CHAPTER 1

The "Cleansing of the Ancient Laws" under Basil I and Leo VI

Hellenizing the Twelve Tables

The Romans considered the Twelve Tables (written down around 450 BCE), the first codification of Roman law, to be among their greatest achievements. Cicero relates that children were required to memorize them by heart; the brief excerpts of the law code which have been haphazardly preserved via quotations from later authors convey the laconic, direct style of the archaic Latin in which the laws were written. The great Roman jurists of later centuries, such as Gaius and Pomponius, still acknowledged the Twelve Tables as the basis of the *ius civile* centuries after the law code had ceased to be of any practical use.[1]

Long after even the ability to read Latin had become rare, at least in Byzantium, this story of the origins of Roman law was expounded upon by another jurist, Symbatios. Symbatios, whom we would designate as Byzantine but who would have thought of himself as no less Roman – despite the Hellenized form of his Armenian name – than Cicero or Julius Caesar, writing in the first decades of the tenth century, used Pomponius' account of the history of Roman law, including the Twelve Tables, in the introduction to his legal collection, the *Epitome* (*legum*).

Symbatios did not simply regurgitate Pomponius' account of the Twelve Tables via his likely source, *Digest* 1.2.2.4. Rather than simply stating, as Pomponius does, that some relate that the author of the Twelve Tables was Hermodorus, an Ephesian exile living in Italy, Symbatios made his own inference about the original language of the Twelve Tables. The Twelve Tables, according to Symbatios, were written originally in Greek before, some say, "a certain Hermodorus, an Ephesian exile in Italy, translated the Twelve Tables from Greek into Latin."[2] Thus Symbatios, who

[1] For general information on the Twelve Tables as well as further bibliography, see Crawford 2012; Schiemann 2001.

[2] *Epitome*, proem. 29–31.

was probably working exclusively from Greek sources to compile the *Epitome*, underlined that the origins of Roman law were likewise written in the Greek language. Though no direct transmission need be posited, an emphasis on the Greek origin of Roman law is found in later texts, particularly from the eleventh century.[3] Thus a uniquely Byzantine interpolation in the legend of the Twelve Tables – namely that they had originally been written in Greek rather than Latin – took root.

Symbatios' rewriting of Roman legal history has not received the attention it deserves: why did Symbatios and later Byzantine jurists think it necessary to claim that the first codification of Roman law had been written in Greek rather than Latin?[4] Rather than being some antiquarian's jest, Symbatios' act is to be read within a context of a reassertion of Byzantine imperial ideology which began after the end of the Second Iconoclasm in 843. The contours of this reassertion can be detected in a debate which occurred in the middle of the ninth century. This discussion, evidenced via an exchange of letters between emperors – both Byzantine and as well as Carolingian – and popes, arose in a new political climate in which the Byzantine Empire attempted to reassert its claim to the late Roman ecumenical and imperial heritage. The defense of Byzantine claims to this legacy was advanced via a number of massive encyclopedic projects directed by the Macedonian dynasty in a number of genres (court ceremony, hagiography, historiography), the most important of which was law.[5]

Byzantine historians often characterize the two hundred-year period from around 850 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.[6] 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

[3] *Legal History Treatise* 82; Michael Attalieates, *Legal Textbook* 415–16.

[4] Pitsakes 2000 is an excellent examination of the history of Roman law in later legal handbooks (particularly the *Hexabiblos* of Harmenopoulos and the *Syntagma kata Stoicheion* of Blastares), including post-Byzantine ones, yet does not discuss this interpolation in the *Epitome* (brief discussion of the *Epitome* in Pitsakes 2000: 401, n. 5).

[5] The impetus and implementation of Macedonian "encyclopedism" not only in law but other genres as well has been expertly examined by Magdalino 1999. Burgmann 1999a: 598–605 offers a more technical analysis of how the legal texts stemming from this project were composed, while Pieler 1989 and Troianos 2001a each offer the legal historian's perspective on the "Cleansing of the Ancient Laws."

[6] For general surveys of this period in Byzantine history, see Gregory 2010: 242–89; Ostrogorsky 1980: 233–350; Treadgold 1997: 446–579; Vasiliev 1961: vol. I, 300–74.

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.[7] Since the founder of the Macedonian dynasty, Basil I (r. 867–86), 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.[8]

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 First Bulgarian Empire, which had for several centuries been Byzantium's most dangerous rival, was conquered fleetingly during the reign of John I Tzimiskes (r. 969–76) and more durably 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 I. 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 inauguration of the Macedonian dynasty coincides with the beginning of a long period of growth in population, land under

[7] Treadgold 1988, for instance, emphasizes the importance of the post-Isaurian rulers, the emperors of the Amorian dynasty.

[8] The ethnic origin of Basil I's family is comprehensively treated by Tobias 2007: 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 the ethnonyms "Macedonian"/"Thracian"/"Slav." Schminck 2001 has more recently rejected the Armenian origin of Basil I. 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.

cultivation and trade extending to the end of the eleventh century.[9] The stabilization of the Balkans facilitated the emergence of powerful new monasteries with substantial landholdings, particularly on and around Mount Athos.[10] 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.

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,[11] 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*, the so-called "Cleansing of the Ancient Laws," as one of the principal achievements of their reigns.

This chapter will demonstrate that the recapitulation of Justinianic law was a component of a larger political program directed at the recovery of "Romanness" 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 First Bulgarian Empire. While the Arab invasions of the seventh century and nearly continual warfare with the Umayyad and then Abbasid 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.[12]

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

[9] The case for significant economic growth during this period is made convincingly by Harvey 1989. For an overview of economic activity from the early eighth to the tenth century, see Laiou and Morrisson 2007: 43–89.

[10] For the role of monks and monasticism in this period, see in particular Morris 1995. On the substantial economic importance of monasteries in Middle and Late Byzantine history, see Smyrlis 2006.

[11] For this *topos* in imperial documents see Hunger 1964: 103–22. Laiou 1994b in her examination of the law and justice by Middle Byzantine historians shows that the period of Macedonian rule witnessed some important innovations. The tenth century in particular saw a serious preoccupation with justice in the sense of "impartiality, good government, protection of the poor, and to some extent – and it is a limited extent – good laws as well" (Laiou 1994b: 183).

[12] The best analysis of this process is Haldon 1997. See now as well Humphreys 2015.

challenged the Byzantine emperor's ecumenical leadership, as well as a new Bulgarian state which, by adopting Orthodox Christianity, attempted to supplant Byzantine suzerainty 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 Abbasids challenged the Byzantines as heirs to the late Roman political legacy, choosing instead to lay claim to the philosophical and scientific traditions of Antiquity.[13] 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 of Bulgaria (r. 893–927), who himself was educated in Constantinople and steeped in Byzantine culture, attempted to fuse his Bulgarian realm with the Byzantine Empire.[14] The Carolingians and the Papacy could challenge the *Romanitas* of the Byzantines on linguistic grounds: how, they asked, can you call yourselves Romans when you don't even speak Latin? Symbatios' reimagining of the Twelve Tables as composed in Greek is best understood as a response to these Western challenges.

Evidence of this challenge to the *Romanitas* of the Byzantines is especially noticeable in the sources of the second half of the ninth century. 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. Although the epistle of Michael III has not survived, apparently he had described Latin as both "barbaric" (*barbaram*) as well as "Scythian" (*Scythicam*).[15] 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."[16] Continuing in this vein, Pope Nicholas urged Michael to "stop calling yourselves emperors of the Romans, because according to your

[13] As presented in the impressive study of Gutas 1998.
[14] The bibliography in Kazhdan 1991g includes important older works on his life and reign. On Symeon's formative years in Constantinople, see Sergheraert 1960: 15–48.
[15] Nicholas I, *Letter to Michael III* 459.5–7.
[16] Ibid. 459.19–21.

opinion you are barbarians … the Romans, however, use this language, which you call barbaric and Scythian."[17]

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. 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 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."[18] 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 epistle, a source of great amusement to Anastasius.[19]

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 "Cleansing of the Ancient Laws" undertaken by the Macedonian dynasty.[20] In her view "the 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."[21] This program of legal reform 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 restoring Justinianic law.[22] Indeed, one cannot separate the "Cleansing of the

[17] Ibid. 459.30–2.
[18] Louis II, *Letter to Basil I* 390.10–15.
[19] Ibid. 390.34–391.6.
[20] See Fögen 1998.
[21] Fögen 1998: 22.
[22] As Troianos 2001a: 243–6 points out, these two aims (restoring Justinianic law and reasserting the empire's Roman character respectively) are complementary and by no means mutually exclusive.

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 back to the power and glory of the Justinianic age.[23] This chapter will examine in detail the legal reforms of the first two Macedonian emperors, Basil I and Leo VI, and the fruits of their codification projects: the *Prochiron*, the *Eisagoge*, and the *Sixty Books*/*Basilika*. While these three works mainly consisted of the rearrangement as well as the Hellenization of Justinianic law, the emperor Leo VI also composed 113 novels, which comprise the largest single instance of imperial legislative activity in Byzantine history after that of the Justinian himself. His legislation, penned in order to correct what he deemed to be flaws in Roman law, represents an attempt to adapt Roman law to a distinctly Middle Byzantine context. Finally, the proem to the *Epitome* bookends the program of the "Cleansing of the Ancient Laws" and was the culmination of an effort to link the Macedonian dynasty with the Roman past, not only in its imperial but also its republican iteration.

The *Prochiron*

The program of legal reform initiated by the first Macedonian emperors cannot be understood without contextualizing the development of Byzantine secular law from the time after Justinian until the middle of the ninth century. Through the reign of Heraclius (r. 610–41), himself a legislator of some importance, the study and teaching of Roman law remained quite strong. Already in the half century after Justinian's death one of the enduring characteristics of Byzantine law, namely the analysis and logical reordering of his *Novels*, is evidenced by the so-called *Syntagma* of Athanasios of Emesa, a legal scholar active in the second half of the sixth century. To this period also belong the first redactions of the most popular collection of Byzantine canon law, the *Nomokanon in Fourteen Titles* – since Justinian's *Novels* became the basis of much of Byzantine canon law, and he himself had given the first four ecumenical councils the authority of secular law, it is more difficult to separate church and secular law in Late Antiquity and the Early Byzantine period than in later centuries.[24]

[23] Pieler 1989: 69.

[24] The relationship between canon and secular law is discussed throughout Wagschal 2015, who examines the language of the canons during the first centuries of Byzantine canon law.

Little is known of either secular or canon law during the "dark centuries" of Byzantine law, from roughly 650 to 850.[25] Simply put, there is an appalling paucity of evidence as to how the law was interpreted and applied between the end of the reign of Heraclius and the advent of the Macedonian dynasty: there are no casebooks (such as the *Peira* for the eleventh century) and no monastic records, which appear only slightly later, particularly from Mount Athos. The first transmitted document among the acts of the archives of the Athonite monasteries, which in total contain some 1,200 legal documents (primarily property demarcations, donations, sales and exchanges) stemming from the medieval period, was a *sigillion* issued in 883 during the reign of Basil I.[26]

The Justinianic corpus of Roman law was still certainly in force at this time. However, if a remark from the most important of the lawbook of the period is to be believed, it could be used only with great difficulty even in the capital, likely through the medium of translations and commentaries into Greek made by the legal scholars during the time of Justinian and immediately afterward, the so-called *antecessores* and *scholastikoi*.[27] From the lawbook in question, the *Ecloga*, promulgated by Leo III (r. 717–41) and Constantine V (r. 741–75) in 741, we learn that particularly in the provinces the Justinianic corpus was nearly impossible to use.[28] Historians of Byzantine law postulate that the increasing inaccessibility of the Roman law may have led to the use of compact and relatively simple lawbooks termed the *leges speciales*, such as the *Nomos Georgikos* and *Nomos Mosaikos*, which did not presuppose an extensive knowledge of Roman law.[29]

At first glance, the *Ecloga* itself seems suited to solve the problem of the inaccessibility of Roman law cited by its promulgators. Running to

[25] For legal literature during the "dark centuries," see Pieler 1994: 302–23; Troianos 2011: 160–212; Van der Wal and Lokin, 1985: 71–7; Wenger 1953: 695–9. For more general remarks on the role of law during this period see Signes Codoñer and Andrés Santos 2007: 53–68 and Haldon 1997: 254–80.

[26] For the first Athonite document see Kaplan 1993: 486. On the Athonite monastic archives as sources, see Morris 2008.

[27] On the *antecessores* and *scholastikoi* see Ch. 6.

[28] *Ecloga*, proem 36–40: "[The emperors Leo III and Constantine V] 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]."

[29] Unlike the authors of most traditional overviews of Byzantine law, I think there is no compelling reason to date the appearance of the *leges speciales* to the seventh and eighth centuries. In light of their diachronic popularity, even in (by the standards of Byzantine law) relatively "enlightened" epochs like the period of the Macedonian dynasty's rule, it is clear that they never completely replaced the Justinianic corpus of Roman law and its various adaptations. They instead filled a particular niche for easily accessible lawbooks among those invested with juridical authority yet at the same time lacking training in Roman law. I discuss these points at greater length in Ch. 4

eighteen titles and overwhelmingly concerned with private law, the *Ecloga* also reflects the ever increasing importance of Orthodox Christianity in secular law; the heading of its proem proclaims it as a "correction towards greater humanity" (*epidiorthosis eis to philanthropoteron*).[30] This phrase is the leitmotif of the entire work and is especially evident in its amelioration of punishments, for instance substituting mutilation for crimes that under Roman law would have been merited the death penalty.[31] The marriage provisions of the *Ecloga*, also innovations, were especially popular and were adopted into later compilations of Justinianic law. Another plausible interpretation of the meaning of the Eclogian phrase *epidiorthosis eis to philanthropoteron* is that the language of the law was simplified and made easier to understand, and was thus a stylistic rather than a substantive "correction."[32]

Far more important than the (in the grand scheme of things quite minor) changes to the substance of Justinianic law was the completely different ideological perspective, and correspondingly a sea change in the way the law was articulated, of the *Ecloga*. The Isaurian emperors saw themselves as but the latest in a long line of lawgivers extending back to Moses, Solomon, the Old Testament prophets and the New Testament apostles.[33] The subjects of the emperor are not described as "Roman" a single time in the entire text, and are instead designated "marked as Christians" (*christosemeiotoi*).[34] This stark emphasis on the Orthodox Christian thread of Byzantine legal culture was in a sense counteracted by the program of the "Cleansing of the Ancient Laws", which instead sought to highlight the Roman political legacy and Hellenic orientation of the Macedonian dynasts.

Despite the popularity of the *Ecloga*, attested both by its translation into other languages (Armenian, Arabic and Church Slavonic) and its extensive manuscript tradition, within the Byzantine Empire itself the lawbook was tainted by the religious policies of its promulgators.[35] As the initiators of the First Iconoclasm, the legacy of both Leo III and Constantine V was condemned after the eventual triumph of the iconophile faction in 843. Rather than being subjected to a *damnatio memoriae*, these iconoclastic

[30] *Ecloga*, proem 6.
[31] Humphreys 2015: 118–25.
[32] Schminck 2015a: 469–74. I would like to express my thanks to Andreas Schminck for sharing this article with me.
[33] Humphreys 2015: 128.
[34] Humphreys 2015: 255.
[35] On the translation of the *Ecloga* into other languages see Burgmann 2005c: 50–1.

emperors occupied center stage in the iconophile narrative of their victorious struggle against them; Leo and Constantine became analogues to past heretical emperors such as Valens, with the former's Iconoclasm playing the same role as the latter's Arianism.[36]

Though in the first half of the ninth century some reworkings of the *Ecloga* attest to a continued interest in secular law, the so-called Amorian dynasty, including Basil I's immediate predecessor Michael III (r. 842–67), appears to have had no serious interest in law.[37] The decades that followed Michael's demise witnessed a rapid and unexpected period of engagement with the secular legal tradition. The impetus for the "Cleansing of the Ancient Laws," undertaken by Basil I and continued by his son, is described by the anonymous author of one of the principal histories of the period, the so-called *Vita Basilii*, a hagiographic whitewashing of the unscrupulous first emperor of the Macedonian dynasty. The characterization of the state of contemporaneous secular law in the *Vita Basilii* is very similar to that in the proem to the *Ecloga*, and indeed the phenomenon of a legal reformer finding the laws in a state of confusion and then correcting them is a well-known Byzantine *topos*.[38]

> 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 cleansing 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.[39]

According to the traditional dating schema, the first text published as part of the Macedonian codification effort, and likely the text which Basil commissioned in the aforementioned *Vita Basilii*, 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.[40] The first promulgation of the *Prochiron* is dated by most scholars to the "reign of the three emperors", that is, Basil along with his sons Constantine and Leo (870–9),

[36] Magdalino 1999: 145–6.
[37] Troianos 2001a: 241–2.
[38] The same *topos* of "correction" (*epanorthosis*) is used as well as the eleventh-century *Novella constitutio*; in general see Hunger 1964: 103–9.
[39] *Vita Basilii*, §33.
[40] The only existing English translation of the *Prochiron* is that of Freshfield 1928, which is essentially a paraphrase of the text.

and a newer interpretation suggests that a second version of it was distributed towards the end of the reign of Leo VI.[41]

The proem to the *Prochiron* is mainly a rationale for its creation. Its first thirty-two lines 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.[42] Law has been given by God to humankind as an aid.[43] While attempting to implement the divine injunctions for justice, the emperors undertook the present work. However, they realized that a comprehensive lawbook would be almost boundless.[44] 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, still other regulations were passed over in silence.[45] The didactic purpose of the handbook 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."[46] Perhaps with the didactic purpose of the

[41] The traditional dating schema for the *Prochiron* was challenged by Schminck 1986: 55–107, who argued that it postdated rather than predated the *Eisagoge*, and that the unnamed work which is attacked in the proem was the *Eisagoge* and not the *Ecloga* (see the discussion of the *Eisagoge* below) as most scholars had assumed. Schminck's arguments hinge on the assumption that the *Eisagoge*, generally believed to have been authored by the patriarch Photios, was anathematized because of its expansive views on the role of the patriarch and his relationship to the emperor, a topic he has expounded upon in other publications (e.g. Schminck 1985 links Photios' views on the roles of the patriarch and emperor to contemporaneous mosaics in Hagia Sophia). Schminck's views on the dating of the *Prochiron* were criticized ten years later by van Bochove 1996: 29–56, who upheld the traditional dating. 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* for the most part maintains the traditional dating: affirming Photian authorship, Signes Codoñer and Andrés Santos 2007 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*. For recent overview of the scholarly debate regarding the dating of the legal codifications stemming from the first few decades of the Macedonian dynasty, see van Bochove 2011.

[42] *Prochiron*, proem, lines 9–10.

[43] Ibid., lines 26–7.

[44] Ibid., lines 33–41.

[45] Ibid., lines 42–5.

[46] Ibid., lines 45–51.

work in mind, terms in Latin were rendered into Greek, therefore creating what are known as *exhellenismoi* in the secondary literature.[47]

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.[48] 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 laws which we have recently cleansed."[49] 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."[50]

Transitioning from presenting the rationale for its composition, in the proem a previous attempt at compiling a handbook similar in format to the *Prochiron* is vehemently criticized. This passage 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 commonweal, and [it is necessary] to be on guard against its fraudulence. 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 for the most part instituted reverence for the law? 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 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.[51]

[47] Ibid., lines 52–3.
[48] Ibid., lines 57–9.
[49] Ibid., lines 59–62. 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 Signes Codoñer and Andrés Santos 2007: 246–67. The evidence for such a project is tenuous and indirect, and the use of the phrase "The Breadth of the Laws" does not appear to have this narrow technical sense in later sources. Signes Codoñer and Andrés Santos do not however (quite understandably given the scope of the book, which is mainly concerned with the *Eisagoge*) claim to present a complete discussion, examining how the term is used in other sources which are analyzed in this study, particularly the *Peira* and the *Edicts* of the patriarch Alexios Stoudites.
[50] *Prochiron*, proem, lines 77–83.
[51] Ibid., lines 63–76.

In the last thirty years conflicting views have emerged as to the object of the proem's attack. Traditionally scholars believed that the *Ecloga* was clearly the target of this diatribe, yet this lawbook's continuing popularity and indeed the incorporation of some of its provisions (especially regarding marriage) into the other legal works of this period renders this interpretation in some respects problematic.[52] Another possibility is that it is in fact an attack on the patriarch Photios and his *Eisagoge*, and particularly the expansive powers delegated to the patriarch in the latter (see below).[53]

In view of the general thrust of the program of the "Cleansing of the Ancient Laws," the traditional view that the proem refers to the *Ecloga* is the most plausible interpretation. Law was not the only genre in which the emperors after the restoration of Orthodoxy in 843 sought to condemn the iconoclastic legacy while at the same time reemphasize the essential continuity of imperial authority before and after Iconoclasm.[54] An attack upon the *Ecloga* in the proem of the *Prochiron* conforms to the larger agenda of the founders of the Macedonian dynasty, whose rulers took great pains to present themselves as the restorers of an imperial legacy tarnished by the iconoclast emperors.

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 guild 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 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

[52] Signes Codoñer and Andrés Santos 2007 and Van Bochove 1996 are the contemporary representatives of this opinion.
[53] This is the view of Schminck 1986.
[54] This point is especially conspicuous in the wide-ranging study of Magdalino 1999.

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 (*ekloge*) of past legislation so much as an overthrow (*anatrope*) 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 "Cleansing 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 pre-iconoclastic emperors, the creators of the *Prochiron* were in effect cementing the continuity of the Macedonian emperors with their pious predecessors. Later lawbooks of the period built upon the *Prochiron*'s themes of rapprochement with the Roman past and the Hellenization of Roman law, two of the three strands of Byzantine legal culture as defined in this study. Yet it is the next lawbook according to the traditional dating schema, the *Eisagoge*, in which the role of Orthodox Christianity, the third thread of Byzantine legal culture, comes to the fore.

The *Eisagoge*

Traditionally, the second recapitulation of Justinianic law issued by the Macedonian dynasty is the *Eisagoge*, a shortened form of *Eisagoge tou nomou* ("introduction to the law"), incorrectly referred to within older literature as the *Epanagoge* ("return [to the law]").[55] All of the proposed datings for the work fall within the period 880 to 888.[56] The *Eisagoge*, or at least the proem and titles two and three, is generally assumed to have been authored by the patriarch Photios.[57] As is the case with the *Prochiron*,

[55] Schminck 1986: 12–14.

[56] Schminck 1986 presents his case for the issuing of the *Eisagoge* in 886; van Bochove 1996: 1–27 argues for the beginning of the period 880–3. Signes Codoñer and Andrés Santos 2007: 160–278, who thoroughly evaluate the relative merits of both Schminck's and van Bochove's arguments, adopt the broader period 880–8.

[57] On the issue of Photian authorship, see especially the pioneering studies of Scharf 1956; 1959. See also Dagron 2003: 236–42. Aerts et al. 2001: 138–40 rightly points out that it is difficult to reconcile Photios' authorship of the *Eisagoge* with that of a revision of *Nomokanon in Fourteen Titles*, some of the provisions of which contradict those of the *Eisagoge*. The latter attribution is probably not valid, or at least the case for Photian authorship of the *Eisagoge* is much stronger than that for the *Nomokanon in Fourteen Titles*.

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.[58]

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, itself a strong indication of Photian authorship. Indeed, biblical justification for the law, which is such a strong component in other proems, is completely absent from the introduction to the *Eisagoge*. The value of the present work, Photios states, is proven by its "most holy nobility."[59] Even in these first lines, the Macedonian dynasty's underlying goal of reaffirming the Byzantine Empire's connection with its late Roman past is affirmed – the validity of the lawbook lies not *ipso facto* in its utility, but rather in its pedigree 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" who gave man a mixed constitution composed of two opposing and antithetical natures, the "knowable" (*noeta*) and "perceptible" (*aistheta*). He introduced the "good law" to restrain and order his condition.[60] 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 one would recognize that that their source, God, is good and not wicked.[61] God gave the "good law" to teach man that God had banished the impiety of the sacrilegious "Manichaeans" – clearly a reference to the iconoclastic emperors – and introduced the power of the uniform monarchy.[62] 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.[63] The content of these opening lines of the *Eisagoge* mirrors the *Prochiron*'s narrative of a reestablishment 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 "cleansed everything remaining in the

[58] There is now also the very useful English translation and commentary of the proem in Aerts et al. 2001.
[59] *Eisagoge*, proem, lines 5–7. Cf. Aerts et al. 2001: 106–10.
[60] *Eisagoge*, proem, lines 7–12. Cf. Aerts et al. 2001: 109–11.
[61] *Eisagoge*, proem, lines 13–16. Cf. Aerts et al. 2001: 111.
[62] *Eisagoge*, proem, lines 17–23. Cf. Aerts et al. 2001: 111–12.
[63] *Eisagoge*, proem, lines 23–7. Cf. Aerts et al. 2001: 112–13.

breadth of the ancient laws, and mixed the mass of the law clearly and purely into forty books like a divine draught."[64] The *Eisagoge* then directly confronts the legacy of the *Ecloga* by lambasting the "babblings of the Isaurians."[65] Traditionally viewed as a condemnation of the content of the *Ecloga*, it has now been convincingly argued that this is in fact an attack on the caesaropapist tendencies of the proem of the *Ecloga*.[66] The *Eisagoge* via its clear delineation of the powers of the emperor and patriarch thus eliminated the dangerous precedent of the Isaurian priest-kings and their policy of iconoclasm. Unlike the *Prochiron*, the *Eisagoge* appears to have been given the force of law.[67] The legitimacy of the 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."[68]

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 cleansing 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."[69] 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

[64] *Eisagoge*, proem, lines 31–3. Cf. Aerts et al. 2001: 115–17.
[65] *Eisagoge*, proem, lines 33–6.
[66] Schminck 2015a: 474–8. Once again I would like to thank Andreas Schminck for this reference.
[67] Schminck 1986: 73–4; *Eisagoge*, proem, lines 41–2. Signes Codoñer and Andrés Santos 2007: 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.
[68] *Eisagoge*, proem, lines 45–6. Cf. Aerts et al. 2001: 120.
[69] *Eisagoge*, proem, lines 22-2.

activities are subordinated to a very new political project. "Novelty" was also a motif of Basil I's building program in the capital, highlighted by the construction of his magnificent "New Church" (*nea ekklesia*).[70]

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, such a view is undercut by the fact that Photios was 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 also 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 eleventh-century *Novella constitutio* (in which the more traditional biblical justification of law is utilized).

While the neo-Platonic turn of the proem of the *Eisagoge* offers a stark contrast to not only the legislation of the Isaurian dynasty but indeed all previous secular law, some of the content of the work is quite exceptional. Most noteworthy are the second ("On the Emperor") and the third titles ("On the Patriarch") of the *Eisagoge*, which present a unique Middle Byzantine schema for government.[71] While the vast majority of the provisions of both the *Prochiron* and the *Eisagoge* was based on Justinianic law, much of the second and all of the third titles are interpolations, written expressly for the *Eisagoge*. In the *Eisagoge*, the emperor and patriarch are figures of almost equal authority, the former possessing the highest authority in temporal and the latter in spiritual matters.

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*.[72] The *Sixty Books* in essentially the

[70] Magdalino 1987.

[71] The Spanish translation and extensive notes of Signes Codoñer and Andrés Santos 2007: 288–93 are extremely useful and discuss the more recent literature's views of these two titles.

[72] On the reign of Leo VI in general see Tougher 1997. 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*; Schminck 1986: 27–33; 1991a; Troianos 2011: 185–8. 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 (this document is

same form would later become known as the *Basilika* (so-called because they are the "imperial" lawbooks), although the term *Basilika* did not gain currency until the eleventh century.[73] 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 legal reform project of Leo VI from the later *Basilika*, which were supplied with extensive scholia that played a vital role in the text's interpretation.

The *Sixty Books* were promulgated early in Leo's reign on Christmas Day 888.[74] The preface to the *Sixty Books*, which was not included by the editors of the new Groningen edition of the *Basilika*, but is accepted by other scholars 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 recount Justinian's own legal reforms and list the various components of the Justinianic corpus: the *Digest*, *Institutes*, *Codex* and *Novels*.[75] Justinian's *magnum opus*, however, was not without its flaws: "thus our Majesty thought the state of the laws as it has been apportioned to be lacking with regard to both the elimination of the difficulty of studying the laws as well as to a clarification of their order."[76] Towards that goal, all of the useful portions of the law were gathered into six volumes; the way the *Basilika* is transmitted, either in six or (later) in four manuscripts, confirms the veracity of this information in the proem.[77] The parts

analyzed in Ch. 5) – probably John Xiphilinos, future patriarch and *nomophylax* of the "law school" founded by Constantine IX Monomachos; see Schminck 1986: 30–2.

[73] According to Schminck's theory, the *Sixty Books* were not exactly the same as the *Basilika* without the accompanying scholia (which in his schema were attached in the eleventh century), but actually contained some differences (particularly in book 60), and that textual witnesses to the *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 1996: 107–39 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 (ibid. 204). More recently, Van Bochove 2011: 262–6 has argued 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.

[74] Schminck 1989: 92–4. Schminck also believed that Leo VI's novels were promulgated at exactly the same time, but meanwhile Signes Codoñer 2009 has advanced some convincing arguments that the collection of 113 novels that has been transmitted to us is a very accidental and ad hoc assemblage of his legislation; see below.

[75] *Sixty Books*, proem, lines 5–15.

[76] Ibid., lines 15–17.

[77] Ibid, lines 19–20; cf. Burgmann 2002: 90.

of the Justinianic corpus which were not included in this collection were grouped into two categories: that which was contradictory and that which seemed superfluous.[78] 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."[79]

The proem to the *Sixty Books*, in contrast to the *Prochiron* and *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 *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 and beginning of the tenth century.

It is worth discussing what the *Sixty Books*/*Basilika* were as well as what they were not. They represented an almost completely Hellenized (though not absolutely so – they were still numerous Latin words and phrases) redaction of the *CIC* divided in sixty books (*biblia*), then further into titles (*titloi*) and chapters (*kephalaia*). More important is the realization of what the *Basilika* were not: 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*.[80] Yet 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 there is no firm basis for this and normative legal texts from this epoch 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 VI's *Sixty Books*/the *Basilika* invalidated older Justinianic law.[81] The

[78] *Sixty Books*, proem, lines 21–4.

[79] Ibid., lines 28–31.

[80] See Kazhdan 1991b: 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.

[81] This is the opinion of Berger 1954. Berger's contention that the *Basilika* invalidated Justinianic law was extensively refuted by Scheltema 1942.

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.[82]

In short, although the publication of the *Sixty Books*/*Basilika* represents the greatest achievement of the "Cleansing of the Ancient Laws," it was not an exclusivist endeavor: Byzantine legal manuscripts show that jurists continued to consult the Greek paraphrases and commentaries stemming from the age of Justinian alongside the *Basilika*.[83] It was not until considerably later, in a novel of Manuel I Komnenos (r. 1143–80) issued in 1166, that the *Basilika* were granted exclusive legal force. In the same vein the titular patriarch of Antioch and consummate canonist Theodore Balsamon (died after 1195) stated in a canonical response to the Greek Orthodox Patriarch of Alexandria Mark III that the Melkite community in Egypt was obliged to use the *Basilika*, even though they apparently had no access to it. These twelfth-century opinions on the absolute authority of the *Basilika* are outliers within the wider Byzantine secular law tradition in general, and do not reflect the understanding of the role of the *Sixty Books*/*Basilika* through the end of the eleventh century.

The *Novels* of Leo VI

To this point the program of the "Cleansing of the Ancient Laws" has delimited aspects of Byzantine legal culture for the most part indirectly. While the proems of the *Prochiron*, *Eisagoge* and the *Sixty Books* offer strong justifications for their composition (better organization and standardization of the written laws, translation into Greek), their contents by contrast differ little from the Justinianic corpus, the *Eisagoge* being only a very minor partial exception. The patrons of this codification project, Basil I and Leo VI, intent on appropriating the empire's legal legacy, generally avoided introducing new constitutions into these lawbooks. This conservatism corresponded to evolving sensibilities in theology, which were then applied to law, regarding the negative connotations of innovation or *kainotomia*.[84] This state of affairs changed drastically however during Leo VI's reign, as he issued perhaps as many 120 novels, although only 113 novels have been transmitted to us.[85]

[82] Scheltema 1935: 341.
[83] Burgmann 1999a: 598–9.
[84] See Ch. 3.
[85] Signes Codoñer 2009: 8–13 discusses the problem of the numbering of the novels and demonstrates that they were likely only given numbers in the tenth century or so. For the *Novels of Leo VI* in general surveys of Byzantine law for this period, see Pieler 1994: 330–3; *Novels of Leo VI*, 17–37;

The precise chronology of the novels is disputed; until recently most legal historians believed that Leo promulgated all his novels in a collection along with the *Sixty Books* on Christmas Day 888.[86] Several years ago a convincing study demonstrated that the *Novels of Leo VI* as they have been transmitted to us are in fact a heterogeneous collection of his legislation that was composed at different points in his reign.[87] This flurry of legislative activity was the most extensive of any emperor after Justinian.

While the works stemming from the "Cleansing of the Ancient Laws" to this point for the most part did not actually comment on the content of Roman law, the *Novels of Leo VI* specify what particular portions of the Justinianic corpus Leo found objectionable, and, in a limited number of cases, one finds corresponding reworkings in the *Basilika*.[88] The working formula of the vast majority of the novels is to begin with an inconsistency or problem in the Justinianic corpus, canon law or both and then to present a solution, via an abrogation, 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

Troianos 2011: 219–32; van der Wal and Lokin (1985): 86–7; Wenger 1953: 705–7. The only monograph dedicated to the novels, now almost a century old but nonetheless quite useful and often insightful, is that of Monnier 1923.

[86] This is the view of (among others) Fögen 1989; Lokin 1997; and Schminck 1989.

[87] According to Signes Codoñer 2009, who argues quite convincingly that Leo VI's *Novels* consist of four components: Part A (the proem and Novel 1) consists of two versions of an introductory constitution written at different points in his reign; Part B (Novels 2–68) is thematically organized, addressed for the most part to Leo's trusted advisor and father-in-law Stylianos Zaoutzes and was likely composed between 886 and 893; Part C (Novels 69–104) has no discernable order and was probably written in the period 893–9; Part D (Novels 105–13) has no addressees except Zaoutzes (Novel 111, which Signes Codoñer suggests was only a draft) and was the last section of the novels to be written. Note that the edition of the *Novels* cited in this study is the new edition of Troianos, which it is based primarily on the older edition of P. Noailles and A. Dain, although with some corrections as well as reference to Zachariä von Lingenthal's nineteenth-centry edition.

[88] Whether these interpolations were actually prompted by Leo's novels depends to a large degree on which chronology one accepts for the composition of the novels. Fögen 1989 makes the case that the composition of the novels accompanied the final stages of the completion of the *Sixty Books*. In total, Fögen found that of the seventy-two novels which criticize the Justinianic corpus, in twenty of these cases Leo's *Novels* indisputably led to interpolations in the *Basilika* (Fögen 1989: 28–9). The comparatively incomplete implementation of Leo's reforms is ascribed by Fögen to the 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 (Fögen 1989: 33–5). Signes Codoñer 2009: 1–8, however, casts significant (and well-founded) doubt on this theory.

accurately when the Divine Intent worked among their authors?"[89] 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 (Novel 22.16), then issuing another novel (Novel 117.8) which Leo read (incorrectly) as making certain exceptions to this rule.[90] Yet even in this context the Late Antique ruler is described as "that Justinian, whose piety and attentiveness toward his subjects honored [his] diadem."[91]

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.[92] Leo compares the laws to doctors, who hinder the coming of maladies and uproot evil.[93] As is common in human affairs, however, many of the laws had been forgotten, neglected or become contradictory.[94] Finding this unfortunate situation unacceptable, Leo then details how that he will rectify it. Although the word "cleansing" (*anakatharsis*) is not used, the methods Leo employs to correct the laws are consistent with the *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" (*lusiteles*) were granted the force of law again by imperial degree.[95] Those laws which by contrast were considered without benefit were either explicitly derogated or were left unmentioned.[96] Finally, customs which seemed reasonable were granted the force of law.[97]

The hearkening back to the empire's heyday under Justinian, a leitmotif of the entire program of the "Cleansing of the Ancient Laws," took an unusual turn in Leo's corpus of novels. Novel 1 compares Leo's own

[89] Leo VI, *Novels*, Novel 2, lines 9–12. On the attitude toward canon law in Leo VI, *Novels*, see Monnier 1923: 23–30.
[90] Leo VI, *Novels*, Novel 30.
[91] Ibid., lines 17–18.
[92] According to Signes Codoñer 2009: 16–18 the proem and Novel 1 constitute Part A of the *Novels* of Leo VI.
[93] Leo VI, *Novels*, proem, lines 10–14.
[94] Ibid., lines 14–25.
[95] Ibid., lines 26–32.
[96] Ibid., lines 32–6.
[97] Ibid., lines 36–40. Kaldellis 2015: 9–14 has argued that Leo's granting of the status of official law to certain customs somehow represents the exercise of constitutional power by the common populace. Leo's recognition of the legally binding precedent of custom is, of course, merely a Middle Byzantine example of a longstanding principle, in both Roman and Byzantine law, which gave custom legal force in certain circumstances. Yet since custom could only acquire legal force where no written law existed, one cannot plausibly argue, as Kaldellis does, that this represented an instance of popular will trumping imperial legislation.

efforts at legal reform with those of his illustrious predecessor, Justinian. 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 activity 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."[98] Yet 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,"[99] a 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.[100]

Legal historians have for the most part viewed the *Novels of Leo VI* as a curiosity that had a minimal impact on Byzantine society.[101] The testimony of Michael Attaleiates would seem to confirm the limited influence 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, excepting only those which were written without other laws already existing, or which were a supplement to the novels enacted by Justinian."[102] Only one of Leo's novels is included in the *Basilika*.[103] An anonymous history of Roman/Byzantine law, which was perhaps authored around the year 1080, likewise notes that few of Leo's *Novels* were actually in use, with the exception of his novels concerning distances between fishing nets (Novel 103) or between a new house and a field boundary (Novel 71), as well as regulations for houses in Constantinople.[104] 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

[98] *Leo VI, Novels*, Novel 1, line 22–4.
[99] Ibid., lines 33–4.
[100] Lokin 1997: 138–9.
[101] This tendency of the secondary scholarship to minimize the impact of Leo's novels was expressed already in the middle of the nineteenth century by Jean-Anselme-Bernard Montreuil, who stated that "ces Novelles n'ont eu dans la législation d'Orient qu'une autorité très secondaire, sans influence sur les principes généraux du droit." Montreuil 1843–6: vol. II, 290.
[102] Michael Attaleiates, *Legal Textbook*, proem, §6.
[103] *Basil.* 58.11.16 (Novel 71).
[104] *Legal History Treatise* 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." The novels of Leo VI referenced by the anonymous author of the treatise are nos. 71, 102–4 and 113.

at legislation.[105] The content of Leo's legislation, which treats some admittedly arcane subjects, likewise did little to dispel this notion: some of the topics include the consumption of blood (Novel 58) as well as precise building regulations and spacing requirements.

The negative verdict of legal historians on the relevance of Leo's novels illustrates the danger of examining legislation without taking into account the wider societal context. In fact, the *Novels of Leo VI* reflect this emperor's attempts to adapt the late Roman heritage to a Middle Byzantine context. Laws which restricted the use of clergy (Novel 4) and baptism (Novel 15) in private chapels were overturned, reflecting the increasing importance of privately endowed churches and monasteries.[106] Leo's legislation in this regard is reflected in the interplay between Middle Byzantine architecture and liturgy, as both became more private and closed in contrast to the public and processional nature of both in Late Antiquity.[107]

Leo's monastic legislation represents an attempt to make Justinianic law conform to the empire of his day.[108] It was precisely at this time that the Athonite monasteries began to become large landholders, mainly by acquiring and cultivating fiscally unproductive (*klasma*) land.[109] Byzantine society itself was much more monasticized in Leo's than in Justinian's epoch, with monks playing a more prominent role in the church, the economy, intellectual life and politics.[110] Although Leo did not attempt a comprehensive reform of Justinian's monastic legislation, he made some nods to contemporary monastic practice, for instance legalizing (under certain conditions) the acquisition of property after a monk was tonsured (Novel 5).[111] Monks and clerics were also given the legal capacity to serve as the guardians (*epitropoi*) of orphans, thus administering their property until the orphaned children became adults (Novel 68).[112]

Other innovations which Leo introduced grappled with more recent forms of Roman law, including the provisions which the Isaurian dynasty

[105] Monnier 1923: 204–7. Pieler 1994: 332 surmised that from a legal perspective Leo VI only in a few cases solved the problems he presents. Fögen 1987: 149–53, 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. Recently, Signes Codoñer 2011: 320–1 has underlined the importance of examining the novels in the wider context of Leo's literary oeuvre.

[106] Thomas 1987: 139–43.

[107] Mathews 1982.

[108] On Leo's monastic legislation see Granić 1931.

[109] Kaplan 1993: 485–6.

[110] Brilliantly analyzed for this period in Morris 1995.

[111] Granić 1931: 67–8.

[112] Granić 1931: 68–9.

introduced into marriage law via their lawbook, the *Ecloga*. Though the Isaurian dynasty and the *Ecloga* are not mentioned explicitly by Leo in his *Novels*, he did indirectly refer to some of the latter's regulations.[113] Novel 20 attacks some of innovations in marriage law found in the *Ecloga*, claiming that "These [regulations concerning prenuptial gifts], which seemed good to the ancients, were overturned by [their] successors."[114] 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.[115] Yet he praises Eclogian marriage law elsewhere in his legislation.[116] Notwithstanding the portrayal of the Isaurian emperors as despicable heretics by post-iconoclastic hagiography and historiography, Leo still thought it acceptable to enact some of the *Ecloga*'s provisions. Novel 32 concerns the punishment that should be meted out to adulterers caught *in flagrante delicto*, for which a constitution of Constantine I ordered that adulterers in question be put to death.[117] Though Leo admits that adultery merits a punishment, in his opinion, no less than that of murder, he finds the aforementioned constitution too harsh.[118] He then orders that a more humane provision (*philanthropotera psephon*), perhaps a reference to the *Ecloga*, which its promulgators touted as a selection of laws "with a more humane tendency" (*eis to philanthropoteron*), be enacted which mandates the amputation of the offender's nose.[119] Another novel (Novel 41) 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.[120]

Bridging the orthodoxy of the late Roman emperors with that of the Macedonian dynasts also meant confirming the validity of canons issued after Justinian's legal reforms. In the *CIC* the first ecumenical councils up to Chalcedon (451) were given the force of secular law by Justinian's

[113] Monnier 1923: 16.
[114] Leo VI, *Novels*, Novel 20, lines 23–4.
[115] Ibid., lines 54–8.
[116] Leo VI, *Novels*, 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 prenuptial possessions. The novel refers to *Ecloga* 2.5.
[117] *Cod*. 9.9.29.4: "Sacrilegos autem nuptiarum gladio puniri oportet."
[118] Apparently unknown to Leo was Justinian's *Nov*. 134.10, which had already abolished the death penalty for adultery.
[119] *Ecloga* 17.27. The *Ecloga* tends to proscribe amputation for offences which would have been met with the death penalty under Roman law.
[120] Leo VI, *Novels*, Novel 41; *Ecloga* 5.8.

Novel 131.1, yet there was no obvious provision within the Justinianic corpus which allowed the incorporation of canons from later councils. The *Novels of Leo VI* thus aimed at harmonizing post-Chalcedonian canon law, including Constantinople II (553) and III (680–1), for which no canons were issued until the Council in Trullo (691–2), Nicaea II (787) and the Apostolic Canons, the validity of which was confirmed by the second act of the canons of the Council in Trullo, with Byzantine civil law.[121] It is possible that the *Novels of Leo VI* led to an interpolation in the *Basilika*, since Justinian's Novel 131 was reworked so that the three post-Chalcedonian ecumenical councils were also given the authority of law.[122]

The actual content of the *Novels* demonstrates that the Macedonian codification program was not a mere regurgitation of Roman law. The "Cleansing 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 a betterment in certain respects. 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 *oikoumene* 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 Leo's novels one can deduce some of the importance which was attached to rehabilitating the spiritual authority of the emperor.

Unlike the law codes which have been examined in this chapter (the *Prochiron*, the *Eisagoge* and the *Sixty Books*), which for the most part represented recapitulations of Justinianic law, Leo's *Novels* represent an attempt to critically engage with the empire's Roman legal tradition and to harmonize seeming contradictions and obsolete rules as well as to legitimize

[121] Such is the conclusion of Troianos 1990 and 1997a: esp. 148–9, who has combed through the Leo VI's *Novels* and identified the influence of post-Chalcedonian canons.

[122] *Basil.* 5.3.2.

post-Chalcedonian canon law. Both of these aims were congruent with the Macedonian Dynasty's "Cleansing of the Ancient Laws," which was itself a part of a larger program of dynastic legitimation that included the reappropriation and renewal of *Romanitas*.

The *Epitome* (*Legum*)

The success of the Macedonian dynasty's efforts to reappropriate the Roman past and to place itself within the arc of Roman history can be found in a private lawbook compiled shortly after the death of Leo VI. The so-called *Epitome* (*legum*) ("Extract from the laws") was probably first authored in 912–13 before being extensively reworked in 921 during the reign of the usurper Romanos I Lekapenos (r. 920–44).[123] The designation *Epitome* (*legum*) is not supported by the manuscript tradition but is nonetheless overwhelmingly used in the secondary literature.[124] The *Epitome* appears to be an expanded version of the *Prochiron*. In adding relevant excerpts from the *CIC*, the author of the *Epitome*, Symbatios who is named in the proem (lines 66–7), evidently consulted the writings of the *antecessores* rather than the corresponding passages in the *Sixty Books*.[125] Little is known about this Symbatios and "the other pious and righteous men" mentioned in the proem, other than his rank (*protospatharios*) 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.[126]

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."[127] The *Epitome* thus begins a trend found in later Middle Byzantine lawbooks, which often give some sketch of Roman legal history and present contemporary legal works as successors to Roman antecedents.[128] 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

[123] In general see Moulakis 1963; Pieler 1994: 348–99; Troianos 2011: 190–3; van der Waal and Lokin 1985: 90; Wenger 1953: 709.
[124] Schminck 1986: 120–31; 1991b.
[125] Van der Wal and Lokin 1985: 90.
[126] For the case for Symbatios as author, see Schminck 1985: 129–31.
[127] *Epitome*, proem, lines 8–10.
[128] For example, the *Legal Textbook* of Michael Attaleiates and the *Synopsis legum* of Michael Psellos.

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. As noted in the introduction to this chapter, in the proem the story of the Twelve Tables is recounted, and via a clever interpolation that they were in fact originally written in Greek, Symbatios underlines Byzantine *Romanitas* – challenged as it was by papal and Carolingian claims that Latin, as the language of the Roman Empire, had long been abandoned by the Byzantines in favor of Greek.[129]

Symbatios gives a very brief synopsis of law during the republican period before moving on to the age of imperial Rome. Like Leo VI, Symbatios describes Justinian's codification effort, which was directed by Tribonian.[130] 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."[131] Symbatios then gives an overview of the codification effort: how Leo VI commissioned the *Sixty Books* and issued his *Novels*.[132] The result of the "Cleansing 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."[133] The legal codification project of the first two Macedonian emperors, Basil I and Leo VI, was thus brought to a successful conclusion – and as such sets the stage for the further examination of Byzantine legal culture in the rest of this book.

Conclusion

An analysis of the proems of the various texts associated with the Macedonian codification effort (respectively the *Prochiron*, *Eisagoge*, *Sixty Books* and the *Epitome*) along with the *Novels of Leo VI* has clearly delineated the goals and scope of the "The Cleansing of the Ancient Laws."

[129] Fögen 1998: 17–22.
[130] *Epitome*, proem, lines 56–8.
[131] Ibid., lines 58–61.
[132] Ibid., lines 62–71.
[133] Ibid., lines 72–4.

The impetus for the Macedonian codification effort consisted primarily of the need for dynastic, ecumenical and political legitimation in the 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 Cleansing of the Ancient Laws" is important for our understanding of Middle Byzantine legal culture both because it both 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. 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*.[134]

[134] In general see Ch. 4.