Russian Primary Chronicle, or as it also known the Tale of Bygone Years (Povest’ vremennykh let).\(^\text{20}\) These treaties, stemming from the years 907, 911, 944 and 971 regulate the conduct of and resolution of conflicts between Byzantine and Rus’ merchants.

Nonetheless, the above examples all were admittedly somewhat exceptional situations:


agreements with foreign powers. Still, there exists a number of private legal collections from the period after the Emperor Justinian until the end of the eleventh century, and at least judging by the number of manuscripts which have survived that contain these private collections, they were at least as popular as their imperially-sanctioned counterparts. In this chapter some of the major private-law collections of the Middle Byzantine period will be surveyed in order to contextualize their function in Byzantine Legal Culture. Within this section the manuscript tradition of these private legal collections will be dealt with in some detail, which will highlight the popularity of these texts in comparison with their imperially-sanctioned counterparts.\textsuperscript{21} A comparison is possible because of the publication of a catalogue listing all of the “secular” manuscripts of Byzantine law.\textsuperscript{22} Subsequently, a brief examination of the Nachleben of Byzantine law, particularly in its Armenian and Slavic iterations, will demonstrate why these private law collections suited the peoples who later employed Byzantine law much more than the Macedonian emperors’ recapitulation of Justinianic law. Then a possible raison d’être for the creation, maintenance, and transmission of these legal collections will be presented based on three main arguments: 1) Their lack of untranslated Latin legal terminology, allowing judges and lawyers to utilize these legal collections without a mastery of Roman legal vocabulary; 2) The brevity and conciseness of these private legal collections in comparison to the Basilika as well as the Greek paraphrases/translations and commentaries of the Justinianic corpus; 3) The complementary as opposed to adversarial function of these texts, which supported rather than undermined the official framework of Roman law.


\textsuperscript{22} The RHBS. This inventory of manuscripts is based on the extensive collection of Byzantine juridical manuscripts, in microfilm as well as increasingly in digital format, at the Max-Planck-Institut für europäische Rechtsgeschichte in Frankfurt.
II. Private Law Collections in the Middle Byzantine Empire—An Overview

Before an examination of private law collections and their function in the Middle Byzantine Empire can be undertaken, the definition of “private” law needs to be clarified. Private law will be used throughout this chapter mainly to denote that which it is not, namely, imperially-sanctioned law which was incorporated into what would eventually in the twelfth century became the official redaction of the Roman law used in the Byzantine Empire, the *Basilika*. A partial exception here is the so-called *Rhodian Sea-law* which was inserted as an appendix into the 53rd book of the *Basilika*. Even this definition is fraught with difficulties, as a number of “official” law codes, such as the *Eisagoge*, were perhaps never promulgated.

Discussion here will therefore be confined to three legal collections: I) The *Farmer’s Law* or *Nomos Georgikos* (NG); II) The *Mosaic Law* or *Nomos Mosaikos* (NM); and III) The *Rhodian Sea-law* or *Nomos Nautikos* (NN). Two of these three legal collections, the NG and NN, are often designated in secondary scholarship, along with the *Soldier’s Law* or *Nomos Stratiōtikos* (NS), as the *leges speciales*, reflecting both the fact that these legal collections are often grouped together in the manuscript tradition as well the notion that they authored in the same period, from the seventh to the eighth centuries. The NS is excluded from this examination, however, because most of its regulations stem from the *CIC* as well the *Stratēgikon* of Maurice. Moreover, as a text which was probably authored at the very latest in middle of the seventh century, it stems from a

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23 Giōrgos E. Rodolakēs, Από το Νόμο Ροδίων στο 53ο βιβλίο των Βασιλικών. Συμβολή στη μελέτη του βυζαντινού δικαίου. Academy of Athens, Yearbook of the Research Centre for the History of Greek Law 40, sup. 8. (Athens: Akadēmia Athēnōn, 2007). Rodolakēs’ study is useful in a number of respects, as it addresses all the pertinent issues regarding the incorporation of the NN into the *Basilika*. Additionally, it contains an edition of NN as it appears in the *Basilika* (Rodolakēs, pp. 213-60). Rodolakēs also, however, advances some views in this study which I find less convincing, such as postulating the existence of an actual written *Rhodian Sea-Law* at Rome in the Early Empire. See the bibliography in Nomos Stratiotikos = Pietro Verri, Le leggi penali militari dell’impero bizantino nell’alto Medioevo (Rome: Scuola ufficiali carabinieri, 1978) as well as Ludwig Burgmann and Eric McGeer, “Nomos Stratiotikos” in *ODB*, vol. 3, p. 1492. Verri’s study contains the various editions of the NS as appendices. English translation of the NS in E.H. Freshfield (trans.), *A manual of Roman Law: The Ecloga* (Cambridge [Cambridgeshire]: University Press, 1926), pp. 122-9.
different period than most generally-accepted datings of the NG and NN.\textsuperscript{25} To the best of our knowledge, none of these laws was imperially-promulgated (although in the case of the NG and NN compilers and copyists claimed that these legal collections were imperially-sanctioned).

Since so little is known about the provenance of these three legal collections it is easy to confine oneself to Quellenkritik, but the goal of this chapter is to try and ascertain the function of these laws within Byzantine Legal Culture.

III. The Nomos Georgikos (NG)

The so-called Farmer’s Law or Nomos Georgikos (NG)\textsuperscript{26} is one of the most controversial texts within Byzantine history and has been the subject of numerous analyses.\textsuperscript{27} One cannot here comprehensively list all of the interpretations of the NG, as such a study could easily occupy the space of a monograph. The text consists of 85 provisions governing what appears to be a free peasantry practicing agriculture and animal husbandry. Certain features of the text, such as the lack of a mention of olive trees, has led some scholars to attempt to localize the NG,\textsuperscript{28} to for


\textsuperscript{26} Although most secondary literature written in English uses the designation Farmer’s Law, this study will use the acronym NG both for convenience as well as to correspond with the numerous publications of the Frankfurt team.


instance Asia Minor,\textsuperscript{29} Thessaloniki\textsuperscript{30} or Italy.\textsuperscript{31} However, Helga Köpstein has presented convincing arguments against recent efforts at localizing the \textit{NG}.\textsuperscript{32}

The eminent nineteenth-century legal historian Karl Eduard Zachariä von Lingenthal initially believed that the law originated in a ninth- or tenth-century context before deciding on a date of composition around the time of the Isaurian emperors Leo III (r. 717-41) and Constantine V (r. 741-75), a view which was at first supported by the author of the first reliable critical edition of the text, Walter Ashburner, and then refuted later.\textsuperscript{33} George Vernadsky postulated a date of composition during the first regnal period of Justinian II (r. 685-95, 705-11), a view which gained considerable currency among non-specialists when it was taken up by Georg Ostrogorsky.\textsuperscript{34} Given what he thought were similarities between the \textit{NG} and the law in Late Roman/Byzantine Egypt, Vernadsky ascribed what he thought was a \textit{tendance orientale} of the \textit{NG} to the influence of refugees from the former Byzantine territories arriving in Constantinople in the seventh century.\textsuperscript{35} Later in the twentieth century Franz Dölger challenged Vernadsky’s thesis, instead proposing that the \textit{NG} originated as a private collection from the time of Justinian I.\textsuperscript{36} During the twentieth century many scholars postulated a Slavic origin of the \textit{NG}, a theory

\textsuperscript{29} Kazhdan, “Farmer’s Law.”
\textsuperscript{31} Simon, “Provinzialrecht und Volksrecht”, p.117.
\textsuperscript{35} \textit{Ibid.}, pp. 178-80; Vernadsky emphasized the use of the term \textit{ίδιος} in papyrus documents from Egypt as well as in the \textit{NG}.
which has justifiably been overturned, as the NG does not contain any words of indisputably
Slavic origin. In the early 1980s Nicholas Svoronos proposed that the NG contained pre-
Justinianic Roman law rather than local law, as well as borrowed provisions from the NM (discussed below). These conclusions were rejected however by Ludwig Burgmann. More
recently, through an analysis of particular provisions of the NG, Pieler has confirmed that despite
the influence of the Old Testament the work is substantially based on Roman law; overall, he
prefers a time of composition during the “dark centuries” of Isaurian rule. Andreas Schminck
argued for a date of composition in the late ninth century. Schminck’s new proposal for dating
shall be taken up later, but first the manuscript tradition of the NG should be discussed.

Karayannopoulos counted over eighty manuscripts of the NG from the eleventh to
seventeenth centuries in his 1958 overview. Since that time the editors of the RHBR have
counted a total of 104 manuscripts, 2 of which are excerpted. If one includes later copies, the NG
is transmitted in over 120 manuscripts in total. Of that number, more than four-fifths of them are
from the 14th-16th centuries. Within this subgroup, the majority are found in conjunction with the
Hexabiblos (a. 1345), a compilation of secular law written by 14th-century jurist Harmenopoulos.
The Hexabiblos proved to be tremendously influential within both the last century of the
Byzantine Empire’s political existence as well as Byzance après Byzance. According to the
famous Royal Decree of 23. Feb. [7. Mar.] 1835, promulgated during the regency of King Otto

37 Karayannopoulos, 380 and note 1; Kazhdan, “Farmer’s Law.”
40 Peter E. Pieler, “Neue Überlegungen zum byzantinischen ‘Bauerngesetz’” in Pascal Pichonnaz, Nedim Peter Vogt
memoriam Nikos Oikonomides, Forschungen zur byzantinischen Rechtsgeschichte 15; Athener Reihe (Athens-
261. Schminck dates the NG to the end of the Photios’ first patriarchate (25. September 867).
Byzantine law, as represented by the *Hexabiblos*, was to be the law of the new Kingdom of Greece until the completion of a new civil code, which was not completed until the Second World War. However, these later, “Harmenopoulian” manuscripts are not relevant to this inquiry. It is the 10th-13th century grouping of manuscripts which is of greater interest, given that they reflect which other legal works were typically grouped with the *NG* at the beginning of the manuscript tradition. It is this group of 17 or possibly 18 manuscripts which can speak to how the *NG* was used by its copyists, and in with what other legal collections it was grouped.

First, almost every early manuscript which includes the *NG* also includes a Macedonian redaction of Roman law. The exception to the rule here is *Codex Barberinianus 578* in Rome’s *Bibliotheca Apostolica Vaticana* (*RHBR* 251), which contains primarily canon law texts such as the *Nomokanon in 14 Titles*, the *Synagoge in 50 Titles* as well as other canons. This manuscript also contains a florilegium from Book 53 of the *Basilika* as well as the *NN*, the latter of which made its way into the *Basilika* as an appendix to Book 53. Within these manuscripts, the *NG* is usually circulated with the *NN* as well as the *NS*. The point to take away from this overview of manuscripts, however, is the same which Karayannopulos made in his 1973 survey of the literature on the *NG*: namely, that the *NG* demonstrates that imperial and “local” law could exist

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43 One of the manuscripts in this 10th-13th century group, *RHBR* 92, is excluded because although it includes an older copy of the *NG*, it was later found inserted along with works of Armenopoulos.

44 Including the *Appendix Eclogae*, *Ecloga privata*, *Eisagoge aucta*, *Epitome ad Prochiron mutata*, *Epitome Marciana*, *Epitome “Vaticana”*, *Prochiron*, *Prochironderivat*, *Prochiron auctum*, and the *Prochiron Calabriae*.

45 See footnote 8 supra. For the interesting story of the discovery of secular law in this manuscript as well as its use as a basis for the Latin translation of Book 53 of the *Basilika* by the Florentine scholar Francesco Venturi (fl. 15-16th centuries), see Dieter Simon, “Handschriftenstudien zur Byzantinischen Rechtsgeschichte”, *BZ* 71 (1978): pp. 332-48, esp. pp. 340-3.
side by side.

The NG was probably used by thematic judges who chose to employ this compact and succinct code to settle everyday village disputes rather than turning to the more complex regulations found in the many redactions of the CIC. Modern scholars should however not view the use of the NG by Byzantine judges as some sort of subversion of the official legal regime; most rubrics of the NG mention that it was promulgated by the Emperor Justinian, thus the NG would have had the same legal validity as any other work of Roman law. Ludwig Burgmann has remarked that there was no simple way to a Byzantine reader of judicial manuscript to determine whether a work was genuinely part of the Justinianic corpus or one of its later reworkings or redactions, or whether a work was imperially-promulgated. It is therefore common in Byzantine juridical manuscripts to find attestations of imperial, patriarchal or synodal legitimation.

It is also within this context that one can invoke Bernard Stolte’s observation on how derogation functioned in the Byzantine Empire, namely, that it is far from clear that older imperial legislation, even if it was not included in the redactions of Roman law characteristic of the Macedonian dynasty, become automatically invalid. Indeed imperial legislation in the form of constitutions and novels appears to have retained its legal validity until it was specifically revoked. From this standpoint the use of the NG, which to the modern scholar is obviously outside the canon of what is considered Roman law since it was not included in the CIC, would not have been seen as objectionable to Byzantine judges, whose jurisprudence in any case also recognized paradigms of justice outside of Roman law.

This point requires further elaboration, as it reveals much how Byzantine Legal Culture coped with new social and economic realities which could not be easily accommodated by the

46 Karayannopulos, p. 373.
49 See Ch. 2.
existing legal regime. Much like Oikonomides’ comment that the jurisprudence of Eustathios Rhomaios created a new legal framework without explicit reference to Roman law, so in a similar manner here we see a simple rural code of 85 articles existing side-by-side with redactions of Roman law, complementing rather than contradicting official legal collections.\(^{50}\)

Given that we lack any mention of the *NG* was employed, in this case the manuscripts are the point of departure as well as the final destination. Whatever its function, it is at least clear that the *NG* did not exist only with a completely separate legal sphere; quite on the contrary, the earliest manuscripts show that the *NG* and various imperially-promulgated redactions of Roman law were collected together.

**IV. The *Nomos Mosaikos (NM)***

The *Nomos Mosaikos (NM)* is a designation used in the secondary literature to refer to a collection of fifty titles (*kephalaia*) of thematically-related excerpts from the Pentateuch; each title consists of between one and five excerpts, so that the work in its two recensions consists of 70 (Recension “A”) or 71 (Recension “B”) passages from the books of Exodus, Leviticus, Numbers and Deuteronomy.\(^{51}\) Although the designation *NM* will be employed here as well, it should be noted that, as with so many other Byzantine legal texts, this is not the title found in most manuscripts, but is rather a shortened form of “A Selection of the Mosaïc Law given by God to the Israelites” (Ἐκλογή τοῦ παρὰ Θεοῦ διὰ τοῦ Μούσεως δοθέντος νόμου τοῖς Ἰσραήλιταῖς).\(^{52}\) Burgmann and Troianos, the editors of the text, offer no concrete dating for the composition of the *NM*, instead only noting that the *NM* probably was composed around the

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\(^{50}\) Oikonomides, pp. 186-90.


\(^{52}\) Burgmann and Troianos, p. 126.
same time as the *Ecloga*. In addition to the *NG*, the *NM* did not become part of Roman secular law, unlike the *NG*, which perhaps served as a supplement to the Macedonian redactions of Roman law, the *NM* offers a Judeo-Christian legal framework completely unlike that of the *Basilika*. As yet there exists no scholarly consensus on the function of the text, a result mainly due to how the *NG* is presented. Although the *NM* somewhat resembles the Late Antique *Collatio legum Mosaicarum et Romanarum*, the *NM*, unlike the *Collatio*, does not explicitly compare Roman and Biblical law. Peter Pieler posited that the creation of the *NM* could be ascribed to the Old Testament tendencies of Iconoclasm and the Isaurian dynasty.

The recent analysis of the *NM* by Andreas Schminck offers a number of intriguing hypotheses concerning what is unfortunately a poorly-understood text. First of all, Schminck has suggested that the *NM* does in fact constitute an implicit comparison of Roman and Biblical law; this can be surmised from the order of chapters. Schminck postulates that the compiler of the *NM* must have consulted the *Ecloga* based mainly on chapters 28-39, 12 chapters which are excerpted out of their order in Leviticus yet which correspond to the order of thematically-related chapters in the *Ecloga*. Thus, Schminck believes, the compiler of the *NM* must have used the *Ecloga* as his basis for the Roman law portion of his comparison, and then found and wrote out the corresponding norms in the Pentateuch. According to this view the goal of the *NM* is a critical comparison of the secular norms of the *Ecloga* with the divine ordinances of the

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Pentateuch. More speculatively, Schminck suggests that the NM could have been authored by Photios, since Photios had demonstrated admiration for Moses as a lawgiver. Due to the possibility of Photian authorship, Schminck dates the NM to around 866, more than a century later than the date suggested by the editors of the text.

Similar to the NG, the manuscript tradition of the NM offers some insights as to its function. The NM manuscripts, of which there are 40, can be divided into two main categories: 1) Among manuscripts containing the Ecloga as well as the Appendix Eclogae, a set of penal regulations; 2) As part of canon law collections. Although both categories contain manuscripts from a period well after when the NM was composed, it is the opinion of the textual editors that the first category consists of manuscripts which closely followed the contents of their prototypes, while the second category represents a later reworking of the texts the NM was copied with. The NM’s early presence in manuscripts with the Ecloga and Appendix Ecloga forces us to examine the NM, in spite of its Biblical contents, in the context of “secular” legal works. While the evidence for the direct influence of Biblical law on Byzantine law is minute at best, the NM would have offered the judge a set of Biblical norms which could be used to justify a particular decision. As discussed elsewhere, while Byzantine jurisprudence was

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57 Ibid., p. 255.
58 Ibid., pp. 261-6. Moses is considered as a model lawgiver in Eis. 11.5 = Epi. 50.70: “Τὸ ἀὐτοκρατορικὸν καὶ βασιλικὸν κριτήριον ἐκκλητῷ ὑπὸ ἐπόνωσις, ἀλλὰ ἐκ τὸν ἰδίῳ ἐκπλήσσεται, καθὰ καὶ θεότης Μωυσῆς νομοθετῶν ἐπανάκρισις τὰς κρίσεις σου διηγήσωσι.”
60 Burgmann and Trojanos, “Nomos Mosaikos”, p. 135.
61 Ibid.
62 An example would be the emendation to Ashburner’s text of the NG proposed by Angeliki Laiou, “A Note on the Farmer’s Law, Chapter 67.” According to Laiou’s reading of the text, the provision should read that a creditor, once he has held the land of a debtor for a seven-year period, had to apply the whole of the profits from the land after the seven-year period to the principal of the loan, and half of the profits made during the seven-year period. Thus the law was meant to discourage creditors from holding onto debtors’ property for long periods of time. The Ecloga does not mention interest, which Zachariä von Lingenthal interpreted as a prohibition against interest, but there is no way to say for certain what the Isaurian emperors thought about interest. Laiou also mentions this Chapt. 67’s similarity to Deut. 15: 1-2, which remits all debts after a period of seven years.
necessarily framed by an overarching Roman legal tradition, the Bible offered paradigms of justice which the judge could use to justify his decision, much as Eustathios Rhomaios cited some verses from the *Odyssey* in support of his decision not to force a woman to marry a second time. Given the *NM* would not have been able to subvert or overturn a Roman legal precedent on its own, its function should be seen more as more complementary than subversive. Like the *Nomoi* of Gregentios of Taphar, the existence and indeed prevalence of the *NM* need not be a reason for legal historians to posit its implementation or enforcement. Rather, the popularity of the *NM* should instead point the variety of texts which judges and lawyers drew upon in approaching legal questions.

V. The *Nomos Nautikos (NN)*

The *Rhodian Sea-law (nomos Rhodiōn nautikos)* or *Nomos Nautikos (NN)*, a collection of maritime regulations divided into three parts, has, perhaps uniquely for a Byzantine legal text, attracted considerable attention outside of the field because of its relevance for the history of commerce and merchants. The *NN* is, like the *NG* and the *NM*, of uncertain origin. Yet unlike the *NG* and *NM*, the date of the composition of the *NN* is complicated by the fact that the island of Rhodes in antiquity did possess a well-known body of maritime law. What form the law took (written or unwritten) and its contents are open questions. The *Rhodian Sea-law* is mentioned in two places in the *CIC*, both within *Digest* 14.2 ("De Lege Rhodia de iactu"). The first mention is *Digest* 14.2.1, a fragment from the second book of the *Sententiae*, a work authored by the

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Roman jurist Paulus. The second mention of the Rhodian Sea-law is the famous and enigmatic Digest 14.2.9. Coming from the authority of the otherwise-unknown Volusius Maecianus, this Greek Digest fragment appears already in the Florentiana manuscript containing the Digest from the year 533/4, thus excluding the possibility that it is a later interpolation. Given the importance of the passage for the history of the Rhodian Sea-law, it is worth quoting in full: “His Honor Eudaimōn of Nikomēdia [said] to the Emperor Antonius: ‘Lord Emperor Antonius, after we were shipwrecked in Italy we were robbed by officials living in the Cyclades Islands.’ Antonius said to Eudaimōn ‘I am the lord of the world, and the law of the sea. Let [the matter] be judged according to Rhodian Sea-law, in [instances] which none of our own laws contradicts it.’ And the most divine Augustus judged the matter thus.” As the passage shows, the “Rhodian Sea-law” (the mention of which here should not be confused with the text under discussion, which was authored much later) was used in those cases in which the Rhodian Sea-law did not conflict with Roman law. Although of course one cannot definitely say whether or not the Rhodian Sea-law was a written legal code or rather an unwritten body of customary law, it should be stated that the way the Rhodian Sea-law is used in this instance closely resembles the way Roman jurists utilized customary law, which allowed a customary rule to be legally valid wherever there existed no written Roman legal precedent.

64 Dig. 14.2.1: “Lege Rhodia cavetur, ut, si levandae navis gratia iactus mercium factus esset, omnium contributione sarciatur quod pro omnibus datum est.”
66 Dig. 14.2.9: “Ἄξιώσεις Ευδαιμόνος Νικομηδίας πρὸς Αντωνίνων βασιλέα· Κύριε βασιλέα Αντωνίνε, ναυφάγιοι ποιήσαντες ἐν τῇ Ἰταλίᾳ διηρπάγημεν ὑπὸ τοῦ δημοσίου τῶν τὰς Κυκλάδας νῆσους οἰκοῦντων. Αντωνίνους εἶπεν Ευδαιμόνη ἐγὼ μὲν τοῦ κόσμου κύριος, ὅ δὲ νόμος τῆς θαλάσσης, τῷ νόμῳ τῶν Ῥοδίων κρίνεσθι τῷ ναυτικῷ, ἐν οἷς μῆπες τῶν ἑμετέρων αὐτὸ νόμος ἑναντιοῦσαι. τοῦτο δὲ αὐτὸ καὶ ὁ θειότατος Ἀὔγουστος ἔκρινεν.”
67 Bas. 2.1.42: “Οὐλπί. Ἡ μακρὰ συνήθεια ἀντὶ νόμου κρατεῖ ἐν οἷς οὐκ ἔστιν ἐγγράφος.”
One has to separate this Rhodian Sea-law of antiquity, which some scholars believe may have served as some kind of incipient maritime international law, with the NN, which despite uncertainty concerning its exact provenance, is agreed to be a Byzantine legal text. Byzantine legal historians have given various dates of composition for the NN. Zachariä saw considerable similarities between the NN and the Ecloga, and therefore dated the NN to the same period, even believing that the NN to have been an official act of Leo III or Constantine V.\(^{68}\) Zachariä’s assignation of the text to the period of Isaurian rule is reflective of his belief that the emperors Leo III and Constantine V were great legal reformers and innovators, a notion which is true to an extent but which later Byzantine legal historians believe was overstated. Ashburner, the editor of the modern critical edition, more conservatively assigned the text to the period 600-800.\(^{69}\) Van der Wal and Lokin propose the period 650-717 for the composition of the three leges speciales (the NG, NN, and NS); in their view dating the leges speciales prior to the beginning of the reign of Leo III would in part explain why Leo felt the need to reassert the most-commonly used areas of Roman law in simple and easily-understandable language.\(^{70}\)

These datings, while valid if one attempts to find parallels in language, style, and organization between the NN and other legal texts of the period, do not seem to fit the historical context very well. The Byzantine economy as well as the Mediterranean economy in general have been the subjects of numerous studies over the past thirty years.\(^{71}\) These newer studies have

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\(^{68}\) Zachariä, p. 316.
\(^{69}\) Ashburner, p. lxvi.
\(^{70}\) Van der Wal and Lokin, p. 75.
refined our view of the Byzantine economy during the “dark centuries”, and the date of composition for the $NN$ proposed by Ashburner, Van der Wal and Lokin, and Zachariä represents the likely nadir of both the Byzantine economy and Mediterranean trade, before economic activity briskly increased starting around the mid- to late-ninth century. The economic context here is vital in determining why a set of regulations regulating ship-borne commerce would have been enacted in a period where most economic historians believe there was hardly any long-distance ship-borne trade at all. Likewise, the political context of the period 600-800 adds little to our understanding as to why the $NN$ would have been authored and enacted. Dating the text in a time contemporaneous with increased economic activity and with a political context which would have supported the composition of a text like the $NN$ are two reasons why the ninth-century dating proposed by Andreas Schminck seems plausible.72

Schminck’s “Probleme des sog. ‘Νόμος Ῥοδιών ναυτικός’” attempts to answer a series of related questions, the first of which is whether the $NN$ was originally part of Leo VI’s *Sixty Books*, the ninth-century recapitulation of Roman law which would become known in the eleventh-century as the *Basilika*. Since we have the *Basilika* as it has come down to us is in incomplete form, the two earliest indices of the *Basilika* are extremely important to our understanding of how the text was organized. The full index (the so-called “Index Coislinianus”), in *Coisl*. 151 (fols. 1-18b) does not mention the $NN$ explicitly, but the partial index *Paris. gr.* 1357 (fols. 123a-128s) adds a title to the Book 53 (the book of the *Basilika* in which the $NN$ is found), which reads “The chapters of the Law of the Rhodians: Chapters of the Law of the Rhodians according to selection or concerning maritime [matters].”73 This difference between these two indices has long vexed scholars as to whether or not the $NN$ was actually

72 Schminck, “Probleme des sog. ‘Νόμος Ῥοδιών ναυτικός.’”
73 $NN$, p. xcix; “τὰ κεφάλαια τοῦ νόμου τῶν Ροδιών· κεφάλαιο νόμου Ῥοδιών κατ’ ἐκλογήν ἢ περὶ ναυτικῶν.”
included in the original version of the *Basilika* or whether it was added later. According to Schminck, the *Index Coislinianus* reflects the pre-Leo VI state of the codification effort which would become the *Sixty Books.*\(^{74}\) The *NN* must have been added shortly afterward since Book 50 (which corresponds to Book 53 of the *Basilika*) of the tenth-century *Epitome Laurentiana*, a text closely related to the *Epitome Legum*, contains extracts from the *NN* (where it is referred to as such).\(^{75}\) Likewise, the *Synopsis Major Basilicorum (SMB)*, a tenth-century abridgement of Leo’s *Sixty Books*, contains fourteen chapters of Part III of the *NN*, namely 2-3, 7, 9 (partial), 10, 13, 28, 31, 34-5, 37, 41, 44, 47.\(^{76}\) Though perhaps the question cannot be answered definitely, for reasons stated below it is more than likely that the *NN*, or at least the Part II of the *NN*, was written in order to be incorporated into the *Sixty Books*.

The *NN* has been divided by modern editors into three parts: Part I is a list of Roman emperors who purportedly sanctioned the *NN*; Part II consists of nineteen chapters of uncertain relation to one another; and Part III contains forty-seven more or less thematically-grouped chapters. Ashburner relegated Part I to an appendix in his edition, since it is a later addition to the text.\(^{77}\) The way the *NN* is arranged, as with every other characteristic of the *NN*, has been subject to much debate. Part III is the most coherent and organized portion of the *NN*. Part II seems to have no organizing principle, and Part I is an obvious forgery transmitted in a draft state. According to Ashburner’s outline of the textual history of the *NN*, the *NN* existed in two redactions. An original edition, written by a “private” hand and corresponding both to Part II and Part III, was followed by a later, “vulgate” edition. This “vulgate” edition, which is represented in the earliest manuscripts as well as the *SMB*, was a reworking of the text in preparation for its

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\(^{74}\) Schminck, “Probleme des sog. ‘Νόμος Ῥοδίων ναυτικός’”, p. 172.
\(^{76}\) *NN*, p. xxxi.
insertion into the Basilika, and at that time Part II was severed from Part III. Schminck suggests instead that Part III was written at the behest of Photios around 866, while Part II was authored specifically for the NN’s incorporation into the Sixty Books, perhaps even by Leo VI himself. Rodolakēs believes that Part II, as well as the prologue, predates the existence of the CIC, while Part III was authored before the eighth century.

The matter of the prologue to the NN, Part I, is perhaps the most enigmatic. There are two main versions of the prologue, both appearing in manuscripts starting in the twelfth century. The oldest manuscript containing the prologue is Codex Parisinus graecus 1384, which is dated to 1165/6. Yet a tenth-century manuscript from Southern Italy (according to Cavallo), the Codex Bodleianus Laudianus 39, contains the heading: “Νόμος Ῥοδίων ναυτικός, ὁν ἐθέσπισαν οἱ θειότατοι ἀοτοκράτορες Ἀδριανός, Ἀντωνῖνος, Τιβέριος, Δοῦκιος, Σεπτίμιος Σευήρος, Περτίναξ Ῥωμαῖοι ἀεισέβαστοι”, which is also found at the start of the prologue. There is little doubt that Part I is a forgery, as it appears later than Parts II and III and appears to be in a draft state. Yet the question is how and why was this prologue authored and attached to Parts II and III of the NN? Following Zachariä, Ashburner suggested that the prologue could have been a student exercise at the Law School founded by Constantine IX Monomachos (r. 1042-55) at Constantinople. However, there are better explanations as to why the prologue was authored.

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78 Ibid., pp. liii, cxxiii.
80 Rodolakēs, passim.
81 NN, p. lxxi-lxxiv.
82 Schminck, “Probleme des sog. ‘Νόμος Ῥοδίων ναυτικός’”, pp. 177-8.
83 Southern Italy, along with Cyprus, is in practice the only place where Byzantine juridical manuscripts can be reliably assigned to a regional provenance; see Burgmann, “The Production of Law Books in Byzantium”, p. 81.
84 The difficulties in creating a critical edition for and then translating Part I compelled Ashburner to state in his commentary: “I have dealt with this rigamarole in the Introduction (p. lxxi) at as much length as it deserves,” NN, p. 121.
85 NN, p. lxxiv; Zachariä, p. 29.
Schminck, citing the South Italian provenance of many of the manuscripts, argues for an eleventh-century South Italian context, perhaps Amalfi.\textsuperscript{86}

More recently, Rodolakēs has proposed the prologue is a “layered” composition, with constituent parts ranging from the first to the end of the seventh century.\textsuperscript{87} According to Rodolakēs, the beginning and end of the prologue contains, with some changes, text from a constitutio principis of the Emperor Tiberius (r. 14-37). Thereafter the original constitution of Tiberius was successively reworked. This is in keeping with the general thrust of Rodolakēs’ work, which is that the NN contains remnants of authentic Roman law.

Schminck’s dating for the prologue is followed here, but for different reasons than those stated by Schminck himself. Schminck’ argument that the six emperors in the prologue to the NN would have, prima facie, meant little in a Constantinopolitan provenance is convincing. However, it is well-recognized that Byzantine culture shifted around the time of the beginning of the Macedonian dynasty, and particularly in the tenth and eleventh centuries, toward a rapprochement with its classical roots.\textsuperscript{88} This “Macedonian Renaissance” has long been recognized with regard to the art and literature of the period, but this extended as well to matters like the genealogies of influential families.\textsuperscript{89} The Phokas family, for instance, adopted an entirely fabricated lineage extending back to the Roman Fabii and Scipii, as recorded by the eleventh-century historian Michael Attaleiates.\textsuperscript{90} These activities demonstrate a reappropriation of Romanitas, a process accelerated by papal and Carolingian challenges to the Byzantines’

\textsuperscript{86} Schminck, “Probleme des sog. Νόμος Ῥοδίων ναυτικός”, pp. 177-8.
\textsuperscript{87} Rolodakēs, pp. 112-3, passim.
\textsuperscript{89} Epstein and Kazhdan, pp. 102-4.
\textsuperscript{90} Michael Attaleiates, Historia = Historia/ Miguel Ataliates; introducción, edición, traducción del griego y comentario de Inmaculada Pérez Martín, Inmaculada Pérez Martín (ed. and trans.) (Madrid: Consejo Superior de Investigaciones Científicas, 2002): pp. 158-61; commentary p. 314.
“Romaness” during the so-called Photian Schism. The codification efforts of the Macedonian emperors, which focused on the recapitulation of the CIC, likewise reflect the reappropriation of Romanitas. The forgery of the prologue to the NN, therefore, was prompted by a desire that a set of nautical legal regulations authored in the ninth century acquire the same legitimacy as other texts within the general codification effort.

VI. The Transmission of the *NM* and the *Leges Speciales*

Although at first glance the transmission of Byzantine secular law and the use of the *NM* and the *leges speciales* appear to have little to do with one another, an examination of how Byzantine law was transmitted to Eastern Europe and the Middle East reveals what both the Byzantines and their neighbors considered “Roman law”, in the broadest of senses. What is most revealing about an examination of the transmission of the Byzantine secular law is a conspicuous lacuna: the *Basilika*, as well its antecedents like the *Sixty Books*, were simply neither translated nor adopted by foreign cultures. The reasons for this lacuna will be explored below. This section will consider the transmission in three language groups: I) Old Church Slavonic, which was used as a literary and liturgical language in the Balkans and medieval ‘Rus; II) Armenian; III) Arabic and Syriac. Excluded from this study is Italy, and South Italy in particular, as it is a special case for the influence of Byzantine law, complicated by the fact that

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92 See Ch. 1.

that the region had both a large Greek-speaking population (it was known as Magna Graecia in Antiquity for a reason) as well as a comparatively recent (in contrast in particular to the Arabic-, and Syriac-speaking populations in the Middle East) legacy of Byzantine rule, which only ended in the eleventh century. The continuing linguistic and cultural influence of Greek-speaking monasteries in Calabria and Sicily is likewise a factor not at play in the above three areas, with the exception of Palestine for Arabic- and Aramaic-speakers.\textsuperscript{94} It is for the above reasons that discussion of the transmission of Byzantine law in Italy is omitted below.

The ninth-century mission to Moravia by the brothers Constantine/Cyril and Methodios, and their decision to translate the Bible and other theological works into a newly-created, Slavic literary language which became Old Church Slavonic (OCS), served as the vehicle of transmission by which Byzantine law, both canon and secular, spread outside the Empire’s northern frontier.\textsuperscript{95} Without engaging with it too closely, it perhaps best to cite here the idea of a enduring Byzantine sphere of cultural influence in the Balkans and Eastern Europe, the “Byzantine Commonwealth” famously postulated by Dimitry Obolensky.\textsuperscript{96} The influence of Byzantine law is evident in one of the earliest legal collections written in OCS, the Law for

\textsuperscript{94} On Byzantine law in Italy, see Marie Theres Fögen, “Law in Italy, Byzantine” in ODB, vol. 2, p. 1195, along with the bibliography listed there; the most authoritative monograph on the subject remains Francesco Brandileone, Il diritto bizantino nell’Italia meridionale: dall’VIII ad XII secolo (Napoli: Jovene Editore, 1987 [reprint]; originally published at Bologna: Tipografia Fava E. Garagnani, 1886).

\textsuperscript{95} The “influence” of Byzantine culture on the medieval Slavs has been and is such a heavily-studied subject that it constitutes a field all its own. For a good introduction to the subject, see the articles (published between 1954 and 2004) in Johnathan Shepard (ed.), The expansion of orthodox Europe: Byzantium, the Balkans, and Russia (Hampshire, England; Burlington, VT: Ashgate Variorum, 2007). Andreas Schminck sees a connection between the request of Slavic rulers for law codes and the start of the of the “Reclensing of the Ancient Laws”; \textit{idem}, “Leges ou Nomoi? Le choix des princes slaves à e’époque de Photius et les débuts de la’ἀνακάθαρσις τῶν παλαιῶν νόμων” in Spyridion Flogaitis and Antoine Pantélis (eds.), The Eastern Roman Empire and the Birth of the Idea of the State in Europe, pp. 309-16. On the legal works which the Cyril-Methodius mission to Moravia produced, see Charlampos K. Papastathēs, Το νομοθετικόν έργον της Κυριλλομεθοδιανης Ιεραποστολής εν Μεγάλη Μοραβία. Ελληνική Εταιρεία Σλαβικών Μελετών 2. (Thessalonike: Hellēnikē Hetaireia Slavikōn Meletōn, 1978).

Judging the People (Zakon Sudnyj Ljudem). The Law for Judging the People is a work of thirty chapters based primarily on the seventeenth chapter of the Ecloga, sometimes reproducing the original exactly while at other times reworking it. According to M. Andreev, the Law for Judging the People is of Bulgarian origin, and the translation’s departures from its Byzantine Vorbild reflect Medieval Slavic customary law. The NG was also translated relatively early on and found its way in the law code promulgated by the fourteenth-century Serbian ruler Stefan Dušan, appearing as the “Law of Justinian.”

Medieval ‘Rus likewise played a prominent role in the transmission of Byzantine Law after the conversion of Prince Vladimir in 988. The influence of secular Byzantine law is represented by translations of the Ecloga, Prochiron, and the NG. Of the three leges speciales, while the NG was quite popular and formed the kernel of a manuscript collection known as the Knigi Zakonnye (Law Books), the NN and NS were of little interest, although they were sometimes copied anyway. The OCS translation of the Procheiron found its way into a series of legal collections known as the Zakon gradskii (City Law). Excerpts from the Ecloga and Procheiron were included in the earliest version of the Kormčaya Kniga (The Pilot’s Book), an ad hoc collection of canon and secular law perhaps intended for the use of ecclesiastical

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99 Ibid., pp. 305-6.
101 Feldbrugge, p. 71.
102 Ibid., p. 75.
officials. With regard to the *Basilika*, an expert on the transmission of law in Medieval ‘Rus has remarked that: “There are no indications that the *Basilika* ever came to Russia during this period and nobody has ever suggested that it did influence Russian law.”

The noteworthy omission of the *Basilika* is likewise the case with the Armenian translations of secular Byzantine law books. Although the Armenian Church already possessed a well-developed canon law tradition dating back to the time of the *kat’olikos* David of Odzum (718-29), no autochthonous secular legal collection was authored before that of Mkit’ar Gōsh. Mkit’ar Gōsh himself cited the lack of an Armenian legal tradition, which forced Christian Armenians to utilize Muslim secular courts, as one of the principal motives for the composition of his *Datastanagirk*. The sources of the *Datastanagirk*, and particularly the degree to which it is indebted to other legal traditions, particularly Byzantine law, is still not entirely clear.

A more direct case of the transmission of Byzantine law can be found in Mkit’ar Gōsh’s twelfth-century contemporary, Nersēs of Lambron (1153-1198). Nersēs himself translated a great deal of Byzantine law; in one of his letters he wrote that since, echoing the sentiment of Mkit’ar Gōsh, there existed no secular law among the Armenians, he therefore sought out a Greek text and translated: 1) The *Ecloga*; 2) The *NM*; 3) The *NS*. Again, as with the case of


104 Feldbrugge, p. 74.

105 *Datastanagirk*, Ch. I (pp. 70-2) in *The lawcode [Datastanarik’] of Mxit’ar Gōs; translated with commentary and indices by Robert W. Thomson*, Dutch studies in Armenian language and literature 6, Robert W. Thomson (trans.) (Amsterdam; Atlanta, GA: Rodopi, 2000).


Byzantine law translated into OCS, neither Nersēs nor any translator attempted to copy what was by then the completed *Basilika*, or any of its antecedents like Leo VI’s *Sixty Books*.

Last but not least Byzantine law was also translated into Arabic and Syriac. The case of Syriac in particular is interesting because certain works of Roman law, like the *Syro-Roman Lawbook* and the *Sententiae Syriacae*, have been preserved in Syriac but not in the language they were originally written in, presumably Greek. Both of the aforementioned compilations are of disputed provenance and their relationship to Roman law has been long debated without resulting in any scholarly consensus. At a later date the *Ecloga* and other works of Middle Byzantine Law were translated into Arabic.\(^{108}\) Within the legal tradition of the Coptic Church, a collection of Byzantine law known as the *Canons of the Emperors* (Ar. *Qawānīn al-mulūk*) demonstrates the texts which were selected for translation. The *Canons of the Emperors* appear in three independent forms of thirteenth- and fourteenth-century scholars: 1) ibn al-‘Assāl (died before 1260); 2) Abū l-Barakāt (died 1324); and 3) Makarios (Maqārah), a contemporary of Abū l-Barakāt.\(^{109}\) Their three versions of the text all contain the *Prochiron*, the *Syro-Roman Lawbook*, and the *Ecloga* (complete in two of the three versions but excerpted in ibn al-‘Assāl). The Arabic *Ecloga* includes excerpts from the *Appendix Eclogae*, the *NS* and the *NN*.\(^{110}\) Again, the point to take away from this very cursory overview of the transmission of Byzantine law in the Middle East is that the *Basilika* and its antecedents were simply not translated.

As the above has demonstrated, the principal achievement of the Macedonian legal reforms, the “Recleansing of the Ancient Laws” which resulted in a substantially pure


\(^{109}\) Leder, pp. 2-3.

recapitulation of Justinianic law, the *Basilika*, was simply not appropriated along with other secular legal texts into Arabic, Armenian, OCS and Syriac.

VII. Conclusion

In this chapter, the manuscript tradition and the transmission of the *NG, NM* and *NN* revealed that these legal texts were incredibly popular within and without the Byzantine Empire, despite the fact that there no exists no evidence that these laws were ever legally valid, that is to say, that they complemented or superseded “official” collections of Roman law, such as the Justinianic corpus or the various Macedonian redactions of it. An explanation will now be advanced as to how and why these laws were used.

In order to contextualize the historical period during which these laws appeared, it is necessary to emphasize that, while pronouncing that Roman law was hopelessly outdated as Oikonomides and Kazhdan did is perhaps an overstatement, Roman law in the Justinianic iteration which the Byzantines had inherited it was at the very least unwieldy and according to isolated anecdotes, unusable. While the statement in the prologue of the *Ecloga* that judges, particularly those outside the capital, had great difficulty understanding Roman law was perhaps a rhetorical exaggeration of the actual situation on the ground,\(^{111}\) there is evidence enough to believe that Justinianic law from the end of the period of the *antecessores* in the sixth century until the completion of the process of *exhellēnismos* in the late ninth century required both a mastery of Greek and Latin along with a good corpus of commentaries and lexica which very few jurists in the Byzantine Empire possessed. The question of competence in Latin among

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\(^{111}\) *Ecloga*, proem, lines 36-40: “…[The emperors] being mindful that the matters legislated by previous emperors are written in many books and that knowing their intent is difficult to understand, and for some indiscernible, especially for those outside of this divinely-protected and capital city of ours [Constantinople]… (…ἐν πολλαῖς τε βιβλίοις τά ὑπὸ τῶν προβεβασπευκτῶν νενομοθετημένα γεγράφθαι γινώσκοντες καὶ τοῖς μὲν δυσδιάγνωστον τὸν ἐν αὐτοῖς περιεχόμενον νοῦν, τοῖς δὲ καὶ παντελῶς ἀδιάγνωστον, καὶ μάλιστα τοῖς ἑξο ὑπὸ τῆς θεοφυλάκτου ταύτης καὶ βασιλίδος ἣμῶν πόλεως εἰδότες τυχάνοντα…).”
Byzantine legal scholars is treated more fully elsewhere, but suffice it to say that until the eleventh century, at which time newer scholia were written to complement the older sixth and seventh century scholia, use of the Greek translations of Justinianic law which had been made by the *antecessores* would still have required a limited knowledge of Latin, as many Latin legal terms were maintained in the Greek translations of Justinianic law. The number of legal scholars competent in both Greek and Latin must have been extremely small, rendering the huge corpus of Justinianic law difficult, although certainly not impossible, to utilize. Thus the first advantage of the laws discussed in this chapter was that they could be used by judges and lawyers *without* knowing Latin. This advantage is all the more important when one considers which laws were translated by the peoples neighboring Byzantium, for if a good working knowledge of Latin was rare in the capital, it was even rarer in Armenia, Bulgaria, ‘Rus, and the Middle East. The occasional outlier, like the Armenian *kat’olikos* Gregory Vkayasēr (“Martyrophile”; 1165-1105), who translated or commissioned translations of Greek, Latin and Syriac *vitae* into Armenian, is the exception that proves the rule. In addition to its conciseness, the lack of Latin legal terminology in the *Prochiron*, which was also at times translated, was partially due to the fact that its writer(s) had shorn or calqued the Latin legal language of its prototypes. Although one cannot prove how these *NM* and the *leges speciales* were used, at the very least they constituted a kind of “stop-gap” legal code which provided judges and lawyers with a comprehensible set of texts before the process of *exhellēnismos* was completed. The lack

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of Latin in these texts likewise accounted for their popularity among those cultures which were influenced by the Byzantine legal tradition.

Besides their lack of untranslated Latin legal terminology, the NM and the leges speciales had the advantage of being small and therefore economical, especially in comparison with the massive Basilika. After Byzantium was cut off from the Egyptian supply of papyrus following the Arab conquests of the seventh century, the price of writing material, almost solely parchment with the exception of the small amounts of papyrus which could be procured from Southern Italy, became much dearer. There was doubtless access to the Justinianic corpus and its Greek translations in the capital, where the emperor, the courts of appeal, the eparch, as well as the legal officials holding jurisdiction within the various departments (sekreta) could refer to the necessary Roman legal texts. It is also possible but by no means certain that access to much of the Justinianic corpus could have been found in some of the other larger cities of the empire like Thessalonike. Access to legal texts in the themata is a much trickier question, and there is no evidence which would allow a comparative analysis of which legal texts were available in the themata as opposed to say Constantinople. Some anecdotes, however, should militate against equating an urban milieu with access to legal texts and a rural milieu with their lack. The mysterious ninth-century polymath and autodidact Leo the Mathematician, for instance, finding no teachers of note in the capital, purportedly found the mathematical and philosophical texts he required for his studies on the island of Andros.\(^\text{115}\) From an earlier period, the teacher of the

seventh-century Armenian scholar Ananias of Shirak, Tychicos, taught mathematics in strategically important but rather small Trebizond.\textsuperscript{116}

As a practical matter, however, the sheer size of the \textit{Basilika} when compared with the \textit{NM} and the \textit{leges speciales} is inescapable in considering the question of access to legal texts. We know that the \textit{Sixty Books/Basilika} was at first commonly divided into six volumes or manuscripts, and later into four.\textsuperscript{117} A one-volume abridgement of the \textit{Basilika}, the so-called \textit{Synopsis Major Basilicorum}, was made in the tenth century.\textsuperscript{118} According to the \textit{TLG}, the Groningen edition of the \textit{Basilika}, which represents only the incomplete text that has been transmitted to modern scholars, runs to 765,405 words. When one considers this number with the length of the received commentary tradition, which runs to 1,282,347 words and which would have been indispensable for applying the law in the \textit{Basilika}, the corpus in total constitutes over two million words. By comparison, the \textit{NM} contains 5,628 words, the \textit{Ecloga} 10,514, the \textit{Prochiron} 29,735 the \textit{Eisagoge} 44,063. None of the \textit{leges speciales} is even one hundredth of the length of the \textit{Basilika} cum commentaries. The sheer size of the \textit{Basilika} probably limited its regular use only to the courts of the capital. This is probably also a reason why the courts of appeal in Constantinople, like that of the Hippodrome and Velum, were stationary. The court of the thematic judge, by contrast, was peripatetic; a Novel of Constantine VII regulating legal fees mentioned that expenses for travelling and upkeep were excluded from the prescribed legal fees that the plaintiff and defendant paid to the thematic judge, but which both parties in court were

\textsuperscript{117} Burgmann, “The Production of Law Books in Byzantium”, p. 90.
still obliged to pay for.\textsuperscript{119} The fact that thematic courts travelled meant that carrying copies of even abridged versions of the \textit{Basilika} would have been extremely difficult. Again, the brevity of the \textit{NM} and the \textit{leges speciales} must have at least partially contributed to their enormous popularity, for such texts were short enough that they could likely be found in the \textit{themata} or could be carried with the peripatetic thematic courts. Thus, the economy of these legal texts, particularly in comparison with the \textit{Basilika}, no doubt contributed to their popularity within and without the Byzantine Empire.

With regard to the perceived validity of these texts, it is possible that the \textit{NG}, \textit{NN} and \textit{NS} were recognized as a genuine part of the Roman legal tradition. The \textit{NG} is ascribed to “Justinian the Emperor” and the \textit{Rhodian Sea-Law} is mentioned in the \textit{Digest} fragment discussed above. As we know from the mid-eleventh century \textit{Meditatio de nudis pactis}, which argued for the superiority of the writings of the \textit{antecessor} Stephanos over the \textit{Basilika} with reference to a case concerning the validity of an informal agreement between a \textit{protospatharios} and a monastery, as well as cases like \textit{Peira} 51.16, which involves a disagreement between two passages from \textit{Digest} and \textit{Novels} of Justinian which made their way into the \textit{Basilika} concerning whether a decision requires unanimity or majority, Byzantine legal scholars acknowledged that the Roman legal tradition was layered. It is within this conceptual framework that one can contextualize the use of the \textit{NG}, \textit{NN}, and \textit{NS}; while the most competent legal scholars, like Eustathios Rhomaios, probably recognized that these three laws post-dated the Justinianic legal reforms, an individual lawyer, like the author of the \textit{Meditatio de nudis pactis}, would have been able to draw on these laws if by doing so it somehow benefited his case. This method reflects the eclectic way in which Byzantine judges and lawyers drew upon legal texts.

\textsuperscript{119} \textit{JGR}, vol. 1, col. 3, n. 7 (pp. 218-221) and n. 9 (pp. 227-9).
The NM, which by no stretch of the imagination could have been included within the Roman legal tradition, performed a different function that that of the NG, NN and NS. While the legal framework of the Byzantine Empire remained Roman, Christian ideas about justice and jurisprudence profoundly influenced the way the law was interpreted and applied, and in this context the NM could have served as a guide as how to provide legal opinions grounded in Roman law with Biblical trappings. This would explain how the NM contains no explicit comparison between Christian and Roman law, since its function was complementary rather than adversarial. The arrangement of material, which Schminck rightly points out corresponds to their presentation in the Ecloga, was thus intended as a complementary side-by-side reading, rather than a comparison of differing opinions. One might object that Biblical and Roman law were so radically different that one could not use the other to support a particular decision, but this would belie the way they are effectively intertwined in a number of Byzantine legal texts, most notably the introduction to the Ecloga.

As a final consideration, it is worth taking into account the nature of the polities which appropriated parts of the Byzantine legal tradition and which commissioned and supported these translations. By and large, the Macedonian redactions of Justinianic law, understandably given that they were ninth- and tenth-century reworkings of texts which reflected the sixth-century empire, projected the worldview of an autocratic and, by the standards of the period, highly-centralized and bureaucratic state. Yet the cultures and states which appropriated these texts, however much they attempted to remake their polities along the lines of the Byzantine model, were organized completely differently, in that they were much less centralized. It is therefore interesting that it has been proposed that the one state which perhaps did attempt to appropriate

\[120\text{ In general see Ch. 2.}\]
Justinianic law was most similar to it in terms of administration and the way in which the state was organized, that of Hārūn al-Rashīd’s ‘Abbāsid Caliphate. For the decentralized polities which appropriated Byzantine law, the NG, NM and NN were better-suited to states with no institutional memory of Roman/Byzantine rule and which did not presuppose a centralized administration.

In closing, despite the opaque textual history of the NG, NM and NN, these laws were used and transmitted to neighboring cultures because of 1) their lack of Latin legal terminology; 2) their brevity and conciseness in comparison to the Basilika; and 3) the complementary role these texts played within Byzantine Legal Culture, serving as aids rather than countermeasures to the framework of Roman law. Hopefully this chapter will help facilitate further research on the origin and function of these texts, which are immensely important both for Byzantine Legal Culture as well as Byzantine society more generally.

Conclusions

I. Burnishing the “Distorting Mirror”

The dichotomy between literature and a changing reality is, I believe, one of the salient features of Byzantine culture. The business of everyday life was not considered a suitable subject for literary treatment. Many Byzantines travelled to strange lands, went on missions to Baghdad and Kiev, performed pilgrimages to Rome and Jerusalem, spent years in captivity among the Arabs, yet not one of them has recorded his experiences and observations.¹

In describing the immutability of Byzantine literature, Cyril Mango famously compared the historian reading the works of Byzantine authors as akin to staring into a “Distorting Mirror.” While the scholar tries to deduce details of circumstances, conditions and events from the lifetime of the author, instead he is presented with timeless and unchanging images dictated by the stringent standards of Byzantine literary genre and style. Either like literature, or perhaps it would be better to say since it was itself treated in some ways as a literary genre by the Byzantines, Byzantine law has long struggled against variations of Mango’s “Distorting Mirror” thesis, whether presented in the form of Alexander Kazhdan’s critique of Byzantine legal scholarship or Nicholas Oikonomides’ attempt to explain why Middle Byzantine jurists did not successfully design a new legal regime.²

The chief goal of this study has not been to serve as realization of Kazhdan’s proposed New History of Byzantine Law, which would be, to use Mango’s metaphor, to burnish the “Distorting Mirror” until a clear image of the “law in action”, law as is actually was during the Middle Byzantine period, is reflected. The reasons for this are twofold. The first and lesser objection to such a study is that it would be impractical, even impossible to write; the sources

needed for such a study, particularly of the archival variety, have not survived in sufficient quantities to present even a very incomplete picture of what the “real” legal regime may have looked like. The second and far more potent objection is that today historians of Byzantium as well as legal historians, while they certainly haven’t abandoned attempting to elucidate actual legal practice, have come to recognize that the imperfections rendered by the “Distorting Mirror” of the sources are as important for our understanding of the subject as actual legal practice. Indeed the concept of Byzantine Legal Culture as employed in this dissertation corresponds to the distorted image: both the way ideas about law and justice are projected by normative and non-normative legal sources as well as the way these ideas were actually implemented in their societal context. It is to be hoped that this study will encourage other analyses within Byzantine legal scholarship which attempt to examine law and society together rather than as separate phenomena.

II. What Was Byzantine Legal Culture?

The salient features of Byzantine Legal Culture which have emerged over the course of this study can be summarized as follows. Above all, Byzantine Legal Culture was multivalent, both in the way in which legal questions were approached and the means by which the law itself was carried out in practice. It is here useful to invoke the difference between inner and external legal culture defined at the beginning of this dissertation. The part of the Byzantine legal tradition which remains more comprehensively studied is that of this inner legal culture, the realm of high judges, jurists, lawyers and upper-level legal functionaries. This stratum of Byzantine Legal Culture was, in its legal orientation, almost completely dominated by its interaction with the Roman legal tradition, not directly via the Justinianic corpus of law, but rather through the medium of the paraphrases and didactic writings of the antecessores, the
various Macedonian redactions of the CIC, as well as the special treatises and textbooks authored in the tenth and eleventh centuries. In general, this *inner legal culture* was capable of engaging with the Roman legal tradition at a sophisticated level; this much is clear from the jurisprudence of Eustathios Rhomaios as practiced in the *Peira* and legal treatises like the *Meditatio de nudis pactis*; in both works, despite occasional errors, to a large extent Roman law was correctly interpreted. This relatively small class of legal professionals, confined essentially to the capital, drew on its knowledge of the Roman legal tradition as a source of prestige and social status. Middle Byzantine jurists had a professional obsession centered not only on practical knowledge, but also, as is particularly evident in the juristic writings of Psellos, on legal arcana, a state of affairs which has long been a source of bafflement and frustration to historians of Byzantine law. This juridical class was held in high esteem for its mastery of “The Wisdom of the Italians.” Perhaps the greatest source of cultural cachet this professional class of jurists possessed was its claim to know Latin; this skill, which was demanded of the “guardian of the laws” instituted by Constantine IX Monomachos’ (r. 1042-55) founding of the Law School in Constantinople, allowed these Byzantine jurists to trumpet a special connection with Byzantium’s Late Roman political legacy.

Yet despite the tremendous achievements of this class, their authoring of the *Basilika*, “new” scholia, legal treatises, commentaries and lexica, the legacy of Byzantine law is, for the most part, not that of this *inner legal culture*, but rather that of *external legal culture*—everybody else. While members of this *external legal culture* considered themselves no less Roman than the jurists of the *inner legal culture*, they nonetheless conceptualized and formulated their relation to law, legal questions and the Roman legal tradition in a completely different way. The Christian legal tradition, the *Lex Christiana* as Peter Pieler has termed it, was more
important to this *external legal culture* than the Roman legal tradition itself, even though this tradition was already thoroughly Christianized. Law and jurisprudence were construed in primarily ethical and moral terms. It looked particularly to the Old Testament for inspiration with regard to legal questions. Writers like Kekaumenos as well as the authors of the *Nomoi* of St. Gregentios and the *NM* are representative of this *external legal culture*. Additionally, because this *external legal culture* did not draw on the vast corpus of legal writings represented in the Macedonian redactions of the *CIC* and the writings of the *antecessores* as a source of societal prestige, it valued concision and clarity when it approached or formulated Roman law. Members of this class, it should be noted, included officials with juridical powers. In the Byzantine Empire, as in the Late Roman state, most officials possessed juridical powers only as a byproduct of their administrative duties. These officials, which included thematic judges, who were not necessarily expected to possess a thorough command of Byzantine law. The popularity of the *NG*, *NM* and *NN* can be accounted for in light of the need of the upper-echelon members of this *external legal culture*, members of the power élite who were not legal professionals, for accessible legal compendia in situations where they had to exercise their judicial powers. When Byzantine law was appropriated by neighboring cultures, it was usually via this *external legal culture*.

One of the important conclusions of this study has been to situate this *inner* and *external legal culture* within in a particular historical and societal context, namely that of the Byzantine Empire during the rule of the Macedonian dynasty. Moreover, *inner* and *external legal culture* are here treated synchronously; this is against the prevailing tendency of surveys of Byzantine law, which still tend to periodize Byzantine legal sources, much like other genres, into epochs of “classicizing” (e.g. the Macedonian period) and “vulgarizing” (e.g. the “dark centuries” of
Isaurian rule). Yet this study has shown, based on a reappraisal of sources thought to have stemmed from the time of the time of Isaurian rule, that texts like the NG, NM and NN were in fact composed in a period long assumed to have been the most “classicizing”: that of the Macedonian dynasty. Thus within the same era texts representative both of the most “classicizing” and “vulgarizing” tendencies were composed. In short Byzantine Legal Culture at any particular moment in its history was capable of producing both types of text and everything in between.

III. The Implications of Byzantine Legal Culture for Future Studies of Byzantine Law and Society

The broader implications of the results of this study of Byzantine Legal Culture suggest changes to the methodology in which historians of Byzantine law as well as Byzantine historians examine legal questions. First of all, it is immensely important when approaching legal questions in Byzantine society to avoid making categorical statements about regulations or legal institutions based on the CIC or the Basilika. First, as to the CIC, practically no jurist or anyone else for that matter in Middle Byzantine society actually read legal texts in Latin. When the Justinianic corpus was consulted, it was always via the antecessores and the rest of the commentary tradition in Greek. Thus, for example, one cannot cite a passage of the Institutes, which was, incidentally, incorporated into the Basilika only to very small extent, as representative of Middle Byzantine legal thinking on a particular matter. A Byzantine jurist’s exposure to the Institutes was, very likely, via the Paraphrase of the antecessor Theophilos. The influence of the antecessores on Middle Byzantine legal thought cannot be overstated; particular jurists, like Stephanos, were revered to the point that their writings had the status, as generally
agreed-upon interpretations of the Justinianic corpus, almost of the law itself. Thus to the extent possible, historians should approach legal questions in Byzantium utilizing the same interpretive texts which the Byzantine jurist had at his disposal.

Second, it is probably best to abandon treating Byzantine law as a codified system with a discrete, society-wide recognized body of law, at least until the second half of the twelfth century when the Basilika was proclaimed to be the official collection of secular law. At the very least, saying that the Basilika was the official law of the Byzantine Empire during the rule of Macedonian dynasty requires qualification: it was valid law only insofar as it was assumed to represent a Greek rendering of the CIC. In the future, more work is needed on the notion of the “The Breadth of the Laws” (to platos tôn nomôn), which seems to have referred to all valid law in this period, in order to ascertain exactly which texts were included within its remit.

Third, this study has demonstrated the agency that parts of Byzantine society outside of the emperor and the imperial household had upon the law. Given the importance of the emperor as the creator and steward of the law, as well as the law’s importance as a component of imperial political ideology, it is not surprising that his agency figures prominently in studies of Byzantine law. Yet this dissertation has shown that the rest of society, and particularly the élite, powerfully shaped the way law was practiced in the Middle Byzantine Empire. Despite their lack of a constitutionally-sanctioned role in creating law, the élite cemented their position within society

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5 The work of Juan Signes Codoñer and Francisco Javier Andrés Santos, La introducción al derecho (eisagoge) del patriarca Focio, Nueva Roma 28 (Madrid: Consejo Superior des Investigaciones Científicas, 2007), pp. 246-67, is an excellent start, but it does not extend to the eleventh century, when the expression for the most part appears to have been used in a very general sense.
and exercised their own power through law and the legal system, particularly via the practices of gift-giving and patronage. This conclusion is supported by recent work on the Byzantine administration, above all that of Leonora Neville, which highlights the limited reach of the central administration even in what was, by medieval standards, a powerful and well-organized state.6

IV. Recovering the pars orientalis of the ius commune

This dissertation is in some respects the same chapter to two different stories: the story of Byzantine society and the story of Roman law. To this point, histories of the transmission of Roman law have portrayed the Byzantines as (quite flawed) conservators of the Roman legal tradition. The story of the ius commune, the rise of common European legal tradition based on Roman law, is still almost entirely a story of Western Europeans’ rediscovery of Justinianic law starting in the eleventh century at Bologna in Northern Italy. The extent to which this rediscovery of Roman law was aided or influenced by a simultaneous Byzantine rapprochement with the Roman legal tradition cannot be determined with any certainty.7 Yet the more general Byzantine role in the story of the revival and spread of the Roman legal tradition in the Middle Ages and later, the pars orientalis of the ius commune, has not yet been fully appreciated. As such this dissertation is a step towards a better understanding of how and why Roman law came to prominence throughout Europe after the eleventh century so rapidly and thoroughly. The study of Middle Byzantine Legal Culture contributes to a better understanding not only of the ius

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commune, but also the regions which are not normally considered to have been within the remit of the *ius commune* and into which Byzantine law was intentionally imported, particularly the Balkans and Eastern Europe but also various Christian communities in the Middle East as well as Caucasia.
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