

Andreas Schminck (Frankfurt am Main), *Law Production and Application in the Period of the Emperors of the so-called „Macedonian“ Dynasty* Oxford, 27 May 2010

A general survey of Byzantine law has to begin with the statement that Byzantine law is substantially **Roman** law and, although largely written in the Greek language, has nothing to do with ancient **Greek** law. Roman law was mainly unwritten law, comparable to English common law, but not based on the precedents of judges but on the *responsa* of *iuris periti*, i.e. the answers or opinions of law experts. The classical period of this Roman juristic law, from roughly the beginning of the Christian era to about 250 A.D., was that in which such famous lawyers as Sabinus, Proculus, Celsus, Gaius, Pomponius, Papinianus, Paulus, Ulpianus and Modestinus flourished.

In addition to these *responsa*, in Republican times, *leges*, especially the *Leges duodecim tabularum* (the „Laws of the Twelve Tables“), and *plebiscita* (the resolutions of the *plebs*) were the most important sources of law. From the time of Augustus, *constitutiones* or *rescripta principum* (decisions of the emperors) took the place of *leges*.

These imperial constitutions were first gathered in private collections, the *Codex Gregorianus* and the *Codex Hermogenianus* from about 300 A.D. Then in the year 438, the Emperor Theodosius II published the „official“ *Codex Theodosianus*, which contains more than 2,500 constitutions from the period between 311 and 437 A.D.

Finally, the Emperor Justinian I (527 – 565) produced a new codification of the whole of Roman law. His work, called *Corpus Iuris Civilis* since the 16th century, was compiled by lawyers and professors of the law schools of Beirut and Constantinople under the direction of the „justice minister“ („Lord Chancellor“) Tribonian and consists of four parts: (1) the *Institutes*, a short introductory manual in four books; (2) the *Digest* (or *Πανδέκται*) in 50 books, the most voluminous and important element of the codification, which consists of so-called „fragments“ from writings of almost 40 Roman jurists; (3) the *Codex Iustinianus* in 12 books, containing constitutions of the emperors from Hadrian (117 – 138) to Justinian himself, the second edition of which, called the *Codex repetitae praelectionis*, was intended to complete the whole codification in the year 533. The fourth part did not belong to Justinian’s original codification. After discovering the pleasure of legislating, he continued to do so even after the completion of his work. Until his death he promulgated approximately 160 laws, the so-called „novels“ („*νεαπαί*“), which were later gathered with some laws of his successors Justin II (565 – 578) and Tiberius (578 – 582) in order to constitute the (private) *Collectio CLXVIII novellarum*.

The language of these four parts of the Justinianic *Corpus Iuris Civilis*, with the exception of that of the novels, was Latin, which remained the language of the law, the administration and the army in the eastern, Greek-speaking half of the Roman Empire. This language had to be learnt by students from the Greek east who attended one of the law schools of Athens, Alexandria, Antioch, Caesaria, Beirut and Constantinople, where they had to complete four years of studies, according to a programme exactly prescribed by Justinian (or rather Tribonian).

But since Greek students failed to master the Latin legal language, their professors drew up so-called *κατά πόδας* (literal translations), *Ἰνδικες* or *summae* (summaries), as well as *παραγραφαί* (explanatory notes), although Justinian had strictly forbidden all kinds of commentaries on his codification.

This ambitious course of legal instruction with such famous so-called *antecessores* as Theophilus, Dorotheus, Theodorus, Isidorus, Anatolius and Thalelaius seems to have broken down, in Constantinople not long after the death of Tribonian during the plague epidemic of the year 542, and in Beirut after the earthquake in the year 551 at the latest.

The breakdown of legal education entailed the gradual decline of legal science from the last years of Justinian's rule until the reign of the Emperor Heraclius (610 to 641), when four novels concerning ecclesiastical matters were issued as well as the famous *Nomocanon of 14 titles* (a new edition is in preparation by Bernard Stolte).

In the following so-called „dark ages“, from the beginning of the seventh to the end of the eighth or, more correctly, the second half of the ninth century, knowledge of the Latin language and legal science in general as well as Roman law in particular disappeared; in this epoch, the *Ἐκλογή* (*Ecloga*) of the Emperor Leo III (717 – 741), founder of the so-called „Isaurian“ dynasty, was promulgated, a poor „selection“ from the *Corpus Iuris Civilis*. This small law book is, as regards size, style and content, clear evidence of the decline and fall of Roman legal culture after Justinian's reign.

The Justinianic codification, the summit not only of Byzantine but also Roman, indeed of European and even global legal culture, had been discovered just before Basil I (867 – 886) came to the throne after assassinating his predecessor and friend Michael III (842 – 867).

Basil I was the founder of the so-called „Macedonian“ dynasty, although he did not originate from Macedonia but from the environs of Adrianople which was always a Thracian town. Basil's „Macedonian“ origin was invented by the Patriarch Photius in order to replace Basil's humble forefathers by noble ancestors belonging to the family of Alexander the Great. In this emperor's reign the plan was conceived to „purge“ („ἀνακαθαίρειν“) the *Corpus Iuris Civilis*, i.e. to substitute *versiones Graecae*, Greek translations, for Latin originals and to join together related materials from different parts of Justinian's codification. In this „ἀνακάθαρσις τῶν παλαιῶν νόμων“ the patriarch Photius was involved, one of the most important personalities produced by Byzantium. He was a great scholar, a real *uomo universale*, when he became the capital's new spiritual leader in 858 under Michael III. Just after Michael's assassination by Basil in 867, he was deposed by the new emperor and spent ten years in exile before being reinstated as patriarch by the same Basil in 877. Having held office for another nine years, he was deposed a second time by Basil's son and successor Leo VI, shortly after the latter's accession to the throne in 886.

Photius's influence upon the legislative efforts of the first „Macedonian“ emperor can be grasped in the *Εἰσαγωγή τοῦ νόμου* (because of a wrong reading in a late manuscript this work was known under the title of „Epanagoge“ for a long time): Photius wrote some parts of this „Introduction to the law“, in particular the preface and the famous titles 2 and 3 about the emperor and the patriarch where a remarkable theory about the two powers, *regnum* and

sacerdotium, is developed. According to this theory, the patriarch is not only on an equal footing with the emperor but he has, in a certain way, priority over him. This theory was formulated by the erudite and skilful patriarch some months before the death of Basil I in 886, and was an important reason for Photius' second deposition by Leo VI.

Leo VI the „Wise“ („ὁ σοφός“), who reigned from 886 to 912, completed the „purging of the old laws“ (the „ἀνακάθαρσις τῶν παλαιῶν νόμων“) by producing a new *Corpus Iuris Civilis*, entirely in **Greek** and better arranged in 60 books, a work later known as the *Βασιλικά*. It was finished in 888, within two years of Basil's death. In those same two years Leo issued most of his novels (there are approximately 118 all told), many of them in order to eliminate contradictions within the Justinianic codification as well as between Justinianic and later regulations, for example those decreed by the ecumenical council „in Trullo“ in 691. With the completion of the *60 Books*, the novels, which were collected in a corpus of 113 laws, and the *Ἐπαρχικὸν βιβλίον* of 912, Leo became the most important Byzantine legislator after Justinian I, whom he wanted to emulate, if not to surpass.

Almost two decades after the completion of the *60 Books*, in the year 907, Leo VI referred to the two parts of his codification, *i.e.* the *60 Books* and the novels, in the preface to his *Πρόχειρος νόμος*. This resembles in some respects the *Εἰσαγωγή τοῦ νόμου*, the first „Macedonian“ law code, which bore the influence of Photius and which came into force just before Leo's accession (probably at Whitsun 886). There is a strong element of polemic in the preface, directed against the Patriarch Photius, Leo's former teacher, whose *Εἰσαγωγή τοῦ νόμου* Leo detested because of its patriarchal seal, that is to say, the clerical spirit it breathed. In order to return to pure Justinianic legal doctrine, Leo VI eliminated all Photian innovations and falsifications, thus carrying out a new „ἀνακάθαρσις“ of the original purge instituted soon after Photius' deposition.

But Leo's legislation did not escape criticism in its turn. His *60 Books* were reputed (as Michael Psellus wrote in the eleventh century) to be „extremely obscure“ („ἄσαφές ἐσχάτως“). At approximately the same time a good part of Leo's novels was considered obsolete, as may be inferred from a text about Byzantine legal history, where it is said that „not all of them were in force“ („οὐ πᾶσαι πολιτεύονται“). The worst fate was reserved for the *Πρόχειρος νόμος*. It was abrogated immediately after Leo's death in 912. Among the law books intended to replace it, there was one compiled by Symbatius, who probably contributed to the *60 Books* as well as to the *Πρόχειρος νόμος*. In the preface to this work, known as the „*Epitome legum*“ of 913/14, Symbatius complimented Leo VI, calling him the „most serene“ („γαληνότατος“), „mildest“ („πραότατος“) and „mightiest“ („κράτιστος“) emperor, a „rhetorician among rhetoricians“ („ῥήτορα ἐν ῥήτορσι“) and a „philosopher among philosophers“ („φιλόσοφον ἐν φιλοσόφοις“), but he considered the *Πρόχειρος νόμος* in need of extensive revision. At the same time, in the second or third decade of the tenth century, two other law codes were compiled, the „*Eisagoge cum Prochiro composita*“ and the „*Eisagoge aucta*“. These three private law books were intended to supersede the *Πρόχειρος νόμος*, but failed to do so. Leo's work remained the most popular official law code, and has survived in almost 50 manuscripts.

Leo's *60 Books*, on the other hand, were, like the Justinianic compilation, much too voluminous to be left intact. Some parts are lost, while others can be partly reconstructed. But the most remarkable fact is that, in some cases, in particular in the first book, there exist not only two but three different versions of the same text, taken from the *Corpus Iuris Civilis*.

Because of the length of the *60 Books*, which were called „τὰ Βασιλικὰ“ from the middle of the eleventh century, an abridged version, known as the *Synopsis maior*, was produced in the second half of the tenth century, around 960. It was probably the work of the famous Symeon Logothetes or Metaphrastes. The material is arranged in alphabetical order. In the last third of the tenth century it was supplemented by appendices, containing mainly excerpts from fifty-six of Leo's novels and single laws issued by Leo's successors, the Emperors Romanus I Lecapenus, Constantine VII Porphyrogenitus, Romanus II, Nicephorus II Phocas, John I Tzimisce and Basil II.

Approximately 23 novels have survived under the names of the emperors of this „Macedonian“ epoch, down to the end of the dynasty at Theodora's death in 1056. The most productive legislator after Leo VI was his highly educated son and successor Constantine VII Porphyrogenitus (913-959) who issued eight novels during his personal rule (945-959). With the help of notes naming the editors of some of these novels it is possible to attribute them to different lawyers of the period: the *magistros* Cosmas, the *quaestor* Theophilus, the *quaestor* Theodorus Decapolites, and the *protasekretis* Symeon. For other reasons some of the surviving laws can be attributed to the Emperor Constantine VII himself, the *parakoimomenos* Basil Lecapenus, Eustathius Rhomaius and the scholar John Mauropous. Leo's two immediate successors, the usurper Romanus I Lecapenus and Constantine VII Porphyrogenitus, took the lead in promulgating a series of well-known novels restricting the acquisition of real estate by great landowners, the „δυνατοί“. Many other issues are dealt with, - military properties („στρατιωτικὰ κτήματα“), murderers, monasteries, duties payable on slaves, contractual penalties, court fees *etc.*

In the last decade of the first millennium the famous Byzantine judge Eustathius Rhomaius („Εὐστάθιος ὁ Ῥωμαῖος“) „flourished“. Born in the early sixties of the tenth century he may have lived until about 1030. His surname or rather nickname „ὁ Ῥωμαῖος“ is strange because the Byzantines called themselves „Ῥωμαῖους“, so that every Byzantine citizen was a „Ῥωμαῖος“. Probably Eustathius got this nickname because of his expertise in the „Ῥωμαϊκὴ τέχνη“, *i.e.* Roman law. Of his many judgments only three or four survive in their original form, but many others have been transmitted to us through the *Πεῖρα*, the most important source for the knowledge of the application of Byzantine law. This *Πεῖρα* was compiled by a junior colleague of Eustathius' around the year 1050.

Not least because of Eustathius' reputation, an official law school was founded by Constantine IX Monomachus. In a νεαρῶν composed by the famous scholar John Mauropous in 1047, John Xiphilinus was appointed „νομοφύλαξ“ („guardian of the law“) and chairman of the law school. In the novel Mauropous sings the praises of Xiphilinus but it is not very clear in what respect the new „νομοφύλαξ“ had rendered outstanding services to the legal science of his time. Of course, there are many *scholia*, *i.e.* explanatory notes, on the legal fragments or rather excerpts in the *Βασιλικά*, but this does not seem to be a sufficient reason

for the eulogies. So we have to assume that John Xiphilinus was more than a simple scholiast, namely the editor responsible for a new arrangement of Leos's *60 Books*. Another work of John Xiphilinus' is the *Tractatus de peculiis*, newly edited and translated by Marie Theres Fögen and Dieter Simon (in *Fontes minores X*). This cannot have been written by Eustathius Rhomaius, as was claimed by Demetrius Chomatianus in the thirteenth century (who is followed by the new editors). For Eustathius as a judge only wrote judgments, not legal treatises.

We are well-informed about the **application** of law at the beginning of the eleventh century, thanks to the *Πεῖρα*. There are two other Byzantine sources of comparable interest for legal historians, namely (1) the decisions of Demetrius Chomatianus, Greek archbishop of Ochrid in Bulgaria (today Macedonia) from the earlier thirteenth century, and (2) the register of the patriarchate of Constantinople from the fourteenth century. But the *Πεῖρα* is the most important source. Apart from it, very few judgments („ὑπομνήματα“) have survived, three or four texts by Eustathius Rhomaius as well as some other anonymous decisions.

All the judgements which have been preserved independently deal with problems of matrimonial law and marriage impediments in particular. The question whether relatives were allowed to marry became the most contentious of legal issues after the promulgation of the *Tomos* of the Patriarch Sisinnius II three years before the turn of the millennium. From the eleventh century onward there was a general rule that all blood, adoptive, and spiritual relatives to the 7th degree of relationship were prohibited categories (to the 6th degree for those related by marriage). The degree of relationship was determined by the number of intermediate generations or births („quot generationes, tot gradus“).

It is common to all these judgments – and the same is true for the legal treatises of the eleventh century – that they refer to the law („νόμος“), which is often quoted literally in a more or less correct form. Since the same legal excerpts are usually found in different law books, it is sometimes difficult to determine the exact source of the citation. But supported by the manuscript tradition of the law codes or, more exactly, by its richness or poorness, we can often identify the law book which served as the model for the passage in question. In the index of the „Repertorium der Handschriften des byzantinischen Rechts“ there are found 55 manuscripts of the *Synopsis maior*, and not less than 15 among them were written during the eleventh century.

Thus there cannot be any doubt that the *Synopsis maior* was the most widespread law book in the eleventh century, not to speak about the following centuries. So we can conclude that the *Synopsis maior* was the main source for all these judgments and treatises, including the *Πεῖρα*. On the other hand, considering the very high level of Eustathius' legal argumentation, it is virtually inconceivable that his juridical orbit was restricted to so mediocre a text as the *Synopsis maior*. It is likely that he searched the capital's libraries and archives for sophisticated texts from which to refine the common juridical discourse. There he would have found Leo's *60 Books* or at least parts of them. Perhaps he found even older texts harking back to Justinianic times.

In the third preface to the *Nomocanon of 14 titles*, dated to 1089/90, the author wrote that the „πολιτικοὶ νόμοι“ were taken from the „βασίλικα“ and from the „πλάτος“. This „πλάτος“ was not a special work distinct from the *Βασιλικά*, but can be described as the residue of the juridical literature of the sixth century which was conserved in later Byzantine times.

A very interesting palimpsest from the beginning of the tenth century has survived in the University Library of Basel (Switzerland) under the shelfmark B II 14. The *textus erasus* contains not only the oldest text of Theophilus' *Paraphrasis* of the Justianic *Institutes* (which are mainly conserved in four eleventh-century manuscripts) but also a mixture of legal excerpts taken from the *Digest* and the *Codex Iustinianus* with many more Latin words than in the *Βασιλικά*. Eustathius, applying the law, probably used manuscripts like the *Codex Basileensis* – in the same way as John Xiphilinus in the next generation, who, according to the novel issued on the occasion of his inauguration as „νομοφύλαξ“, was required to know both languages.

As author of his judgments Eustathius showed himself to be an excellent rhetorician, with a penchant for a metaphorical style. He did not, incidentally, shrink back from mentioning disgusting diseases. But Eustathius was mainly concerned with justice in the sense of fairness (δικαιοσύνη) and, in order to find it, he brought many νόμοι to bear. In this respect his legal argumentation did not differ from the reasoning of modern law courts.

Eustathius was a **civil** judge but there were also **ecclesiastical** judges who tried to extend their competence.

From the fourth century, the Byzantine Church developed a separate system of quasi-legal norms, the „κανόνες“, which were either issued by ecumenical or local synods or extracted from the writings of clerical authorities like the five Greek Fathers of the Church (Basil the Great of Caesarea, Gregory of Nyssa, Gregory the Theologian of Nazianzus, John Chrysostom and Athanasius of Alexandria). From the sixth century onward, these „κανόνες“ were gathered in collections and sometimes mixed with civil laws in so-called „*Nomocanons*“. These collections, which focussed on texts of the fourth and fifth centuries, were enlarged during the following centuries, when powerful patriarchs of Constantinople endeavoured to add their own writs to the corpus of authoritative canonical material.

Some years after Leo VI' fourth marriage, which caused a famous scandal in Byzantium, the Patriarch Nicholas I, who had been deposed by Leo and reinstalled by Leo's brother and successor Alexander (912-913), promulgated the *Τόμος τῆς ἑνώσεως* in the year 920, forbidding fourth marriages for good (until today). In 997 the patriarch Sisinnius II promulgated another fundamental law, introducing new marriage impediments among people related by marriage rather than kinship. Although this *Tomos* was criticized here and there, it remained the most often copied and quoted text of Byzantine law.

Apart from these quasi-legislative acts, the patriarchs of Constantinople issued many decisions in the „Macedonian“ era, dealing with a range of issues, but the main subject became and remained matrimonial law over which the Church claimed exclusive competence. Thus, for example, the famous Patriarch Michael I Keroularius, co-author of the Great Schism of 1054, promulgated a long decision about the interpretation of the *Tomos* of Sisinnius.

The **application** of norms by clerics did not differ fundamentally from that by civil judges, but it was natural that texts of ecclesiastical origin should play a more important part.

Sometimes patriarchs tried to get emperors to promulgate civil laws with clerical input. The most notorious case is that of the *Εἰσαγωγή τοῦ νόμου*, defining the relationship between emperor and patriarch in the following way (title 3, chapter 8): „Since the constitution („πολιτεία“), analogous to man, consists of parts and members, the highest and most necessary parts are the emperor („βασιλεύς“) and the patriarch („πατριάρχης“). For this reason the peace („εἰρήνη“) and happiness („εὐδαιμονία“) of the subjects in soul and body lie in the agreement („ὁμοφροσύνη“) and harmony („συμφωνία“) of kingship („βασιλεία“) and priesthood („ἄρχιερωσύνη“) in all respects.“

Leo VI did not approve of Photius' formulations and deposed him. In a similar way, he deposed Nicholas I, two decades later. Both patriarchs were – like Thomas Becket – not members of the clergy when they were appointed but good friends of the emperors who enthroned them. But the clash of powers was inevitable, in these cases as in many others.

Select Bibliography

The Oxford Dictionary of Byzantium, 3 volumes, New York and Oxford 1991

Pieler, Peter E., Ἀνακάθαρσις τῶν παλαιῶν νόμων und makedonische Renaissance, *Subseciva Groningana* III (1989) 61-77

Pieler, Peter E., Νομικὴ φιλολογία, in: Herbert Hunger, *Βυζαντινὴ λογοτεχνία (Ἡ λόγια κοσμικὴ γραμματεία τῶν Βυζαντινῶν)*, III, Athens 1994, 183-379

Repertorium der Handschriften des byzantinischen Rechts, I, Frankfurt 1995; II, Frankfurt 2010

Schminck, Andreas, *Studien zu mittelbyzantinischen Rechtsbüchern*, Frankfurt 1986

Schminck, Andreas, Zur Einzelgesetzgebung der „makedonischen“ Kaiser, *Fontes Minores* XI (2005) 269-323

Troianos, Spyros N., Ἡ προβληματικὴ τῆς νομικῆς γραμματείας τὴν ἐποχὴ τοῦ Πορφυρογεννήτου κατὰ τὴ νεώτατη ἔρευνα, in: *Constantine VII Porphyrogenitus and His Age*, Athens 1989, 87-102

Troianos, Spyros N., *Οἱ πηγές του βυζαντινοῦ δικαίου*, 3rd edition, Athens 2011

Zachariä von Lingenthal, Karl Eduard, *Jus Graeco-Romanum*, 7 volumes, Leipzig 1856-1884

Zachariä von Lingenthal, Karl Eduard, *Geschichte des griechisch-römischen Rechts*, 3rd edition, Berlin 1892