

**Castration and Eunuchs in the Byzantine Empire (6th-11th centuries):
A Study of Legal Sources**

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Summary

The purpose of this thesis is to draw a new picture of the history of eunuchs in the Byzantine empire through the comprehensive study of imperial legislation promulgated from the sixth century to the eleventh century. Eunuchs were one of the key components of the empire, especially known for their close relationship with emperors. This study complements the conventional study of eunuchs, which has depended on non-legal sources, with the perspective of Byzantine law and the imperial authority behind it, focusing on the transformation and continuity in imperial views towards eunuchs and castration.

This thesis is arranged in the following way. Chapter 1 provides a list of laws concerning eunuchs in laws codified and promulgated under the name of Justinian I (527-65) and compares it with the laws of the Isaurian emperors in the eighth century. Chapter 2 deals with the introduction process of a new form of punishment, mutilation of the penis, in the Isaurian legislation. Chapter 3 provides an overview of a legal project carried out in the Macedonian period from the end of the ninth century and compares it with that of the preceding emperors. The following three chapters examine the context of new stipulations concerning eunuchs promulgated by Leo VI (886-912). Chapter 4 examines laws prohibiting castration. Chapter 5 deals with the right of eunuchs to adopt. Chapter 6 studies marriages of eunuchs. Chapter 7 finally moves on to imperial decisions made by Basil II (976-1025), especially a decision which restricted the inheritance rights of eunuchs. This thesis concludes that the laws about eunuchs were transmitted between the later Roman empire and the middle Byzantine empire, reflecting a variety of changes which occurred in relations to the Byzantine empire, law, and eunuchs, especially, the Christianisation of Roman law and the integration of eunuchs in society.

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List of Abbreviations

<i>AA</i>	<i>Archives de l'Athos</i>
Athanas. <i>Apolog.</i>	Athanasius, <i>Apology for his Flight</i>
Athanas. <i>Hist.</i>	Athanasius, <i>History of the Arians,</i>
<i>Bas.</i>	<i>Basilika</i>
<i>BMGS</i>	<i>Byzantine and Modern Greek Studies</i>
<i>BF</i>	<i>Byzantinische Forschungen</i>
<i>CFHB</i>	<i>Corpus fontium historiae byzantinae</i>
<i>CSHB</i>	<i>Corpus scriptorium historiae byzantinae</i>
<i>CJ</i>	<i>Justinian Code (Codex Justinianus)</i>
Claud. <i>In Eutr.</i>	Claudian, <i>In Eutropium</i>
<i>CT</i>	<i>Theodosian Code (Codex Theodosianus)</i>
Cummings, <i>Rudder</i>	C. Cummings (tr.), 1957, <i>The Rudder</i> (<i>Pedalion</i>) of the Metaphorical Ship of the One Holy Catholic and Apostolic Church of Orthodox Christians or All the sacred and divine canons..., Chicago, 1957.
<i>Dig.</i>	<i>Digest</i>
<i>DOP</i>	<i>Dumbarton Oaks Papers</i>
<i>DOSt</i>	<i>Dumbarton Oaks studies</i>
<i>Eisag.</i>	<i>Eisagoge</i>
<i>FM</i>	<i>Fontes Minores</i>
Georg. Mon.	George the Monk
GMC	George the Monk (Continued)
<i>Inst.</i>	<i>Institute</i>
<i>JGR</i>	<i>Jus graecoromanum</i>
Joannou, <i>CCO</i>	P. -P. Joannou (ed. and French tr.) 1962, <i>Discipline générale antique (Ile-IXe s.), 1.1:</i> <i>Les canons des conciles oecuméniques</i> , Rome.
Joannou, <i>CPG</i>	P. -P. Joannou (ed. and French tr.), 1963, <i>Discipline générale antique (IVe-IXe s.), 2: Les</i> <i>canons des Père Greques</i> , Rome.

Joannou, CSP	P. -P. Joannou (ed. and French tr.), 1962, <i>Discipline générale antique (IVe-IXe s.), 1.2:</i> <i>Les canons des Synodes Particuliers (Ive-IXe s.),</i> Rome.
JÖB	<i>Jahrbuch der Österreichischen Byzantinistik</i>
Just. Apol.	Justin Martyr, <i>Apology</i>
Mich. Syr.	Michael the Syrian
NPNF 14	H. R. Percival (tr.), 1900, <i>The Seven Ecumenical Councils, Nicene and Post-Nicene Fathers of the Christian Church, Second Series</i> , vol. 14, New York and Oxford, repr. Peabody, 1995.
Nov.Jus.	<i>Novels of Justinian I</i>
Nov.Leo.	<i>Novels of Leo VI</i>
ODB	A. P. Kazhdan <i>et al.</i> (eds.), 1991, <i>The Oxford Dictionary of Byzantium</i> , 3 vols., New York and Oxford.
PBE 1	J. R. Martindale <i>et al.</i> , 2001 and 2015, <i>Prosopography of the Byzantine Empire I (641-867.)</i> Online edition available at: http://www.pbe.kcl.ac.uk/data/index.htm [Accessed: 3 September 2021].
PBW	M.Jeffreys <i>et al.</i> , 2017, <i>Prosopography of the Byzantine World, 2016</i> , King's College London. Online edition available at http://pbw2016.kdl.kcl.ac.uk [Accessed: 17 September 2021].
PG	<i>Patrologia cursus completus: series graeca</i> , ed. J. -P. Migne, 161 vols. in 166 pts., Paris, 1857-66.
PLRE 1	A. H. M. Jones, J. R. Martindale, and J. Morris, 1971, <i>The Prosopography of the Later Roman Empire Vol. 1, A.D.260-395</i> , Cambridge.
PLRE 2	J. R. Martindale, 1980, <i>The Prosopography of</i>

	<i>The Later Roman Empire Vol. 2, A.D.395-527,</i> Cambridge.
<i>PLRE 3</i>	J. R. Martindale, 1992, <i>The Prosopography of the Later Roman Empire Vol. 3, A.D.527-641,</i> Cambridge.
<i>PMBZ</i>	R. -J. Lilie <i>et al.</i> , 1998-2013, <i>Prosopographie der mittelbyzantinischen Zeit</i> , I: 641-867, 6 vols., II: 867-1025; 8 vols., Berlin. Online edition available at https://www.degruyter.com/database/pmbz/html [Accessed: 17 September 2021].
<i>PO</i>	<i>Patrologia Orientalis</i>
<i>Proch.</i>	<i>Prochiron</i>
Prokopios, <i>SH</i>	Prokopios, <i>Secret History</i>
Psellos, <i>Chron.</i>	Michael Psellos, <i>Chronicle</i>
Psellos, <i>Hist.Synt.</i>	Michael Psellos, <i>Historia Syntomos</i>
<i>REB</i>	<i>Revue des études byzantines</i>
Theoph.	Theophanes
Theoph.Cont.	Theophanes Continuatus
Theoph. <i>Inst.</i>	Theophilos Antecessor, <i>Paraphrase of the Institutes</i>
<i>TU</i>	<i>Texte und Untersuchungen</i>

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Introduction

Byzantine Eunuchs and Law

Preface

The existence of eunuchs was one of the remarkable features of the Byzantine empire.¹ Emperors from at least the fourth century onwards came to actively use eunuchs as chamberlains (*cubicularii*) in the imperial bedroom. In the later Roman empire, especially its eastern part, some eunuchs played important political roles as grand chamberlains (*praepositus sacri cubiculi*) of the emperors.² Even after the administrative system of the empire had gone through significant changes during the seventh century, eunuchs kept occupying important position in the imperial court and in administration.³ In particular, their political power culminated in the period between the tenth century and the eleventh century.⁴ In addition, Byzantine eunuchs took on important roles outside of imperial court. They played a military role as commanders of imperial troops especially from the sixth century onwards, in spite of prejudices that eunuchs were effeminate and unsuitable for military affairs.⁵ They were found in religious spheres such as the Christian church and monasteries.⁶ Further, eunuchs were sometimes used as private servants in elite or wealthy households.⁷ Accordingly, it is an unquestionable fact that the eunuch was one of the key components of imperial society.

The primary purpose of the current thesis is to draw a new picture of the history of eunuchs in the Byzantine empire from the perspective of Byzantine law and Byzantine emperors who used it. In particular, this thesis offers an analysis of how emperors understood eunuchs and the act of castration during the period from the reign of Justinian I (527-65) until the end of Macedonian dynasty (1056), focusing on legal sources codified and promulgated in

¹ Tougher 2008, 4; Messis 2014, 11.

² Dunlap 1924, 161-324; Guiland 1943, 214-9; Hopkins 1963, 62-80; Hopkins 1978, 172-96; Tougher 2008, 36-53.

³ Guiland 1943, 219-32; Sidéris, 2001; Tougher 2008, 54-67

⁴ Tougher 2008, 54-67.

⁵ Guiland 1943, 205-14; Stewart 2017, 33-54.

⁶ Guiland 1943, 202-5; Tougher, 2008, 68-95; Messis 2014, 119-207.

⁷ Ringrose 2003, 76, 82-3, 115; Tougher 2008, 33, 43.

the name of emperors. In the later Roman period, especially between the fourth century to the sixth century, Roman law offered an important guideline for solving any daily problems in the imperial territory. In particular, the later Roman emperors frequently legislated for a variety of contemporaneous issues, while such imperial legislation was one of significant means for emperors and their government to rule the empire, attempting to control specific activities of individuals through threatening them with punishments and sometimes through reform of the legal and social system in accordance with the contemporaneous situation.⁸ The most remarkable period in the history of the law of the later Roman empire was the reign of Justinian I. The emperor took the initiative in compiling old stipulations of Roman law, while he himself promulgated many new laws (novels) during and after the large codification project. The voluminous corpus of the Roman law produced then became the foundation of subsequent imperial legislation even after the roles and functions of law seemed to be changed as a result of the transformation of the empire itself during the seventh century. It should also be noted that the law of Justinian I was translated, interpreted, and redacted in the process of its transmission, sometimes modified or added to with totally new provisions. In the middle of the eighth century, Leo III (717-41), who was known as the founder of the Isaurian dynasty, promulgated the *Ekloga*. Moreover, several emperors in the Macedonian dynasty (867-1056) led the compilation project of earlier laws as represented by the *Basilika*, and promulgated new laws from the end of the ninth century to the eleventh century. It is a remarkable fact that various issues concerning the legal status of eunuchs and castration were dealt with in these legal works. The later Roman and Byzantine legislators had an interest in enacting laws about transactions of eunuch slaves and the lives of eunuchs (e.g. marriage and adoption). Furthermore, it is well known that emperors repeatedly promulgated laws which prohibited the act of castration in the empire, even though they used eunuchs in their court.⁹ However, in spite of the significance of legal evidence as a rich source of information, most modern scholars only use these laws subsidiarily because they tend to focus on eunuchs in historiographical and hagiographical sources. In this context, this present study will attempt to examine comprehensively legal clauses which mention eunuchs and castration in order to

⁸ For the nature of law in the later Roman empire, including imperial constitutions, see Harries 2001, 6-35, esp. 19-26. For general accounts of penal system, see Harries 2001, 118-52.

⁹ Guiland 1943, 196-201; Tougher 2008, 9; Rotman 2015; Kontani 2018.

make up for their lack of examination in the study of eunuch. This approach will enable the clarification of how eunuchs lived in the empire from a different point of view.

This analysis of eunuchs in legal sources during the period between the sixth century and the eleventh century will contribute to the understanding of the transformation and continuity of eunuchs in imperial society. For about five hundred years, the empire experienced various difficulties and changes, which could have had multiple effects on the imperial civil and military administration, economy, and religion: the ambitious attempts of Justinian I to recover Italy and Africa,¹⁰ the crisis in the seventh century caused by the Islamic conquests which led to the loss of imperial territory,¹¹ the social turmoil led by the controversy over 'Iconoclasm' from the eighth century,¹² and the territorial expansion and cultural prosperity during the Macedonian period from the end of the ninth century.¹³ In this course of transformation, especially in the period between the seventh and the eleventh century, the situation surrounding eunuchs also experienced significant changes. The domestic supply of eunuchs, who were traditionally supplied from foreign slaves, became noticeable, eunuch patriarchs appeared, and imperial offices reserved only for eunuchs were instituted.¹⁴ On the other hand, Byzantine legal sources are significant in that they can show a different kind of transformation of eunuchs with continuity in them. Most legal clauses in the Byzantine period were founded on the legacy of Justinian I; namely, the Byzantine legislators mainly cited or partly modified the laws promulgated in the reign of Justinian I, while they sometimes issued totally new provisions. Thus, the comparative study of law will be helpful in revealing which point in specific clauses had been changed from the preceding provisions in the sixth century. This approach will also be applied to the examination of laws concerning eunuchs, which shed light on how imperial views towards eunuchs and their legal status had been changed or unchanged during the period. Furthermore, it might be possible to speculate that these three aspects of transformation—the political and social situation of the empire, eunuchs, and the law—closely related to each other. Therefore, the close examination of legal sources will clarify the process and background of the transformation of eunuchs from a new

¹⁰ Maas 2005; Lee 2005.

¹¹ Haldon 1997; Louth 2008b, 221-50; Brubaker and Haldon 2011.

¹² Brubaker and Haldon 2011.

¹³ Magdalino 2011, 143-59; Chitwood 2017, 17.

¹⁴ Tougher 2008, 54.

perspective, reconsidering Byzantine eunuchs within the larger framework of transformation of the imperial society and law.

The current study will offer new views about the relationship between emperors and eunuchs in society from the perspective of the former. Imperial legislation is one of the few sources in the later Roman and Byzantine empires which directly informs us about what emperors and their government desired.¹⁵ Indeed, unlike historiography and hagiography, the laws concerning eunuchs definitely show that the emperors played an active role in fixing or changing the legal situation concerning eunuchs and infertile men, using the legal framework concerning eunuchs which had been drawn up by their predecessors. The emperors, especially Leo VI (886-912), who themselves had direct relationships with eunuchs, attempted to keep eunuchs in their norm or 'ideal' state through accepting or rejecting their specific activities. At the same time, the present thesis takes notice of the increasing integration of eunuchs in imperial society as an important factor in the changes in such legal attitudes of emperors towards eunuchs. As a result, such a subjective perspective of imperial government towards eunuchs is key in revealing what a eunuch was understood to be or should be in the Byzantine empire, in addition to the objective explanations of eunuchs in earlier studies of historiography and hagiography. On this point, this project will contribute greatly to not only eunuch studies but also studies of Byzantine society to which both emperors and eunuchs belonged.

Literature Review

Byzantine eunuchs have been studied from various aspects up until the present day. This prosperous situation of eunuch study can be regarded as a critical reaction to modern historians until the twentieth century who reproduced hostile views about eunuchs without questioning the biases of the primary sources or avoided studying eunuchs due to their discomfort about the act of castration.¹⁶ As an example of such historians, Edward Gibbon provided the notorious image concerning eunuchs in the later Roman and Byzantine empires,

¹⁵ The writings of the emperor Julian and the compilations initiated by Constantine VII Porphyrogenitos were exceptional cases.

¹⁶ For general reaction of modern historians to eunuchs in history, see Tougher 2008, 14-20.

that powerful and evil eunuchs governed weak emperors when he judged the reign of Constantius II (337-61) depending on prejudices against eunuchs in the fourth century.¹⁷ Under such circumstances of historical study, eunuchs in that period were gradually brought to the attention of scholars as a subject of academic research from the first half of the twentieth century.

The study of Byzantine eunuchs was started by scholars who were interested in researching the administrative institutions of the later Roman and Byzantine empires. An article by James Dunlap in 1924 examined the grand chamberlain of the later Roman and Byzantine emperors, an office to which eunuchs tended to be appointed.¹⁸ Rodolphe Guiland laid important groundwork for the study of eunuchs. A series of his works from the 1940s onwards offers substantial data on the prosopography of eunuchs and the offices and titles which they gained.¹⁹ In particular, his article titled 'Les eunuques dans l'empire byzantine. Etude de titulature et de prosopographie byzantines' (1943) provides an abundance of prosopographical information about numerous eunuchs in the church, army, and civil hierarchy from the fourth century until 1453, which helps our general understanding of eunuchs in the empire.

Significantly, in the 1960s Keith Hopkins introduced a sociological approach to the study of later Roman eunuchs in order to answer the question why eunuchs held enormous power in the imperial court from the fourth century onwards.²⁰ This question seemed to have originated from his criticism of the abovementioned idea of Gibbon which closely connected the emergence of powerful eunuchs with the 'weakness' of emperors; namely, based on the fact that there are powerful eunuchs even under powerful emperors, he persuasively argued that the power of eunuchs should not be ascribed to the 'weakness' of individual emperors but to other social factors.²¹ According to him, later Roman eunuchs, most of whom could not be assimilated into the aristocracy due to their barbarian and slave origin and their loss of family ties, served as scapegoats for emperors and as intermediaries between an isolated emperor and

¹⁷ Womersley (ed.) 1994, vol. 1, 684-5. Gibbon accepted the prejudices described by the fourth-century historian Ammianus Marcellinus. Tougher 2008, 14-6.

¹⁸ Dunlap 1924, 161-324.

¹⁹ Guiland 1943, 197-828; Guiland 1967.

²⁰ Hopkins 1963, 62-80; Hopkins 1978, 172-96.

²¹ Hopkins 1978, 180-1

the aristocracy while they served in close proximity to the emperors as chamberlains. His theory concerning the social position of court eunuchs that their power was derived from their closeness to the emperor gave an important perspective to subsequent studies.

From the end of the twentieth century onwards, the study of eunuchs was diversified, for scholars expanded the scope of study from eunuch servants in the imperial court to eunuchs in other spheres of imperial society such as the church, monasteries, and army. Moreover, there was an increasing number of studies concerning individual eunuchs who had occupied a remarkable position in Byzantine history, although some of these examinations had already been anticipated by Raymond Janin in the 1930s.²² In particular, Shaun Tougher published numerous important articles and monographs about eunuchs from the Roman to the Byzantine period.²³ His monograph in 2008 titled *The Eunuch in Byzantine History and Society* offered new groundwork for the study of eunuchs. It considered eunuchs in history as a whole, methods of castration and definitions of eunuchs, political and military roles of court eunuchs in the later Roman and Byzantine empires, eunuchs in religious positions, and images of eunuchs which contemporary men had, and comparing later Roman and Byzantine with eunuchs in other civilizations and cultures such as Islam and China. His arguments about Byzantine eunuchs will be referred to in the following chapters of this thesis on several occasions. Moreover, it is noteworthy that there was an increasing interest in eunuchs from the perspective of gender studies. Kathryn Ringrose especially conducted research on the gender of Byzantine eunuchs in some articles published from the middle of 1990s.²⁴ Finally, in her monograph published in 2003 titled *The Perfect Servant: Eunuchs and the Social Construction of Gender in Byzantium*, she has examined historical descriptions of Byzantine eunuchs and argued that eunuchs, towards whom later Roman authors had hostilities, were constructed positively as a third gender distinct from men and women in the middle Byzantine

²² Janin 1931 (John the *orphanotrophos*); Janin 1935 (Samonas); Brokkaar 1972 (Basil Lekapenos); Fauber 1990 (Narses); Long 1996 (Eutropius); Masterson 2019 (Nikephoros Ouranos).

²³ Tougher, 1997, 194-218; Tougher 2002; Tougher 2004; Tougher 2006a; Tougher 2006b; Tougher 2010; Tougher 2017; Tougher 2021. In addition, he edited a collection of papers about eunuchs titled *Eunuchs in Antiquity and Beyond*. Tougher (ed.), 2002.

²⁴ Ringrose 1994; Ringrose 1996; Ringrose 1999.

period.²⁵ According to her, the main factors of this change were on the one hand the gender transgression made by eunuch generals and officials who had undermined assumptions about the incapacity of eunuchs, and on the other the further integration of eunuchs into society as a result of the increasing number of eunuchs from within the imperial territory.²⁶ Her argument concerning eunuchs being a third gender was criticised by subsequent studies due to the oversimplification of multifaced descriptions of eunuchs. It has been pointed out by scholars that perceptions of eunuchs in society were more fluid than Ringrose suggests, for middle Byzantine sources contain a lot of negative stereotypes of eunuchs as well as positive descriptions.²⁷ However, her study did give an impetus to the examination of the positions of eunuchs in Byzantine culture and society. In France, George Sidéris, who did his PhD on eunuchs during the period between the fourth century and the seventh century,²⁸ has argued for the ‘trisexuation’ of Byzantine society in an his article published in 2010, considering that the physiological view of ‘un troisième sexe’, established by Galen, was accepted gradually by the Byzantines.²⁹ As a result of this, according to his argument, the specific identity of eunuchs as the third sex, a neutral being neither male nor female without spermatoc production or sexual desire, was gradually built up.³⁰ However, Charis Messis has reviewed descriptions of eunuchs from the fourth century through to the twelfth century in his monograph published in 2014 which came out of his doctoral thesis on Byzantine men, completed in 2006 at l’École des Hautes Études en Sciences Sociales. He rejected the idea that Byzantine sources give us a coherent picture of eunuchs as a unique sexual and social category, e.g. third gender and third sex.³¹ He has argued that the authors during that period could have chosen to construct eunuchs flexibly, both positive and negative or masculine and feminine, as rhetorical tools according to the needs of genres and goals of their texts.³² The

²⁵ Ringrose 2003.

²⁶ Ringrose 2003, 210-1.

²⁷ Tougher 2008, 96-118; Messis 2014. It is also argued that positive views towards eunuchs had already been contained in the later Roman sources. Sidéris 2002; Tougher 2008, 99-102.

²⁸ Sidéris 2001.

²⁹ Sidéris 2006, 243; Sidéris 2010, 77-100; Sidéris 2017, 145-206.

³⁰ Sidéris 2017, 205.

³¹ Messis 2014, 362.

³² Messis 2014, 367.

background of authors and their works were also taken into consideration by him; namely, he explains that friendly attitudes towards eunuchs in middle Byzantine sources did not result from the fact that eunuchs were accepted as a third gender, but reflected the contemporary situation that eunuchs occupied an essential place in the imperial palace and powerful eunuchs sometimes became sponsors of official texts.³³ He seems also to be sceptical about whether these texts could be helpful in clarifying the real life of eunuchs, for real eunuchs were an elusive and fluid subject hidden behind the rhetoric and the silence of Byzantine authors.³⁴ The idea of flexible images of eunuchs offered by Tougher and Messis is adopted by the present thesis. To sum up, the previous study of Byzantine eunuchs had been fundamentally developed from the close investigations of historiographical and hagiographical sources.

The analyses of legal sources did not occupy a major part of the study of Byzantine eunuch studies, whereas scholars' interest in the legal status of later Roman eunuchs has been increasing. Guiland provides a compact explanation of the treatment of eunuchs in Roman and Byzantine law: the definition of eunuchs, a series of imperial prohibitions on castration, restrictions on marriage and adoption, and Leo VI's permission for eunuchs to adopt.³⁵ In the field of legal history, however, research of Danilo Dalla on sexual incapacity in Roman law provides an extensive list of laws which dealt with male and female infertility, including castration, along with his commentary.³⁶ He collected the laws concerning the definition of sexual impotency, prohibition on the act castration, and legal acts of infertile people such as adoption, tutorship, making testaments, and marriage, mainly from the Roman civil laws, while he mentions the decisions of Byzantine emperors and canon law. Moreover, in his article published in 1994, Dieter Simon, as a legal historian, examined descriptions of laws concerning eunuchs in the twelfth-century text by Theophylact of Ochrid, now called *In Defence of Eunuchs*. Then, he provides a general account of the position of eunuchs in both civil laws and canon laws, referring to prohibitory laws against castration, novels of Leo VI concerning adoption and marriage of eunuchs, and canonical rules against castration. As a result, these studies are valuable works for the current study in terms that they provide an

³³ Messis 2014, 364-7.

³⁴ Messis 2014, 368.

³⁵ Guiland 1943, 199-201.

³⁶ Dalla 1978.

outline of the legal status of eunuchs in Byzantium.

In the late 2010s, two articles which focused on eunuchs in Roman law, were published, but the purposes and conclusions of these studies different from each other. Firstly, Youval Rotman aimed to analyse a paradox that Roman emperors, who harshly prohibited castration, employed eunuchs at the same time.³⁷ As a result of his examination of imperial prohibitions on castration, the civil and military roles of eunuchs, and laws about the family status of eunuchs, he concluded that emperors prohibited castration in order to accumulate eunuchs through confiscating castrated slaves from private slave owners who had ignored the ban. According to him, emperors needed to employ eunuchs, who had no power to procreate, as members of ‘a new type of non-hereditary aristocracy’ in the fourth and fifth centuries, so Justinian I denied the possibility of castrated men to adopt in his *Inst.* 1.11.9. Rotman’s argument is interesting, but there seems to be a problem that he tends to make all provisions concerning eunuchs converge on the relationship between emperors and their eunuch officials. Perhaps it might be true that these laws contributed to the accumulation of eunuch slaves in the imperial court or to create them a non-hereditary aristocracy, as Rotman argues. However, considering that the legal sources suppose various kinds of eunuchs, such as those who were castrated due to disease, it seems doubtful that these laws were intentionally designed for the abovementioned purposes. On the other hand, the second study is an article I published in 2018 concerning the treatment of eunuchs in laws compiled and promulgated during the reign of Justinian I, which provides the foundation of this thesis. The purpose of this article was to clarify how Roman legislators, especially Justinian I, dealt with castration and eunuchs through analysing comprehensive laws which were officially recognised as valid as a result of the major codification project of Justinian.³⁸ Differing from Rotman who considered that Roman laws exclusively concerned eunuchs who served as imperial officials, I have argued that the legislators, who had diverse views on eunuchs, emphasised their physical status as infertile men rather than their social roles as imperial servants. In addition, this article attempted to resolve the abovementioned contradictions concerning the prohibition on castration, distinguishing between the imperial attitude towards the act of castration and that towards those who had been castrated; namely, it concludes that legislators prohibited those who castrated others due to the risks of castration which could be equal to murder or injurious

³⁷ Rotman 2015, 129-50.

³⁸ Kontani 2018, 305-31. The laws assembled in this article will be listed in chapter 1.

assault and could make free citizens slaves, but they accepted those who had been castrated as victims. It should be noted that this study introduced a different approach to eunuchs from other previous studies which focused on eunuchs; namely, I mentioned that comparison between eunuchs and other categories of people such as slaves and freedmen could provide a new way of understanding the subject of eunuchs. For example, this article explained that the abovementioned Justinian I's prohibition against adoption by castrated men was partly derived from his and his commissioners' increasing necessity to add a detailed rule about adoption made by castrated men as a result of the improvement of freedmen status during his reign, because such an improvement could theoretically open a way for more castrated men, most of whom were freedmen or slaves, to adopt. As a result of this study, a general framework for understanding eunuchs in the sixth-century legal sources was created. The study in the present thesis concerning eunuchs in Byzantine legal sources will begin with this sixth-century legal framework of eunuchs.

The laws issued after the death of Justinian I seem to have attracted less attention from scholars seeking to grasp the contemporaneous situation surrounding eunuchs, probably due to the decreasing numbers of laws and the character of these laws. Ringrose takes a sceptical view of the reliability of legal sources as a means of examining the contemporary situation of eunuchs for the reason that law codes included both conservative and traditional laws, some of which were out of use, and new laws without distinction.³⁹ However, it is notable that some scholars found value in Byzantine legal sources when they studied Byzantine eunuchs. Sidéris used some legal clauses as one of the grounds of his argument that eunuchs were considered as a third sex.⁴⁰ According to him, referring to the laws concerning adoption and marriage of eunuchs, Justinian I and jurists made eunuchs a specific legal category distinct from men and women, and Leo VI explicitly distinguishes three types of 'γένος', which he interpreted as meaning three 'sexes', of men, women, and eunuchs.⁴¹ Messis, who criticised the inflexible interpretation of eunuchs, reviewed the secular laws of the later Roman and Byzantine emperors.⁴² He mainly covered prohibitions on castration from the early Roman empire until the reign of Leo VI, and two novels of Leo VI about

³⁹ Ringrose 2003, 26.

⁴⁰ Sidéris 2010, 90-1.

⁴¹ Sidéris 2002, 243; Sidéris 2010, 90-1; Sidéris 2017, 198-9.

⁴² Messis 2014, 97-105.

prohibition on marriage of eunuchs and permission for adoption by eunuchs. He judged that Leo VI's comment about a particular and unusual 'γένοϛ' of eunuchs was rather a rhetorical expression; therefore, he rejected Sidéris' view that Leo VI meant the legal recognition of a third sex of eunuchs.⁴³ He concluded that the Byzantine state, through its legislation, endeavoured to control the sources of supply of eunuchs and to protect marriage, of which the final goal was procreation, and to keep eunuchs subordinate to men through preventing marriage of eunuchs, which would threaten male roles in the social edifice.⁴⁴ In addition, according to him, the new provision of Leo VI, which gave eunuchs the right to adopt and the possibility to transmitting their property to legal descendants, should be considered as a compensation to faithful servants who are eunuchs.⁴⁵ As a result, these studies suggest the analysis of legal sources had a significance for grasping Byzantine legislators' views about eunuchs. These laws, however, need to be examined in much greater depth, and this is what this thesis will do.

The major problem in these previous studies, which focused on stipulations concerning eunuchs, is that the wider legal and social contexts behind these stipulations were not considered. It is an undeniable fact that the issue of eunuchs constitutes only a small part of the extensive collections of Roman law and novels of Byzantine emperors, which dealt with various issues raised in imperial society. Moreover, Roman laws were not necessarily static after the death of Justinian I but underwent some modifications in the course of the imperial compilation projects and legislation from the sixth century to the eleventh century. Why did Byzantine emperors and officials decide to or not to collect older laws in their compilation projects? Why did they have to change traditional laws or to issue new laws? What did the new laws concerning eunuchs and castration mean in the whole of society at the time of promulgation and for the whole legal structure in Byzantium? Some attempts of scholars to explain the social background of individual clauses will be helpful for considering these questions. Tiziana Creazzo's 'Le novelle di Giustiniano I e Leone VI sull' eunuchia: interesse politico o filantropia?' (2008), which is a comparative study of prohibitory laws against castration issued by Justinian I and Leo VI, paid attention to the difference of political background between these laws. In addition, Tougher briefly discussed why Leo VI issued

⁴³ Messis 2014, 103, n. 30.

⁴⁴ Messis 2014, 103-5.

⁴⁵ Messis 2014, 105.

new laws about eunuchs, pointing out a possibility that his legislation was motivated by his close connection to eunuchs and his sympathy for them caused by his desire for male offspring.⁴⁶ Referencing these cases of analysis, the current thesis will review all laws concerning eunuchs issued by the later Roman and Byzantine emperors in order to answer these questions. I believe that clarifying the legal and social contexts of these laws will enable us to consider the view of imperial government about eunuchs in more detail. Moreover, it will be able to draw a picture of its transition process in accord with that the transition of laws and imperial society after the death of Justinian I.

Recent studies of Byzantine law support this approach to eunuchs in the Byzantine legal sources. Scholars traditionally considered it harder to study the contemporaneous social context or social role of Byzantine law than that of the law promulgated in and before the reign of Justinian I.⁴⁷ This was because a major part of existing laws in the Byzantine period were the reworking of the Roman law compiled by Justinian I, because the number of new imperial laws dropped off from the seventh century, and because the fall of Egypt in 642 caused the loss of the evidence of papyri which informs us about legal practice in real life. Although Alexander Kazhdan proposed, as a historian, a ‘new history of Byzantine law’, which was an examination of the social practice of Byzantine law based on the analysis of various pieces of evidence other than normative texts, in his article published in 1989,⁴⁸ Bernard Stolte still took a somewhat pessimistic view of writing a social history of Byzantine law in his article ‘The social function of the law’ (2009).⁴⁹ However, it is notable that the later part of 2010s saw the publication of a series of monographs which focused on Byzantine legal sources as a means for researching contemporaneous imperial ideology and political context behind the legal compilations or novels of emperors. Mike Humphreys’ *Law, Power, and Imperial Ideology in the Iconoclast Era, c. 680-850* (2015) is an important attempt to reevaluate the significance of legal sources in the Isaurian period and to clarify the imperial ideology behind these sources. He has examined continuity and change of the Roman legal

⁴⁶ Tougher 1997, 202; Tougher 2008, 66; Tougher 2017, 232.

⁴⁷ Stolte 2009; Stolte 2015. Stolte mentions that the groundwork for the history of Byzantine law is Karl Eduard Zachariä von Lingenthal’s *Geschichte des griechisch-römischen Rechts* published in 1892. Stolte 2015, 364-6.

⁴⁸ Kazhdan 1989, 1-28.

⁴⁹ For his attitude towards Kazhdan, see also Stolte 1998; Stolte 2015.

tradition via the reformulation made by Justinian I through focusing on which stipulation the compilers of his period of study intentionally selected for their law books and which stipulations they did not. In the end, he concluded that the law of the Iconoclast era showed a significant continuity with the Roman law of Justinian I, but, at the same time, the more Christianised way of expression observed in the law of the Iconoclast era marked the ideological transformation of the empire in accord with its social and political changes. He also proved that emperors in the Iconoclast era could still use the law as a vital tool for their practical rule and demonstration of their ideology. Meredith Riedel showed how the religious faith of Leo VI impacted his decisions as a result of her study of Leo VI's literary output including his novels in her *Leo VI and the Transformation of Byzantine Christian Identity: Writings of an Unexpected Emperor* (2018). Her close reading of the novels, research of the social context behind them, and comparison of them with earlier legislation showed the emperor's attempts to make his empire an orthodox Christian polity. Such approaches to the contexts of imperial legislation will be adapted in the present study. Furthermore, Zachary Chitwood's *Byzantine Legal Culture and the Roman Legal Tradition, 867-1056* (2017) is significant. The aim of his study was to examine the law in the Macedonian era in its wider historical and social contexts, focusing on the interaction between official legal texts and various phenomena in society such as the imperial reform of law, legal practice and education, and the function of private law collections. In the conclusion of the monograph, he drew a picture of continuity and transformation in law from the reign of Justinian I through the period under the Macedonian dynasty, considering the interplay of three characteristics of Byzantine legal culture 'the Roman political legacy, Orthodox Christianity and Hellenic culture'.⁵⁰ First, the law of Justinian I, who considered himself and most of his subjects as Romans, emphasised the continuity from the Roman legal tradition, whereas the crisis in the seventh-century caused by Islam inspired the Isaurian emperors to describe their subjects as Christians and to emphasise the model of the Old Testament in the *Ecloga*. Thereafter, the Macedonian emperors inherited the Roman political legacy through their codification and legislative program, but the Roman legal tradition experienced some changes in its content in accord with a middle Byzantine context and Hellenization as a result of the translation of its Latin text into Greek. Regarding the aspect of Orthodox Christianity, Macedonian law was kept at a distance from the extreme Christian expression of Isaurian law, but Christianisation

⁵⁰ Chitwood 2017, 184-90.

of law continued to be advanced by the Macedonian legislators like Leo VI. Chitwood argued, however, that the growth of this aspect of law resulted in the line between secular law and canon law becoming gradually blurred. As a result, these studies are considerably significant for the present thesis in that they provide a fund of useful information about both the context and character of Byzantine legal texts, which probably affected the promulgation of each stipulations concerning eunuchs contained in such texts. Moreover, the transition process of Roman law shown by Humphreys and Chitwood serves as an important basis for our examination on the transition of laws concerning eunuchs from Justinian I to the end of the Macedonian dynasty.

In addition to these studies of imperial legal policies, there are studies of individual topics in Byzantine law, such as marriage, adoption, and inheritance. These laws drew the particular interest of scholars of the Byzantine family. Ruth Macrides published a series of articles concerning marriage, inheritance and procedures for establishing kinship ties (i.e. adoption and sponsorship) in Byzantium, in which she examined legal sources in the later Roman and Byzantine empires and revealed a detailed picture of the history of Byzantine family law.⁵¹ In his article titled ‘L’adoption dans le droit byzantin’ (1998), Constantin Pitsakis provides a detailed picture of the Byzantine law of adoption, e.g. nature and form of adoption and transition of the laws of adoption from the third century onward. Angeliki Laiou’s works on Byzantine marriage (*Mariage, amour et parenté à Byzance aux XIe-XIIIe siècles*) (1992) and ‘The evolution of the status of women in marriage and family law’ (2000) also have importance in that they include much information about the legal tradition and social practice of marriage, from which eunuchs were excluded. These studies provide valuable data for the current thesis which examines laws about eunuch marriage and adoption. Conversely, the current thesis will contribute to the field of study of Byzantine family law as a case study of eunuchs. Although the issue of eunuchs in Byzantine law did not tend to be focused on in previous studies of Byzantine family due to legal restrictions on marriage and adoption for them, our close examination of laws concerning eunuchs’ households will provide important data for enriching understanding of norms for family life and their transition in the Byzantine period.

In addition, there has been relevant research on specific law codes or law books. The

⁵¹ Macrides 1987 (godparenthood); Macrides 1990 (adoption); Macrides 1992 (dowry and inheritance); Macrides 2000 (adoption and godparenthood).

monograph of Thomas van Bochove titled *To Date or Not to Date: On the Date and Status of Byzantine Law Books* (1996) deals with various issues surrounding the date and purpose of the Macedonian legal project. Paul Magdalino's 'Orthodoxy and history in tenth-century Byzantine "encyclopedism"' (2011) provides a framework of the compilation projects initiated by Macedonian emperors as a whole, as a result of which the legal, hagiographical, and military compilations were published. Moreover, Spyros Troianos' 'Λέων ζ' ο Σπφός νομική σκέψη και κοινωνική συνείδηση' (2007) explains the background, structure and character of the *Novels of Leo VI*, and Nicolas Oikonomides' 'The "Peira" of Eustathios Rhomaios: an abortive attempt to innovate in Byzantine law' (1986) provides groundwork for studying the eleventh-century law book *Peira*. On the other hand, studies of individual emperors and dynasties are also helpful for the analysis of Byzantine law because they supply information on the political background of the imperial legislation; for example, the Isaurian emperors were examined in John Haldon's *Byzantium in the Seventh Century: The Transformation of a Culture* (1997) and Leslie Brubaker and John Haldon's *Byzantium in the Iconoclast Era c. 680-850: A History* (2011); Shaun Tougher studied Leo VI in his *The Reign of Leo VI (886-912): Politics and People* (1997); and the new legislation of Basil II (976-1025) was discussed in Catherine Holmes's *Basil II and the Governance of Empire (976-1025)* (2005).⁵²

Finally, studies of canon law should also be noted because the imperial legislation of the later Roman and Byzantine emperors was inseparably bound up with canon law. Scholars of Byzantine law focus on the interaction between the canons of the Council in Trullo (691/2) and imperial legislation, e.g. the study of Humphreys on laws in the Iconoclastic period and Spyros Troianos' 'Οι κανόνες της συνόδου «ἐν Τρούλλῳ»(Πενθέκτης) στις Νεαρές του Λέοντος ζ' του Σοφού' (2007). David Wagschal's *Law and Legality in the Greek East: The*

⁵² In addition to these monographs, handbooks and companions of Roman law and the later Roman and Byzantine empires are important. In particular, the current thesis sometimes refers to articles in Averil Cameron, *et al.* (eds.), *The Cambridge Ancient History Volume XIV: Late Antiquity: Empire and Successors, A. D. 425-600* (2000); Michael Maas (ed.), *The Cambridge Companion to the Age of Justinian* (2005), Elizabeth Jeffreys, *et al.* (eds.), *The Oxford Handbook of Byzantine Studies* (2008), Jonathan Shepard (ed.), *The Cambridge History of the Byzantine Empire, c. 500-1492* (2008), and David Johnston (ed.), *The Cambridge Companion to Roman Law* (2015).

Byzantine Canonical Tradition, 381-883 (2015) provides a picture of Byzantine canon law in its intellectual and cultural framework, along with an important indication about the relationship between civil laws and canons, as ‘similar, but not the same’.⁵³ *The History of Byzantine and Eastern Canon Law to 1500* (2012) edited by Wilfried Hartmann and Kenneth Pennington, is also helpful for the present thesis because it provides detailed information on the contents and backgrounds of canons issued in church councils during the Byzantine period.

Methodology

Again, the aim of this thesis is to draw a new picture of eunuchs’ history in the Byzantine empire from the perspective of Byzantine law and the imperial government behind it. The history of Byzantine eunuchs, whose existence was closely related to emperors, hitherto is reconstructed principally by the analyses of historiographical and hagiographical accounts, while legal sources have been used secondarily in eunuch studies. Thus, the comprehensive study of the legal status of Byzantine eunuchs hardly exists, and, as mentioned above, several questions concerning the legal stipulations concerning eunuchs (e.g. background, purpose, and impact), remain to be answered. In response to this situation, the present thesis focuses on Byzantine legal texts promulgated from the imperial government and demonstrates the legal position of eunuchs and the process of its transition from the later Roman period to the Byzantine period. This thesis will prove that close analysis of legal sources is vital for studying eunuchs in Byzantium, especially imperial views towards eunuchs.

The primary method which the current thesis will use is gathering and close reading of laws concerning eunuchs issued during the period between the reign of Justinian I and the end of Macedonian dynasty in 1056. This study covers this period because the period is characterised as that when the emperors had a degree of interest in Justinian’s legal legacy and eunuchs had a strong presence in Byzantine society.⁵⁴ ‘Byzantine law’ in this study means mainly the official normative texts which include the compilations of older laws made by order of emperors, as well as their own new laws. The main body of Byzantine law is the voluminous compilations of Roman law initiated by Justinian I and his numerous novels. The

⁵³ Wagschal 2015, 278.

⁵⁴ Cf. Tougher 2008, 54-67; Chitwood 2017, 184-90.

provisions collected in them, in which stipulations concerning eunuchs and castration were included, were transmitted, reinterpreted, or modified in later periods. Thus, the current thesis will gather and examine closely laws concerning eunuchs issued during this period in chronological order, focusing on what point in each law the legislator changed or left untouched from its preceding law. This analysis will clarify the transformation and continuity of the imperial view of eunuchs in their empire and the practice of castration and the status of eunuchs between the later Roman empire and the Byzantine empire.

In addition, the examination of each law in its wider context is necessary for answering the question why the imperial government decided to or not to compile the clauses concerning eunuchs and to promulgate new laws about them. The present thesis distinguishes between ‘legal’ context and ‘social’ context, while these two categories occasionally overlap with each other. The analysis of the ‘legal’ context is to compare the content of an individual law which deals with eunuchs and other related laws, both secular and canonical, which had already been known at the time of its promulgation or was issued contemporaneously. Moreover, if the law is included in a legal compilation, the character and ideological context behind the compilation should be taken into consideration, referring to the abovementioned studies of Byzantine law. On the other hand, the ‘social’ context means all other factors in society which could have contemporaneously affected the imperial decision: namely, the political and social situation of the empire, the situation surrounding emperors and eunuchs, and eunuchs’ roles in general and their relationship with emperors. This context will be examined mainly from evidence in historiographical and hagiographical sources, and the prosopography of individual eunuchs. The previous studies of eunuchs which refer to legal sources concerning eunuchs tend to focus only on what is written in the laws in question without mentioning the legal and social contexts behind these laws. The use of these methods, however, enables us to contextualise the transition of imperial legislation concerning eunuchs, or perhaps, that of the phenomenon of eunuch, in the history of Byzantine law and society. Furthermore, such contextualisation can prompt a reconsideration of previous understandings of individual legal stipulations concerning eunuchs.

Finally, it should be added that this examination will not aim to reveal how these clauses were circulated in imperial society through examining private legal collections published in the Byzantine period. This is a complicated problem because, as mentioned above, the new compilations and new legislation never invalidated the older ones. As for laws about eunuchs, private legal collections sometimes contain an older provision abolished by

novels. The issue of the impact of a specific provision — if the new law was totally opposite to the older one, namely, Leo VI's novel concerning adoption of eunuchs — will be considered in chapter 5 of this thesis. The current thesis, however, is not generally concerned with the actual impact of imperial legislation on the real life of eunuchs or its prevalence but rather values the fact that such legislation shows that the emperor and his government knew older laws and used them with new stipulations for controlling certain acts concerning eunuchs. As a matter of fact, Byzantine emperors were inseparable from the existence of eunuchs in that they probably communicated with many eunuchs who were chamberlains, military officers, or clerics. Thus, it is reasonable to say that their laws were mirrors that reflected their experience with eunuchs, their understanding of older laws, their ideology, and the social needs which they felt. In this respect, imperial legislation is an important source for the study of eunuchs to get a glimpse of what the emperors and his officials imaged and thought about eunuchs, whether the contents of these laws were known widely or not. That is the reason why the current study focuses on the compilations or novels promulgated under the name of emperors rather than on private legal collections.

Evidence and Sources

The main source for the current study is Byzantine law, namely, the official normative texts the majority of which were issued by the imperial government. These laws can be divided into two categories, compilations of older laws and new legislations (novels), and in the current study each category will be divided into three categories: laws of Justinian I, laws codified by the emperors of the Isaurian dynasty, and laws promulgated under the Macedonian dynasty. The most ambitious codification project is that undertaken at the request of Justinian I in 529-34, which consist of the *Justinian Code (CJ)*, the *Digest (Dig.)*, and the *Institutes (Inst)*. The *Justinian Code* is an updated compilation of imperial constitutions from the reign of Hadrian (117-38) until 534, based on the past compilations of *Gregorian Code* and *Hermogenian Code* during the reign of Diocletian (284-305) and the *Theodosian Code* by Theodosius II (408-50). The *Digest* is a collection of opinions of classical jurists mainly in the third century, which had been recognised to have the power of law. The *Institutes*, an updated version of the *Institutes* written by classical Roman jurists, such as the third-century jurist Gaius, was published as a textbook for use in legal education in law schools. These legal texts offer

fundamental knowledge of a variety of topics in Roman law, especially in the sixth century, including treatment of eunuch slaves, prohibition of castration in the empire, and the legal status and capacity of eunuchs. These compilations with the novels of Justinian I —the *Corpus Iuris Civilis*—were published at the end of the nineteenth century after being edited by Paul Krüger, Theodor Mommsen, Rudolf Schöll, and Wilhelm Kroll, although no complete manuscript from Justinian’s time remained except for survival of the one almost complete manuscript of the *Digest*, called the *Codex Florentinus Digestorum*.⁵⁵ Moreover, modern translations are available due to significant efforts of scholars, such as the translation of the *Institutes* by Peter Birks and Grant McLeod, Alan Watson’s translation of the *Digest*, and the new translation of the *Justinian Code* by Bruce W. Frier and his colleagues on the basis of the manuscript of the translation written by Justice Fred H. Blume. Thereafter, the laws compiled or issued by Justinian I were selected and rearranged in a concise form in the name of two Isaurian emperors, Leo III and his son Constantine V (741-75) and published as the *Ecloga* in 741. Although most of the provisions compiled in the sixth century were written in Latin (except for some Greek constitutions of Justinian I) the *Ecloga* used the Greek translation of the Justinianic law. In addition, the *Ecloga* contains stipulations different from the laws of Justinian, namely, new stipulations promulgated after Justinian I and canonical clauses. When it comes to eunuchs and infertile men, almost no provisions in the law of Justinian I were collected in the *Ecloga*, while a new penalty against criminals’ mutilation of the penis, was introduced. In any case, reproduction of multiple manuscripts of the *Ecloga* seems to indicate that the legal text was widely used.⁵⁶ There is an edition by Ludwig Burgmann published in 1983 with a German translation; thereafter, in 2017 Mike Humphreys published an English translation of the *Ecloga* with other laws. In the Macedonian period, the founder of the dynasty Basil I led the legal codification project, the *Eisagoge* (introduction) and the *Prochiron* (handbook). This project was completed by the promulgation of the *Sixty Books*, later known as the *Basilika*, in the reign of his son, Leo VI. These new Greek compilations of the older law, that of the laws of Justinian I, including his novels, and the *Ecloga*, are much more voluminous than that of the Isaurian period; in particular, the *Basilika* includes numerous provisions concerning eunuchs and castration collected in the sixth century. Harman Scheltema and his colleagues published an edition of the *Basilika* with its scholia.

⁵⁵ Kaiser 2015, 127-36.

⁵⁶ Stolte 2015, 364; Humphreys 2017, 18.

Unfortunately, sixteen books of the *Sixty Books* had been lost, but Scheltema's group reconstructed them from the quotations of these lost books contained in other legal texts such as the *Synopsis Basilicorum Maior*, an abbreviated version of the *Basilika* probably written in the tenth century.⁵⁷ Although the possibility should be kept in mind that the reconstructed texts might not be literally the same as the original texts of the *Basilika*, the present thesis will sometimes refer to them, signifying that the provisions were reconstructed ones. Thereafter, the *Epitome Legum* was written as a revision of the *Prochiron* by the author named Symbarion. The first edition was completed in the first year of the reign of Constantine VII the Porphyrogenitos (913/4) and the revised version was published in 921 during the reign of Romanos I Lekapenos (920-44).

In addition to these compilations of Roman law, emperors promulgated new laws concerning specific topics. Although these novels were not compiled officially, they informed directly which issues emperors were interested in. The 168 constitutions issued after 534, when the *Justinian Code* was promulgated, were collected as the *Novellae*, which with the above-mentioned three compilations of Justinian I are now called as the *Corpus Iuris Civilis*. In the *Novellae*, not only the novels issued by Justinian I but also the novels of his successors, Justin II and Tiberius II, are also included. However, the current thesis, which studies the novels promulgated during the reign of Justinian, will refer to them as the *Novels of Justinian* (*Nov.Jus.*) in order to distinguish them from novels issued by other emperors. Indeed, the two successors of Justinian I did not deal with eunuchs in their novels. There are three novels concerned with eunuchs and castration, which mention divorce due to a husband's impotence, the role of eunuchs in convents, and the prohibition of the act of castration in the empire. The *Novellae* were edited by Rudolf Schöll and Wilhelm Kroll as a part of the edition of the *Corpus Iuris Civilis*. Regarding the translation of these novels, there is now the valuable work of David Miller and Peter Sarris, published in 2018. Thereafter, Leo VI issued more than a hundred novels, three of which dealt with eunuchs and castration: 1) withdrawal of restrictions on adoption by castrated men, 2) renewed prohibition against castrating others in the empire, 3) prohibition of marriage between a eunuch and a woman. There are two editions of his existing 113 novels: the earlier one is edited by Pierre Noailles and Alphonse Dain with French translation (1944), then Spyros Troianos published a new edition along with a modern

⁵⁷ Stolte gave an updated and detailed explanation for the edition of Scheltema. Stolte 2021. For the *Synopsis Basilicorum Maior*, see Burgmann 1991, 1995.

Greek translation in 2007. After the death of Leo VI, the number of novels decreased. The novel of Basil II promulgated in 996, however, is partly relevant to this thesis because the legislator who prohibited the accumulation of land by the ‘powerful’, gave the act of a court official, who was probably a eunuch, as an example of the behaviour of the ‘powerful’. In addition, Basil II showed his hostility towards his deposed great-uncle, the eunuch Basil Lekapenos. This novel, which was edited by Nicolas Svoronos with French translation in 1994 and translated into English by Eric McGeer, will inform the imperial view towards eunuchs from the perspective of land holding and political power.

There are unofficial but important sources of Byzantine law. The legal professor Theophilos, who was one of the commissioners of Justinian I’s codification projects, wrote a Greek commentary on the *Institutes* of Justinian I titled *Paraphrase of the Institutes*. His detailed explanation of the definition of eunuchs is considerably instructive to the present study. There is a new edition produced by a team of Byzantine legal historians headed by Jan Lokin with a translation by Alexander Murison in 2010. In addition, the eleventh-century *Peira*, a collection of excerpts of Eustathios Romaïos who was a judge in Constantinople, is important, because it records a decision made by Basil II which restricts inheritance rights.

There is another kind of source which informs us about the situation of eunuchs around the emperors in the Macedonian era: Philotheos’ *Kletorologion*. This is a list of the order of precedence for imperial feasts. Philotheos, as an *atriklines*, officials who were in charge of observing the order in such feasts, produced this list for his colleagues in 899. This list was finally added as an appendix to Constantine VII’s *Books of Ceremonies*.⁵⁸ It is notable that Philotheos’ list includes eight eunuch titles and ten offices reserved for eunuchs. Therefore, the *Kletorologion* provides an important key to considering whether a man described with a certain title and/or office in the sources was a eunuch or not. We have an edition by Nicolas

⁵⁸ Tougher 2008, 57. Although the present author did not have access to the new edition of the *Book of Ceremonies* (G. Dagron, B. Flusin, and D. Feissel (ed. and French tr.), 2020, *Constantine VII Porphyrogénète: Le livre des cérémonies*, Paris), the review of Kaldellis informs us that the edition does not include the *Kletorologion*, which circulated independently. According to Kaldellis, however, the editors argue the *Kletorologion* is one of the texts which formed part of the expansion of the *Book of Ceremonies*. Kaldellis 2021 Available at: <https://bmcr.brynmawr.edu/2021/2021.04.27/> [Accessed: 25 October 2021].

Oikonomides with his French translation (1972) and an English translation published by Ann Moffatt and Maxeme Tall in 2012.

There is no doubt that imperial legislation connected closely with canon law. Justinian I allowed canons of oecumenical councils to have the power of law. In his novels, Leo VI attempted to incorporate provisions of canons with that of secular law. Thus, canon laws are important sources for researching Byzantine law. Eunuchs were mentioned in several canons from the fourth century to the ninth century. Canon 1 of the First Council of Nicaea (325) and three canons of the Canons of Apostles (21, 22, 23), which were probably collected around 380,⁵⁹ prevent those who have castrated themselves from being in or taking holy orders with a few exceptions. Canon 5 of the Council in Trullo (691/2) ordered that eunuchs shall not live with unrelated women. Moreover, canon 8 of the Council of Constantinople (861) incorporated the civil provision against those who castrated others. The present study will use Pericles-Pierre Joannou's editions of the canons except for the canons of the Council in Trullo. As for the latter, a new edition was produced by George Nedungatt and Michael Featherstone with translation. In addition, the translations of other canons by Henry Percival (1900) and Denver Cummings (1957) are also available in addition to Joannou's French translation.

The current study will frequently depend on prosopographical resources when it is necessary to know what role individual eunuchs or eunuchs as a group played at a certain period. There are several works of prosopography which offer rich biographical information and lists of key references concerning later Roman and Byzantine individuals. Regarding individuals in the later Roman period, the large-scale project led by Arnold H. M. Jones, John R. Martindale, and John Morris came to fruition as the three-volume publication of *The Prosopography of the Later Roman Empire* (1971-91, henceforth *PLRE*), which covers the period 260-641. They, however, mainly focused on the prosopography of office holders, so clerics, for example, were excluded. As for the biographies after 641, there are three works all of which also have online editions. The first is John R. Martindale *et al.*, *Prosopography of the Byzantine Empire I (641-867)* (2001 and online edition 2015, henceforth *PBE*), which collected biographies of every individual who existed from the beginning of the reign of Herakleios until the enthronement of Basil I, from Byzantine sources. In addition, Ralph-Johannes Lilie, *et al.*,

⁵⁹ Ohne 2012, 29.

Prosopographie der mittelbyzantinischen Zeit (1998-2013, henceforth *PMBZ*) is a comprehensive biographical dictionary for the Byzantine empire from 641 to 1025, including all Byzantines mentioned in both Byzantine and non-Byzantine sources and all persons outside the empire recorded in the Byzantine sources. As for the last decades of the Macedonian dynasty, *Prosopography of the Byzantine World, 2016*, which was produced by a group under Michael Jeffreys on the basis of the last two projects and covers the period between 1025 and 1180, is helpful. Although these prosopographical resources are helpful for studying eunuchs, there seem to be some contradictory or different interpretations of sources between them. Therefore, the present thesis will have to solve this problem in biographies of several eunuchs.⁶⁰

These biographical studies show that eunuchs and cases of castration were mentioned in various historiographical and hagiographical sources. It should be, however, noted that these sources hardly mention the legal status of eunuchs discussed in legal sources (e.g. marriage and adoption). Although it is impossible to discuss the detail of all such sources, the basic information of some sources, which the present thesis will mainly use needs to be explained here. For histories of the reign of Justinian I, the chronicle of John Malalas and the *History of the Wars* of Prokopios, both of whom were contemporaries of the emperor, inform us of interesting events during his reign. On the other hand, Prokopios' *Secret History* (*Anekdotai*) which is full of invectives mainly against the emperor and his empress, Theodora offers a different perspective of his reign, and the credibility of each event should be discussed. The period after the seventh century sees a decreasing number of contemporaneous sources. The chronicle of Theophanes the Confessor, which covers the period between 285 and 813, refers to eunuchs in the empire. In the west, the *Liber Pontificalis*, which is the record of pontificates from Peter to the late ninth century,⁶¹ offers valuable testament of eunuch eparchs of Italy appointed by Byzantine emperors. However, there are more historiographical sources for the Macedonian era, as represented by the chronicles of Theophanes Continuatus, George the Monk (Continued), Symeon Logothete, Leo the Deacon, John Skylitzes, Michael Psellos, and Michael Attaleiates. These sources offer various information about eunuchs, especially those who had exercised political or/and military power

⁶⁰ Tougher identifies 229 eunuchs in his list of 'select prosopography of late Roman and Byzantine eunuchs'. Tougher 2008, 133-71. This is also helpful for finding eunuchs.

⁶¹ McCormick 1991, 1223.

in the empire, but there is a question whether there were eunuchs which these Byzantine authors did not identify as eunuchs, because they had the option just to describe a eunuch as a man. Thus, the present thesis, as scholars such as Tougher have done, judges that a person who holds a title and office, which Philotheos considered reserved for eunuchs in his *Kletorologion*, was ‘probably’ a eunuch, in addition to people whom the writers described as eunuchs.

Hagiographical sources also mention eunuchs. The patriarch Ignatios in the ninth century, was a eunuch, whose *Life* was written by Niketas David the Paphlagonian probably, according to the argument of Irina Tamarkina, between 806 and 901/2.⁶² In addition, the author of the *Life of St. Basil the Younger*, probably written in the middle of the tenth century,⁶³ tells of the relationships between the saint and eunuchs in Constantinople. The author mentioned some names of eunuchs who really existed from the reign of Leo VI until the middle of the tenth century.

Eunuchs are also mentioned in other sources written by clerics and monks. In the sixth century, Paul Helladikos, the abbot of the Elusa monastery in Idumaea, mentioned a story about a eunuch in a letter. The ninth-century patriarch Photios wrote a letter to a eunuch whom he attacked.

Finally, there should be mentioned an unusual text: Theophylact of Ohrid’s *In Defence of Eunuchs*,⁶⁴ which was edited and translated into French by Paul Gautier in 1980. The Byzantine archbishop Theophylact wrote it to console his eunuch brother in the early twelfth century. This text consists of a dialogue between a monk who had traditional prejudices against eunuchs and castration and a eunuch who spoke in defence of eunuchs. Although this source tends to receive great attention in eunuch studies which attempt to clarify the social image(s) of eunuchs, the current study, which is focused on the analysis of imperial legislation up until the eleventh century, will not discuss its content in detail. However, this text deserves to be mentioned in the present study because it informs us how the supporter of eunuchs

⁶² Tamarkina 2006, 630. For Niketas David the Paphlagonian and the *Life of Ignatios*, see Jenkins 1965, 241-7; Karlin-Hayter 1970, 217-9; Paschalides 2004, 161-73.

⁶³ For the dating of the *Life*, see Sullivan *et al.* 2014, 7-8.

⁶⁴ Ringrose 2003; Tougher 2008, 108-9; Messis 2014, 321-36. For general accounts on the text, see Mullet 2002.

interpreted the prohibitory laws against castration promulgated in the later Roman period.⁶⁵

There are other kinds of evidence for studying Byzantine eunuchs, such as sigillographical evidence or visual evidence, although the current thesis does not use them much due to the different nature of these materials from legal sources. As for the former evidence, the prosopographical resources, especially the *PBE*, judge seals of court chamberlains as those of eunuchs, though it seems difficult to find more information than just their names and their offices. On the other hand, it is well known that there is visual evidence of eunuchs, such as mosaics and miniatures in manuscripts.⁶⁶ Chapter 4 of the current thesis mentions the creation of a mosaic of the eunuch patriarch Ignatios in the north tympanum of Hagia Sophia during the reign of Basil I, when it considers the relationship between the Macedonian emperors and eunuchs.

As for the referencing of these sources, the current thesis uses two different ways in accordance with the particular kinds of sources. The legal sources, including canon laws, are principally referred by numbers of provisions, while page numbers of modern editions are sometimes mentioned as well when it is necessary to indicate a certain part of each provision or to cite directly sentences of original Greek and Latin texts. On the other hand, page numbers of modern editions of other kinds of sources like historiographies are certainly provided because there are some sources which editors do not divide into chapters, or the numbering of chapters differs depending on editors.

Defining and Approaching Eunuchs: Castration and Male Infertility

It is necessary to return to the fundamental question: who is a eunuch? This seems a simple question, however it is difficult to answer due to the fact that later Roman and Byzantine sources use variant terms for eunuchs, a variety of categories and ambiguous definition in the sources. Therefore, we will provide basic information (cause, term, definition, and origins)

⁶⁵ Simon 1994.

⁶⁶ Tougher 2008, 23-4; 84-118 esp. 112-3.

about eunuchs here, focusing on the legal sources.

How did a person become eunuch? Castration surgery was the most famous way to make someone a eunuch. Although there is little information about the details of castration in the later Roman and Byzantine sources, the seventh-century physician Paul of Aegina exceptionally gives a detailed explanation of two methods of castration: compression and excision of the testicles.⁶⁷ This means that castration surgery in the later Roman and Byzantine empires meant the removal of testicles, not the penis, although the word ‘castration’ implies the removal of the male genitals. Moreover, Paul suggests that castration surgery was required for removing sexual desire from its patient; he mentions that castration by excision is preferred to compression of testicles for the reason that ‘those who have had them squeezed sometimes have venereal desires, a certain part, as it would appear, of the testicles having escaped the compression’.⁶⁸

The operation of castration was not only performed on those who were healthy but also on sick people.⁶⁹ Justinian I and Leo VI exceptionally allowed castration for treatment to be performed although they condemned those who castrated healthy people. Indeed, my study of the *Miracles of St. Artemios*, a collection of miracle stories in seventh-century Constantinople, argues that castration was possibly used as a medical procedure, such as for the treatment of hernias.⁷⁰

It is likely that castration surgery tended to be performed on children, while there are examples of the castration of adult men. The Byzantine encyclopedia *Suda*, written in the tenth century, indicates that it seemed unusual that adult men removed their testicles in order to become court eunuchs, citing an episode concerning the fourth-century *praepositus sacri cubiculi* Eutropius from the lost history written by Eunapius of Sardis, contemporary with Eutropius.⁷¹ Paul of Aegina indicates that castration by compression was performed for

⁶⁷ Paul of Aegina, 6.68. Tougher 2008, 30; Messis 2014, 40-5; Kontani 2018, 309.

⁶⁸ Paul of Aegina, 6.68, ed. Heiberg, vol. 2, 112; tr. Adam, 380. οὗτος ὁ τρόπος τοῦ κατὰ θλάσιν προκέκριται· οἱ γὰρ τεθλασμένοι ποτὲ καὶ συνουσίας ὀρέγονται μέρους τινός, ὥς ἔοικε, τῶν διδύμων ἐν τῇ θλάσει διαλανθάνοντος. Cf. Messis 2014, 42-3.

⁶⁹ For several cases of castration for health reasons, see Messis 2014, 40-1.

⁷⁰ Kontani 2017.

⁷¹ Eunapius, *History*, fr. 65.7 (*Suda* Σ 897), ed. and tr. Blockley 98-9. Ὅτι ἐπὶ Εὐτροπίου τοῦ

children of a tender age. In addition, the middle Byzantine empire saw several cases of political castration which was performed on young sons of rivals of emperors and dethroned emperors in order to disqualify future rivals to the imperial throne.⁷² There is, however, a possibility that adults were castrated for various reasons, such as disease and accident. They could be subjected to penal mutilation of their genitals according to imperial provisions (chapter 2). Moreover, earlier canons suggest that voluntary castration was undergone for religious reasons although the church prohibited such self-castration from the fourth century.⁷³ As for political castration, there is a notable but unusual case in which Michael V (1041-42) castrated his male relatives who were adults, or even fathers.⁷⁴ Regarding the physical characteristics of castrated men, as Tougher refers to, the studies of castrati singers who were especially popular in western Europe in the eighteenth century help our understanding. There are two explanations according to the age when castration was performed.⁷⁵ Eunuchs castrated before reaching puberty kept their voice high due to less production of male hormones.⁷⁶ In addition to this, there are other characteristics of such eunuchs: lack of beard growth, infantile size of the penis, long limbs, and a body shape like a female.⁷⁷ Those who had been castrated

εὐνούχου, τοῦ ἐπιτρόπου Θεοδοσίου τοῦ βασιλέως, τὸ τῶν εὐνούχων ἔθνος διὰ τὴν ἐκείνου βαρύτητα καὶ δυναστείαν ἐς τοσούτον ἐπέδωκε καὶ παρετάθη πλήθους, ὥστε τινὲς ἤδη καὶ τῶν γενειάδας ἐχόντων, εὐνοῦχοι βουλευθέντες καὶ Εὐτρόπιοι γενέσθαι προσελπίζοντες τῆς ψυχῆς ἀφηρέθησαν σὺν τοῖς ὄρχεσι, τὸ τοῦ Εὐτρόπιου ἀπολαύσαντες. ‘In the time of Eutropius, the guardian of the Emperor Theodosius, because of the former’s importance and power the tribe of eunuchs became so numerous that even some persons who had beards, in their eager to haste to become eunuchs and Eutropiuses, lost their wits and their testicles, enjoying the advantages of Eutropius.’ Eutropios was *praepositus sacri cubiculi* of the emperor Arcadius (395-408), so the author of this article made an error.

⁷² Krsmanović 2017. This kind of castration will be mentioned in following chapters.

⁷³ Kontani 2017. For self-castration performed in early Christianity, see Caner 1997, 396-415; Stevenson 2002, 123-42.

⁷⁴ Tougher 2008, 62. Psellos, *Chron.* 5.42.3-9, ed. Reinsch, vol. 1, 102; tr. Sewter, 146-7; Attaleiates, 4.3, ed. and tr. Kaldellis and Krallis, 17-9.

⁷⁵ Tougher 2008, 32-4; Messis 2014, 43.

⁷⁶ Peschel and Peschel 1987, 26-7; Jenkins 1998, 1877-8; Tougher 2008, 32.

⁷⁷ Hopkins 1978, 193-4; Peschel and Peschel 1987, 27-9, 33; Jenkins 1998, 1878; Tougher

after showing secondary sex characteristics seemed to be hardly affected by removal of their testicles.⁷⁸ On the other hand, as for the effect of castration on sexual potency, Tougher, who realised its uncertainty and individual differences, summarizes that prepubertal eunuchs hardly suffered from their sexual desire, while postpubertal ones who had a penis could experience erections and even ejaculations.⁷⁹ It might be likely that, as Rousselle mentions, eunuchs in the Roman empire were—the typical or true eunuchs—prepubertal eunuchs;⁸⁰ indeed the *Kletrologion* indicated the division between eunuchs (οἱ εὐνοῦχοι) and the bearded (οἱ βαρβᾶτοι).⁸¹

It should be noted that the words *spado* and *eunuchus*/εὐνοῦχος, which had the meaning of castrated man, could have the more inclusive meaning of infertile man who, whether his genitals were injured or not, had lost the capacity for procreation for various reasons. As a matter of fact, later Roman and Byzantine authors regarded a person whose genitals had been badly damaged in an accident in his childhood as a eunuch, e.g. the sixth-century military commander Solomon.⁸² Moreover, Messis argues that some pharmaceutical products, plants, and magic arts, were believed to cause a necrosis of male genitals and a loss of sexual capacity during the Roman and the Byzantine period.⁸³ On the other hand, the category of natural eunuchs or eunuchs by birth is known. This category might include men who had congenital defects affecting the penis or testicles.⁸⁴ Finally, as Messis mentions, a literary *topos* of those who were castrated by divine intervention to ensure sexual abstinence emerged in sources in the later Roman and Byzantine period.⁸⁵

Outlines of terms and definitions of eunuchs in legal sources should be briefly shown here

2008, 32.

⁷⁸ Tougher 2008, 32.

⁷⁹ Tougher 2008, 34; Messis 2014, 43. Tougher refers to Ayalon's study of eunuchs in Islam. Ayalon 1999, 316-25. Cf. Kuefler 2001, 34.

⁸⁰ Rousselle 1988, 124; Tougher 2008, 32.

⁸¹ *Kletrologion*, ed. and French tr. Oikonomides, 124.13-135.10, esp. 129.10.

⁸² Theoph. *Inst.* 1.11.9; Prokopios, *Wars*, 3.11.6, ed. and tr. Dewings, vol. 2, 102-3.

⁸³ Messis 2014, 43-4.

⁸⁴ Cf. Tougher 2008, 32-3.

⁸⁵ Messis 2014, 44.

before beginning the close examination of individual laws. It seems relatively easy to find how eunuchs were defined in the legal sources in comparison with sources of other genres. Although the definition and terminology of eunuchs was changeable due to various factors, there seems to be a principle in legal sources that eunuchs are considered as a category of infertile men.⁸⁶ My previous study of the legal definition of eunuchs used words of impotence/impotent in the sense of both incapacity for sexual intercourse and male infertility,⁸⁷ but it is better to replace this expression with infertility/infertile in the current thesis because the lawyers and legislators seemed to stress their capacity for procreation more than their sexual potency.

My past research shows that there are five terms, which can be translated as ‘eunuch’, in laws compiled in the reign of Justinian I: *castratus*/καστράτος, *eunuchus*/εὐνοῦχος, *spado*/σπάδων, *thlasias*/θλαδίας and *thlibias*/θλιβίας.⁸⁸ The classical jurists whose works were compiled in the *Digest* mostly used *spado*, although it is hard to distinguish it from *castratus*. The meaning of *spado* could be changed according to the context of each clause; namely, the word could mean all infertile men who had no power to become a biological father (whether infertile by nature or infertile as a result of accident and castration), castrated men, or non-castrated infertile men (at least when used in combination with the word *castratus* which means castrated man).⁸⁹ Moreover, *thlibias* and *thlasias*, derived from θλίβω and θλάω, are defined on the basis of the manner of castration; namely, these words probably mean men whose genitals were compressed rather than excised.⁹⁰ In the imperial constitutions collected in the *Justinian Code*, however, the word *eunuchus* tends to be used instead of *spado* and *castratus* and the verb *castrare* is also replaced with *facere eunuchus*/εὐνουχίζω.⁹¹ As for the word εὐνοῦχος, Messis mentions that there are mainly two etymologies in later Roman and Byzantine texts: εὔνους (well-minded, friendly) and εὐνήν ἔχω (guardian of bed).⁹² For example, the former is mentioned by the fifth-century bishop Theodoret of

⁸⁶ Although my previous study used the term of impotence.

⁸⁷ Kontani 2018, 309.

⁸⁸ Kontani 2018, 310-1.

⁸⁹ Kontani 2018, 310.

⁹⁰ Kontani 2018, 310. *Dig.* 50.16.128 (Ulpian, *Lex Iulia et Papia*, book 1).

⁹¹ Kontani 2018, 310.

⁹² Messis 2014, 31-2. Cf. Ringrose 2003, 15-6.

Cyrrhus who described that eunuchs were thought to ‘please’ emperors as their name indicated,⁹³ while the second etymology, which will be discussed in chapter 6, was derived from their role of caring for the bed of people of high social status.⁹⁴ In the end, the sixth-century law professor of Constantinople, Theophilos, organised these words and provided clearer definitions for the different types of male infertility in Greek. He suggests that the word εὐνοῦχος was a general term meaning those who were incapable of procreating. He divided it into three categories: σπάδων, καστράτος and θλιβίας. Introducing the word εὐνοῦχος, Theophilos redefined σπάδων as a non-castrated infertile man who was ‘prevented from begetting children by some derangement or chillness troubling the genital organs’,⁹⁵ unlike the Latin word *spado*. Then, he stated that θλιβίας was a man who had a part of his genitals accidentally crushed by his nurse or mother and καστράτος was a man whose genitals were mutilated.⁹⁶ It should be noted that he distinguished σπάδων from καστράτος and θλιβίας on account of the possibility of recovery from genital disability, categorising those who can potentially regain reproductive ability σπάδων and those who permanently lost the ability καστράτος and θλιβίας.⁹⁷ It is noticeable that these legal sources did not think much about when a person became a eunuch or infertile, in other words, whether a person became a eunuch before puberty or after. On the other hand, there are some suggestions that lawyers and legislators had an idea that eunuchs could be made in their childhood, for *Dig.* 9.2.27.28 (Ulpian, *Edict*, book 18) mentions the castration of a slave boy (*puer*) and Theophilos explains that a θλιβίας was made by his nurse or mother.

The abovementioned terminology concerning eunuchs was passed on to the Macedonian era. This means that the ambiguous definition of *spado*/σπάδων was also

⁹³ Theodoret, *History of Monks*, 8.9.3-4, ed. Canivet and Leroy-Molinghen, vol. 1, 392.1-4; tr. Price, 77. Εἷς δέ τις τῶν οὔτε εἰς ἄνδρας, οὔτε εἰς γυναῖκας τελούντων, ἀλλ’ ἀφηρημένων τὸ τῷ χρόνῳ γενέσθαι πατέρες, καὶ τοῦτου εἵνεκα εὐνοεῖν βασιλεῖ νομιζομένων καὶ τὴν προσηγορίαν ἐντεῦθεν καρπούμενων, ... Theophylact of Ohrid mentioned this etymology in the twelfth century. Theophylact of Ohrid, ed. Gautier, 309.14-5; tr. Gautier, 308.

⁹⁴ Messis 2014, 31-2.

⁹⁵ Theoph. *Inst.* 1.11.9, ed. Lokin *et al.*, 92.4-5; tr. Murison, 93. καὶ σπάδωνές εἰσιν οἵτινες διὰ τι πάθος ἢ ψῦξιν ἐνοψχλήσασαν τοῖς γονίμοις μορίοις παιδοποιεῖν κωλύονται, ...

⁹⁶ Theoph. *Inst.* 1.11.9, ed. Lokin *et al.*, 93.9-15. Kontani 2018, 310-1.

⁹⁷ Kontani 2018, 326-8.

maintained. The *Basilika* seemed to compile the provisions in the law of Justinian through using its Greek translation without establishing consistency of terminology. Accordingly, the Latin word *spado* is transliterated as σπάδων or translated as εὐνοῦχος,⁹⁸ but *castratus* is translated as εὐνοῦχος or ἐκτομίας.⁹⁹ In addition, the Latin word *eunuchus* which appears in the *Justinian Code* is also transliterated as εὐνοῦχος.¹⁰⁰ The situation became more complicated because Theophilos' three divisions of εὐνοῦχος was probably known at that time.¹⁰¹ Accordingly, the *Basilika* seems to show that the general use of *spado* in the *Digest* which covers infertile men as a whole was nearly replaced by the word εὐνοῦχος, as Theophilos had already explained. On the other hand, Leo VI only used the word εὐνοῦχος in his novels (*Nov.Leo.* 26, 27, 98), probably in the sense of castrated man.¹⁰²

To conclude, legal sources, especially in the reign of Justinian I, showed that the word εὐνοῦχος in the legal sources did not exclusively mean castrated man. Therefore, it is necessary to examine eunuchs as a part of the category of infertile men in order to understand them in the context of Byzantine law. The present thesis will generally use the word eunuchs in the sense of castrated men, while the words 'infertile men', 'castrated men', and 'non-castrated infertile men' will also be used in order to express the various categories of eunuchs in the law.

This definition of eunuchs will also define laws of eunuchs in Byzantine law. The present thesis assembles laws of eunuchs in accordance with the following criteria: 1) laws in which eunuchs and infertile men are dealt with, 2) laws which mentioned damage to or loss of male genitals, 3) laws concerning men who could not easily beget children because of themselves.

As for terminology in historiographical sources, Messis gives an outline.¹⁰³ He mentions that the word εὐνοῦχος was the most common, while θλαδίας, θλιβίας, and καστράτος were rarely

⁹⁸ *Bas.* 19.10.6-7 (*restitutus*), 29.1.35, 48.2.14, 33.1.40 (*restitutus*), 35.8.6 (*restitutus*), 38.1.15.

⁹⁹ *Bas.* 48.2.14, 49.1.6, 60.3.27.28.

¹⁰⁰ *Bas.* 48.14.4.

¹⁰¹ *Bas.* 33.1.59 (*restitutus*) = *Synopsis Basilicorum Maior*, E. 43.3, Y.3.5.

¹⁰² The terminology concerning eunuchs in the *Novels of Leo VI* will be discussed in detail in chapter 5 and chapter 6 of this thesis.

¹⁰³ Messis 2014, 31-40.

used; instead of καστράτος, the word ἐκτομίας was frequently used.¹⁰⁴ According to him, the word σπάδων was also widely used, but its meaning is uncertain; this word came to be used as a synonym for ἐκτομίας/ἐντομίας (castrated man) until the middle Byzantine period.¹⁰⁵ He, however, suggests a difficulty in judging whether these terms were used for expressing specific types of eunuchs or used simply as a synonym for infertile men as a whole without any distinctions between the types of castration.¹⁰⁶ Therefore, it seems that Byzantine sources, including legal sources, did not necessarily use the word eunuch for describing those who had been actually castrated. In addition, Messis concludes that the authors of these sources, who, according to him, did not have any intention to record the reality of eunuchs, chose each term for stylistic and ideological reasons.¹⁰⁷ In any case, the present thesis supposes that specific figures, whom Byzantine authors described with the abovementioned words, could have been subject to laws concerning εὐνοῦχος.

It is difficult to provide a comprehensive picture of the origins of castrated men in the later Roman and Byzantine empire for two reasons. Firstly, the information about their origins is biased towards that of eunuchs in the imperial court. In addition, even when authors of our sources discussed individual eunuchs, they did not always mention the personal background of these eunuchs. The studies of Tougher and Messis, however, provide helpful information for considering where eunuchs came from.¹⁰⁸

The origins of eunuchs, in the sense of castrated men, can be distinguished between foreign and native extraction. In the later Roman period, authors tended to mention the foreign origins of eunuchs, such as from Persia, Armenia, and Abasgia.¹⁰⁹ This probably means that these eunuchs were supplied as eunuch slaves, mainly from the east. Prokopios reports that Abasgia, on the eastern shore of the Black Sea,¹¹⁰ supplied most of the eunuchs in the imperial court until when Justinian I, who had secured sovereignty over Abasgia, stopped

¹⁰⁴ Messis 2014, 35.

¹⁰⁵ Messis 2014, 35-6.

¹⁰⁶ Messis 2014, 35.

¹⁰⁷ Messis 2014, 40.

¹⁰⁸ Tougher 2008; Messis 2014, 45-52.

¹⁰⁹ Scholten 1995, 28-33; Tougher 2001, 144.

¹¹⁰ Garsoïan, 1991, 3.

the kings from creating and selling Abasgian eunuchs.¹¹¹ On the other hand, as we mention in chapters 1 and 4, a series of imperial prohibitions against castration in the empire suggests the possibility that castration was performed on those who were born in the empire, for various motives.

Byzantine sources suggest that the new situation seemed to occur gradually, namely, the domestic supply of eunuchs became noticeable.¹¹² It is true that the foreign origin of eunuchs (i.e. Persia, Slav, Arab, and Scythian) are still reported in sources,¹¹³ while Liudprand, the bishop of Cremona, who visited the court in Constantinople as an envoy, made the emperor Constantine VII a gift of four eunuch slaves whom he acquired from the merchants of Verdun.¹¹⁴ However, it is also notable that the presence of eunuchs from within the imperial territory, especially Paphlagonia, was gradually increased from the eighth century and became more visible in the period between the ninth and tenth centuries.¹¹⁵ Our sources mention many individual eunuchs who were born in the empire, and their detailed backgrounds will be mentioned in chapter 4. Tougher suggests possible factors for the increase of native eunuchs: the end of the supply of eunuchs from Abasgia in the reign of Justinian I and the establishment of eunuchs' power in the imperial government which increased the motivation for Byzantines to make their sons eunuchs and send them to the imperial court for their benefit.¹¹⁶ Moreover, it is noticeable that there is an increasing number of cases in which men born in the empire were castrated for political reasons, and some of them played important

¹¹¹ Prokopios, *Wars*, 8.3.19-21, ed. and tr. Dewing, vol. 5, 80-1.

¹¹² Tougher 2008, 54; Messis 2014, 48-9.

¹¹³ Tougher 2008, 60-1.

¹¹⁴ Liudprand, *Antapodosis*, 6.6, ed. Chiesa, 147.98-148.101; tr. Squatriti, 199. These eunuchs were described as *carzimasia* slaves, who had both testicles and penis cut off.

¹¹⁵ Messis 2014, 48-52. For Paphlagonian eunuchs in the Byzantine empire, see Madgalino 1998, 149-50. The twelfth-century historian Kedrenos mentioned that Paphlagonians castrated their own children and sold them as slaves in the fifth century due to famine. It is, however, uncertain whether Paphlagonian eunuchs had already existed in the fifth century, or if Kedrenos' story was made on the basis of the twelfth-century situation. Kedrenos, ed. Bekker, vol. 1, 590, lines 7-8. Cf. Tougher 2008, 64.

¹¹⁶ Tougher 2008, 64-5.

roles after their castration, e.g. the patriarch Ignatios.¹¹⁷ Tougher argues that this shift of supply of sources of eunuchs caused the greater integration of eunuchs in Byzantine society,¹¹⁸ namely, they were able to keep or even create family ties in the empire. The present thesis also values this change in eunuchs' origins as an important factor in the research on the context of changes in laws concerning eunuchs. In other words, the present writer thinks it necessary to reconsider Byzantine laws about eunuchs on the hypothesis that these, especially those of emperors of the Macedonian dynasty, were premised on the stronger presence of such native eunuchs at the time of their issuing.

Structure of the Thesis

This thesis consists of two parts: part 1 deals with the laws of Justinian I and the Isaurian emperors, and part 2 with the law under the Macedonian dynasty. It will start by making a list of laws concerning eunuchs in the laws of Justinian on the ground of the previous work of the present writer and comparing it with the laws of the Isaurian emperors (chapter 1). Although this comparison clarifies their dramatic decrease in the latter period, analysis of the course of the transition of law and empire between the sixth century and the eighth century will suggest a possibility that differences in the context of each law caused the decrease. Chapter 2 deals with the introduction process of a new form of punishment, mutilation of the penis, in the *Ecloga* in order to examine the transition of the imperial view about such an act of quasi-castration. The examination is conducted by comparing the clause with other kinds of penal mutilation adopted in the law of Justinian I and in the *Ecloga*, and with actual cases of mutilations mentioned in the non-legal sources.

In part 2, chapter 3 carries out similar research as chapter 1 in a series of legal codifications and novels promulgated early in the Macedonian period by inspecting the context and motivation of each codification and promulgation of novels. This research will assemble laws concerning castration, eunuchs and male infertility, especially from the *Basilika*, and compare them with that of Justinian I in order to shed light on both continuity and change between them. The following three chapters will provide a close examination of

¹¹⁷ These cases of eunuchs will be mentioned in part 2 of this thesis.

¹¹⁸ Tougher 2008, 65-6.

three novels of Leo VI concerning the prohibition of castration (chapter 4), the permission for eunuchs to adopt (chapter 5), and the prohibition of the marriage of eunuchs (chapter 6). Each chapter will review the text of each novel in detail and make clear which points in older laws had been modified, referring to the previous civil and ecclesiastical norms. Then, the legal and social contexts of these novels will be analysed, mainly through comparison with other related laws which deal with punishments of criminals, adoption, and marriage. As a result, these chapters will clarify the flexible view of Leo VI towards eunuchs and the various factors which affected his new legislation. Finally, chapter 7 moves on to two imperial decisions made a century after Leo VI, by Basil II: a novel which problematised the accumulation of land by the 'powerful', including eunuchs, and an imperial decision which restricted the inheritance right of eunuchs. The examination of these decisions of Basil II will offer a hypothesis that the troubles concerning eunuchs which the emperor and his officials dealt with were brought about by the assimilation of eunuchs into the imperial society, as a result of the gradual increasing of native eunuchs in the empire. In the conclusion, this thesis will make clear the imperial view about eunuchs and the process of its transition in accord with changes in the history of eunuchs, law, and the empire in the period between the later Roman empire and the middle Byzantine empire.

This study will make a significant impact on the conventional studies of Byzantine eunuchs in terms of its method and its results. Hitherto, Byzantine laws concerning eunuchs tended to be used as mere subsidiary evidence for studying Byzantine eunuchs, probably due to the small numbers of existing laws, the difficulty of examining Byzantine law, and the different nature of the legal sources from the other sources on which scholars mainly depended. Thus, even when the laws concerning eunuchs were utilised, most scholars just focused on what each law means without examining the detailed background behind it. Thus, the present project will break through this situation as a comprehensive study of later Roman and Byzantine laws on eunuchs. The close examination of the contexts behind each law enables us to revise upwards the value of Byzantine laws as historical sources for studying eunuchs, especially the views of the imperial authorities towards them, introducing an approach of comparative analysis. As a result, this examination will add new or more detailed information to our understanding of the laws about eunuchs, such as the purposes of imperial government in promulgating such laws, their meaning, their minor changes, and their contexts. It will go so far as to revise the traditional understandings of some of the laws. Moreover, the social norms for Byzantine eunuchs will be explained in more detail through considering the

principles in legal sources in connection with the descriptions in other sources. Therefore, the present writer believes that this project will contribute significantly both to the study of Byzantine eunuchs and the study of Byzantine history.

Part 1

From Justinian I to the Isaurian Era

Justinian I is one of the most significant figures in Roman and Byzantine history in term of his large-scale codification project of Roman law. The Justinianic laws consist of the *Justinian Code*, the *Digest*, the *Institutes*, and the *Novels of Justinian I*. The first two are compilations of the laws of classical jurists and the imperial constitutions, which were regarded as valid at the time of Justinian I. The third is the new textbook for law students updated from the third-century *Institutes*. In addition to them, the emperor promulgated numerous new provisions which were collected unofficially as the *Novels* in the sixth century. These legal texts suggest that the emperor and his commissioners were interested in the legal status of eunuchs and infertile men, for they compiled a significant number of stipulations on castration and male infertility. Therefore, there is no doubt that the laws of Justinian I are important sources for understanding the circumstances surrounding eunuchs in the later Roman period.

After the death of Justinian I, the empire experienced considerable changes from the end of the sixth century to the eighth century. His successors faced the crisis of the empire, especially as a result of the Islamic conquests from the seventh century which led to the loss of imperial territory. This seems to have had multiple effects on the empire, such as the transformation of civil and military administration, economy, religion, and laws, and changes concerning castration and eunuchs which became apparent from the ninth century can be understood in this context.

The promulgation of the *Ecloga* in 741 was the first attempt to compile Justinianic laws. The role and function of the law seemed to change along with the transformation of the empire during the seventh century. The emperors and jurists who followed Justinian I translated, interpreted, and redacted the Justinianic law, while some emperors instituted new provisions. The emperor Leo III and his son Constantine V issued the *Ecloga* in which the Justinianic provisions were recompiled with modifications, but it is noticeable that the provisions concerning eunuchs promulgated in the sixth century were hardly collected in the *Ecloga*. On the other hand, one of the changes introduced in the *Ecloga* is remarkable for this thesis; Leo III partly replaced the death penalty with penal mutilation in the *Ecloga*, and instituted that those found guilty of bestiality should have their penis cut off.¹¹⁹

¹¹⁹ *Ekloga* 17.39.

Such law of the Isaurian era does not draw much attention from historians of eunuchs in comparison with other stipulations in the laws of Justinian I and the Macedonian emperors. That is not only because the Isaurian emperors hardly mentioned eunuchs and male infertility in their laws, witness the *Ecloga*, but also because the common method of making eunuchs in the Byzantine empire was probably to excise or crush both testicles, not remove the penis.¹²⁰ Moreover, scholars who studied the penal system or bodily mutilation in Byzantium focused on penal mutilation mentioned in book 17 of the *Ecloga* as a whole, but they did not discuss the introduction of the mutilation of the penis in detail.¹²¹ However, the present thesis, the purpose of which is to demonstrate the transition process of laws about eunuchs from the reign of Justinian I, considers it necessary to analyse the *Ecloga* in detail because the eighth-century law book is a valuable source promulgated in the name of emperors which can inform us what Roman legal tradition, including the legal status of eunuchs, had been transmitted from the reign of Justinian I through to the Macedonian dynasty. This also means that it is worthwhile to focus on the new clause of the *Ecloga* which declared the use of mutilation of the penis as a punishment because it seems to show a remarkable change in Roman penal law as well as the imperial view towards the act of castration. The present writer considers that even though the mutilation of the penis might have been considered different form ‘normal’ castration it seems undoubtful that such mutilation was a kind of castration in a broader sense, i.e. mutilation of male genitals. Therefore, the study of the *Ecloga* will offer some clues to understand what happened to the earlier laws concerning eunuchs and castration during this period when sources are limited in number and difficult to use in comparison with those for the sixth century or the tenth century.¹²²

This part will clarify how Roman legal stipulations concerning eunuchs, which had been collected and promulgated during the reign of Justinian I, were transformed and remained unchanged after the emperor’s death through comparing the laws of Justinian I and the eighth-century *Ecloga*. In chapter 1, we will firstly overview the context and character of the legal project of Justinian I, and list all stipulations concerning eunuchs promulgated in the

¹²⁰ Some scholars comment briefly on penal mutilation in the *Ecloga*. Tougher 2008, 28; Messis 2014, 98-9.

¹²¹ Zachariä von Lingenthal 1892, 330-49; Sinogowitz 1956, 18-20; Patlagean 1984; Troianos 1992, 66-8; Humphreys, 118-25.

¹²² Haldon 1997, xxi.

reign of Justinian with reference to my past research.¹²³ Then, we will examine the content of the *Ecloga* and its context and compare it with that of the legal project of Justinian I, focusing on the stipulations concerning eunuchs and infertile men. As for this analysis of Isaurian laws, the thesis will mainly rely on the recent works of Humphreys in terms of the background of the Isaurian laws. Humphreys examined the legal sources of the ‘Iconoclast era’, c. 680-850, comprehensively and provided important details about the transformation of the concept of law and imperial ideology from the reign of Justinian I.¹²⁴ Then, chapter 2 will examine the contexts of the introduction of penal mutilation of a criminal’s penis into Roman legal principles. As a result of this examination, it will be suggested that the character and context of the *Ecloga*, which reflected imperial needs and policies in the eighth century, explains the situation surrounding the laws about eunuchs.

¹²³ Kontani 2018.

¹²⁴ Humphreys 2015.

Chapter 1

The Law of Justinian I and the Law of Leo III

The Context and Character of the Legal Project of Justinian I

Justinian, who was a commander in chief of armies (*magister militum praesentalis*) during the reign of his uncle, the emperor Justin I (518-27), and had been made his co-emperor, ascended to the throne in 527.¹²⁵ As Corcoran mentions, there are three remarkable projects during his long reign until his death in 565: military affairs especially against Vandals and Ostrogoths, efforts to establish Christian unity, and the codification of Roman law.¹²⁶ The first one is the military reconquest of the Roman provinces in the west, which had been lost since the fifth century. Imperial armies sent by Justinian I finally achieved military successes at the expense of imperial manpower and finance, reconquering Africa from the Vandals (533) and Italy from the Ostrogoths in early 550s, in addition to the recovery of a part of Spain from the Visigoths (552).¹²⁷ Belisarius is well known among the military commanders who led the imperial forces, but it should be noted that castrated men also played important roles in the conquest, such as Solomon in North Africa and Narses in Italy.¹²⁸ The second project is Justinian I's attempt to establish Christian unity in the empire, which is an extension of what his predecessors from the fourth century did by attempting to settle disputes and schisms over various topics in Christianity.¹²⁹ The pressing matter in his reign was to solve the dispute over Christology that arose from the Council of Chalcedon in 451. Justin I and Justinian I, who were pro-Chalcedonians, tended to take a harsh approach against anti-Chalcedonian Christians in the eastern provinces from 527. In particular, Justinian I intervened in this doctrinal debate in order to reconcile Chalcedonian and anti-Chalcedonian Christians, requiring the support for the papacy.¹³⁰ In spite of a series of meetings, however, his efforts

¹²⁵ For Justinian I and his reign in general, *PLRE* 3, Fl Sabbatius Iustinianus 7, 645-8; Cameron 2000, 63-85; Maas 2005, 3-27; Louth 2008a, 99-129.

¹²⁶ Corcoran 2016, xcvi-xcviii.

¹²⁷ Maas 2005, 11; Lee 2005, 121-2.

¹²⁸ Stewart 2017, 33-54. For Narses, there is a monograph written by Laurence Fauber in 1990.

¹²⁹ Corcoran 2016, xcvi.

¹³⁰ Cameron 2000, 79-85; Maas 2005, 6-9, 14-7.

ended in failure not only in unity of Christian doctrine in the east, but also in acquisition of support from western clergy.¹³¹ The third project is his legal codification project, the scale of which was largest of those performed during more than a thousand years between the fourth century and the fifteenth centuries. As a result of this codification, the older provisions of Roman law, which had a variety of sources of law were rearranged and reshaped as an authoritative and comprehensive compilation of Roman law in a Christian framework.¹³² As Maas, who edited a companion to the reign of Justinian I, suggested based on these policies of Justinian I, behind these policies there seems to be an effort by the emperor to make the Roman empire unified by a single Christian faith under his authority after a century from when the Roman provinces in the west were lost.¹³³ The following will consider the context and character of the third project, keeping this point in mind.

Justinian I's legal reform and his three great legal projects – the *Justinian Code*, the *Digest*, and the *Institutes*—had been achieved during the earliest period of his reign between 528-534.¹³⁴ In this project, Justinian I seems to have had several purposes. The first and most important task for the emperor was to solve the problem that the existing laws gradually increased in number and became more and more complicated as emperors promulgated new laws. Although there were some attempts to compile imperial constitutions before Justinian I like the *Gregorian Code* and *Hermogenian Code* under the reign of Diocletian, and the *Theodosian Code* by Theodosius II, numerous constitutions continued to be issued thereafter until the reign of Justinian I.¹³⁵ Moreover, the writings of the classical jurists, who wrote legal textbooks and various works on legal problems mainly in the third century, also made the situation complex, for some of these works were allowed to have the force of law after the fourth century.¹³⁶ Theodosius II planned to compile the jurists' writings but this project was

¹³¹ Maas 2005, 8. For detailed accounts of Justinian I's attitude towards the dispute, see Gray, 2005, 215-38.

¹³² Humfress 2005, 162; Humphreys 2015, 18-23; Corcoran 2016, xcix.

¹³³ Maas 2005, 4.

¹³⁴ For general accounts of the process and background of Justinian I's legal projects, Humfress 2005, 161-84; Humphreys 2015, 18-21; Kaiser 2015, 119-48; Corcoran 2016, xcvi-clxiv.

¹³⁵ Liebs 2000, 244-7; Kaiser 2015, 120-1; Humphreys 2015, 16-7; Corcoran 2016, xcix.

¹³⁶ Kaiser 2015, 119-20.

not carried out.¹³⁷ As a result, Justinian I felt a necessity to reduce the complexity of the laws, distinguishing between laws which had the power of law in the sixth century and laws which were contradictory or obsolete.

In addition, Humphreys suggests that the situation concerning the laws was undesirable for Justinian I because it could cause ‘a degree of ideological autonomy’ of law; namely, in spite of the unquestionability of the authority of law as an imperial symbol, these laws, especially the uncoded laws of classical jurists, could be used as a tool for damaging the emperor due to their independent nature from the imperial authority.¹³⁸ Further, according to him, a powerful landed-elite in the empire and barbarians, who ruled the western part of the empire at that time, encroached upon the Roman law as an imperial symbol.¹³⁹ As for the latter, Humphreys also indicates a possibility that Justinian I’s codification projects might be affected by the project of compiling existing Roman law ordered by barbarian kings in the west in the early sixth century.¹⁴⁰ As a result, it seems to be certain that the codification projects of Justinian I were required not only for practical reasons but also political and ideological reasons.

Another feature of the Justinian I’s legal reform was the Christianisation of Roman legal tradition. Humphreys suggests that Justinian I problematised the classical, pagan, features in Roman law and, even when Christian elements were contained in the law, there was incomplete Christianisation of the law.¹⁴¹ Although Humphreys mentions that the codifiers of the writings of classical jurists ‘did not doctor their “pagan” juristic material in favour of more Christian precepts or rules’, she argues that the *Digest* was codified as ‘a Christian law book’.¹⁴² Indeed, Justinian I frequently emphasises the intervention of God in his laws.

¹³⁷ Kaiser 2015, 121; Corcoran 2016, c.

¹³⁸ Humphreys 2015, 16-9.

¹³⁹ Humphreys 2015, 17-8. He also mentions that the imperial elites who had access to legal education especially for their careers as imperial officials, used the concept of law in order to criticise the emperor. Humphreys 2015, 15, 18, n.84. Cf. Harries 2001, 25-6.

¹⁴⁰ Humphreys 2005, 162-3. She recognises that there is no mention of these ‘barbarian’ collections in the laws of Justinian I. For law in the western kingdom, see Charles-Edwards 2000 260-87.

¹⁴¹ Humphreys 2015, 18-9. For the Christianisation of Roman law, see Humphreys 2005, 167-71.

¹⁴² Humphreys 2005, 167-8.

Therefore, the abovementioned contexts of Justinian I's codification undoubtedly show that the authoritative and comprehensive codification of Roman law in the framework of Christianity had a significant meaning for the policy of Justinian I, as a Christian and a Roman autocrat.

Justinian I appointed a committee of ten men, including the later *quaestor sacri palatii* Tribonian, in order to codify the *Justinian Code* in 528.¹⁴³ In the *Constitutio Haec* issued in 528 in order to declare his intention to compile the *Code*, the emperor explained that the codification was to shorten the length of each lawsuit by reducing the complexity of imperial constitutions.¹⁴⁴ The members of the commission of the *Justinian Code*, seven high-ranking officers and three other specialists in law,¹⁴⁵ harmonised all constitutions that were codified in the *Gregorian*, *Hermogenian*, and *Theodosian Code* through removing irrelevant, obsolete and contradictory stipulations, and rearranging them based on their subjects.¹⁴⁶ As a result, the *Justinian Code* replaced all previous legislation and unified imperial law into Justinian I's own authority.¹⁴⁷ Based on the success of the *Justinian Code* enacted in 529, the emperor did the same for the works of classical jurists by convening a second commission headed by Tribonian, who had already been *quaestor sacri palatii*, in 530. The office of *quaestor sacri palatii* was one of the high-ranking court offices and those who held this office were responsible for drafting and publishing imperial legislation.¹⁴⁸ Then, as a result of the publication of the *Digest* in 533, the authority of the juristic writings collected in it was shifted from the jurists to the emperor.¹⁴⁹ Moreover, Justinian reformed legal education and required all students to use the *Justinian Code*, the *Digest*, and the new textbook for the use of legal education in the law schools, the *Institutes*, which also had the force of law.¹⁵⁰ The *Institutes*, an updated version of the *Institutes* written by classical jurists such as the third-

¹⁴³ For general accounts of the process of Justinian I's legal projects, Humfress 2005, 161-84; Humphreys 2015, 18-21; Kaiser 2015, 119-48; Corcoran 2016, xcvi-clxiv; Sarris, 2018, 1-52.

¹⁴⁴ *CJ, Constitutio Haec*, pr.

¹⁴⁵ *CJ, Constitutio Haec*, pr.

¹⁴⁶ *CJ, Constitutio Haec*, 2.

¹⁴⁷ *CJ, Constitutio Haec*, pr. Humphreys 2015, 19.

¹⁴⁸ Jones 1964, 504-5; Humfress 2005, 166.

¹⁴⁹ Pazdernik 2005, 200; Sarris 2011, 148.

¹⁵⁰ Humphreys 2015, 21.

century jurist Gaius, was published with the *Digest* in 533.¹⁵¹ In 534, Justinian I promulgated the second edition of the *Justinian Code* in which the new legislation of Justinian I promulgated after 529 was added to its first edition. Thereafter, Justinian I promulgated the new constitutions in order to correct the imperfection of his own previous legislation according to the changing circumstances.¹⁵² These novels, which were predominantly issued in the common tongue of Greek, are different from the other three codifications, the most part of which were written in the traditional legal language of Latin. Humphreys argues that, as a result of his reform of Roman law mentioned above, Justinian I could use law to attempt to reshape the Roman state and society by issuing the novels.¹⁵³ The emperor actually promulgated novels for carrying out his programme of reform especially in the period from c. 535 to 555: for example, the revision of tax-collection, the strengthening of the authority of provincial governors, the measures against the lawlessness of powerful landowners, and the overhauling of the fiscal and administrative structures of provinces.¹⁵⁴ These novels, however, were not compiled officially but by private initiatives after the death of Justinian I; the most important of such private collections is the ‘Greek Collection of 168 Novels’, dating from c. 575 and including the novels of Justin II (565-78) and Tiberios I (578-82).¹⁵⁵ To sum up, as a result of the Justinianic legal revolution, Roman law became associated with the imperial office and these Justinianic laws became the foundation of the later codification in Byzantium.

In addition, Justinian I, as a Christian ruler, made specific efforts to situate Roman law within a Christian framework in the course of these codification projects.¹⁵⁶ He gathered imperial constitutions concerning the Church and dogma in the first book of the *Justinian Code* although the *Theodosian Code* dealt with the topic in its last (sixteenth) book. Humfress argues that the rhetoric of the constitution *Tanta/Dedoken* of the *Digest* issued at the time of the completion of its codification in 533 shows that the emperor attempted to Christianise all the non-Christian writings of classical jurists collected in the *Digest*.¹⁵⁷ Moreover, the

¹⁵¹ Kaiser 2015, 125.

¹⁵² Sarris 2018, 10-3.

¹⁵³ Humphreys 2015, 21.

¹⁵⁴ Sarris 2018, 41-4.

¹⁵⁵ Sarris 2018, 16-20.

¹⁵⁶ Maas 1986, 17-31; Humphreys 2015, 23.

¹⁵⁷ Humfress 2005, 167-8. *Dig. Constitutio Tanta/Dedoken*.

emperor promulgated many novels concerning ecclesiastical and monastic life, giving the canons of the first four ecumenical councils the force of civil law.¹⁵⁸ On the other hand, Justinian I repeatedly emphasised the assistance and the inspiration of God as an important factor in the completion of his codification projects.¹⁵⁹ He even promulgated the constitution which confirms the authority of the *Digest* in the name of Jesus Christ and Justinian I in 533.¹⁶⁰ Thereafter, the Christianisation of the Roman law accelerated in Justinian I's legal projects, and continued to influence the later legal projects.

Eunuchs and Castration in the Legal Projects of Justinian

As a result of such large-scale codification projects and new legislation, Justinian I left a large number of stipulations in Roman law for future generations. The voluminous compilations of Justinian I, such as the fifty books of the *Digest* and twelve books of the *Justinian Code*, served as a foundation of the Byzantine legal projects performed by the Isaurian and the Macedonian emperors. Therefore, it seems to be no surprise that these sixth-century compilations preserve most of the existing stipulations concerning eunuchs and castration.

As the starting point for our analysis, it is necessary to provide an overview of the treatment of eunuchs and infertile men in the laws promulgated as a result of the legal project of Justinian I. This is essential for the current study because the following part will be the examination of how the laws concerning them codified or promulgated during the reign of Justinian I were accepted or modified by his successors, who made the legacy of Justinian I the foundation of their legal projects. Thus, the data on these laws assembled in my previous study is useful.¹⁶¹ This is a comprehensive study of the laws about eunuchs compiled and promulgated in Justinian I's reign, focusing on how the codifiers and legislators understood

¹⁵⁸ *Nov.Jus.* 131.1. Humphreys 2015, 23-4. Conversely, Sarris mentions that the late sixth-century evidence suggests that the novels were rapidly assimilated into canon law. Sarris 2018, 19.

¹⁵⁹ *CJ Constitutio Haec, Constitutio Summa; Dig. Constitutio Deo auctore, Constitutio Tanta/Dedoken.* Humphress 2005, 161-76; Patzdernik 2005, 200.

¹⁶⁰ *Dig. De confirmatione digestorum.* Humphress 2005, 162, 167-8,

¹⁶¹ Kontani 2018, 305-31.

eunuchs and the act of castration and why Justinian I enacted new laws on prohibition against castration in the empire and on restriction of adoption by castrated men.¹⁶² Here, the present thesis will concisely explain how eunuchs and infertile men were dealt with in laws codified as valid and promulgated as novels in the reign of Justinian I on the basis of the stipulations assembled as a result of my previous research (table 1 and table 2), although individual laws concerning marriage, adoption, making a will, and prohibition of castration will be spelled out in part 2.

Table 1: Stipulations concerning eunuchs and impotent men in the *Digest*¹⁶³

No.	Source		Theme
<i>Dig.</i> 1.7.2.1	Gaius	<i>Institutes</i> , book 1	Adoption of <i>spado</i>
<i>Dig.</i> 1.7.40.2	Modestinus	<i>Distinctions</i> , book 1	Adoption of <i>spado</i>
<i>Dig.</i> 9.2.27.28	Ulpian	<i>Edict</i> , book 18	Castration of a slave of others
<i>Dig.</i> 21.1.6	Ulpian	<i>Curule Aediles' Edict</i> , book 1	A slave who is <i>spado</i>
<i>Dig.</i> 21.1.7	Paul	<i>Sabinus</i> , book 11	A slave who is <i>spado</i>
<i>Dig.</i> 21.1.38.7	Ulpian	<i>Curule Aediles' Edict</i> , book 2	Transaction of animals
<i>Dig.</i> 23.3.39.1	Ulpian	<i>Edict</i> , book 33	Marriage of eunuchs
<i>Dig.</i> 24.1.60.1	Hermogenian	<i>Epitome of Law</i> , book 2	Divorce because of sterility
<i>Dig.</i> 27.1.15.	Modestinus	<i>Excuses</i> , book 6	Tutelage of <i>spado</i>
<i>Dig.</i> 28.2.6	Ulpian	<i>Sabinus</i> , book 3	Institution of posthumous heirs of eunuchs
<i>Dig.</i> 28.2.9	Paul	<i>Sabinus</i> , book 1	Posthumous heir of those who have no power of fathering children
<i>Dig.</i> 37.14.6.2	Paul	<i>Lex Aelia Sentia</i> , book 2	Oath of castrated freedmen not to have children

¹⁶² Kontani 2018, 305-31.

¹⁶³ I recreated table 1 on the basis of 'Table 1: *Digesta*' in Kontani 2018, 306, replacing the column of terminology with that of theme. Mayr (ed.) 1923-25; Ambrosino 1942; Dalla 1978; Bartoletti Colombo and Archi (eds.) 1979; Bartoletti Colombo and Archi (eds.) 1984; Instituti Saviniani Fundatum (ed.) 1964-87 were used for creating two tables in Kontani 2018, 306-7.

<i>Dig. 39.4.16.7</i>	Marcianus	<i>Delatores</i> , book 1	Transaction of luxury items including Indian <i>spadones</i>
<i>Dig. 40.2.14.1</i>	Marcianus	<i>Rules</i> , book 4	Marriage of eunuchs
<i>Dig. 48.8.3.4</i>	Marcianus	<i>Institutes</i> , book 14	Prohibition of castration
<i>Dig. 48.8.4.2</i>	Ulpian	<i>Duties of proconsul</i> , book 7	Prohibition of castration
<i>Dig. 48.8.5.</i>	Paul	<i>Duties of proconsul</i> , book 2	Prohibition of castation
<i>Dig. 48.8.6</i>	Saturninus	<i>Duties of proconsul</i> , book 1	Prohibition of castation
<i>Dig. 49.16.4</i>	Arrius Menander	<i>Military Law</i> , book 1	Military service of those who have one testicle
<i>Dig. 50.16.128</i>	Ulpian	<i>Lex Iulia et Papia</i> , book 1	Definition of <i>spado</i>

Table 2: Stipulations concerning eunuchs and impotent men in the *Justinian Code*, the *Institutes*, and the *Novels of Justinian I*¹⁶⁴

No.	Emperor	Date	Theme
<i>CJ</i> 5.62.1	Septimius Severus etc.	204	Tutelage of <i>spado</i>
<i>CJ</i> 4.42.1	Constantine I	307-337	Prohibition of castration
<i>CJ</i> 6.22.5	Constantius II	352	Testament of eunuchs
<i>CJ</i> 4.42.2	Leo I	457-473	Prohibition of castration
<i>CJ</i> 12.5.4	Leo I	467/8	Emancipation of <i>cubicularii</i> who were given to the imperial court and their testament
<i>CJ</i> 5.17.10	Justinian I	528	Divorce due to two-years impotence of husband
<i>CJ</i> 7.7.1.5	Justinian I	530	Price of slaves
<i>CJ</i> 6.43.3.1	Justinian I	531	Price of slaves
<i>Inst.</i> 1.11.9	Justinian I	533	Adoption of eunuchs
<i>Nov.Jus.</i> 22.6	Justinian I	535	Divorce due to three-years impotence of husband (modification of <i>CJ</i> 5.17.10)
<i>Nov.Jus.</i> 133.5	Justinian I	539	Eunuchs in convents
<i>Nov.Jus.</i> 142	Justinian I	558	Prohibition of castration

These two tables show that the classical jurists and later Roman emperors, including Justinian I, dealt with a wide variety of topics concerning male infertility. The main principle of the Roman law is a prohibition on castration in the empire.¹⁶⁵ The emperors repeatedly promulgated prohibition, while they had appointed eunuchs most of whom were probably foreign slaves to positions of trust, such as chamberlains and commanders.¹⁶⁶ Moreover, there is a notable tendency that jurists and emperors set a high valuation on castrated slaves

¹⁶⁴ I recreated table 2 on the basis of ‘Table 2: *Codex Justinianus, Institutiones and Novellae* in Kontani 2018, 307, replacing the column of terminology with that of theme. The original table lists *CT* 16.5.17, which will be considered in chapter 7 of this thesis.

¹⁶⁵ *Dig.* 48.8; *CJ* 4.42; *Nov.Jus.* 142.

¹⁶⁶ For the relationship between the Roman emperors with their eunuchs, Tougher 2008, 9, 36-67; Rotman 2015, 129-42.

probably due to their rarity. Although eunuchism of any slaves should be alerted to buyers as disease,¹⁶⁷ castration tended to be understood as a measure for making a slave more valuable.¹⁶⁸ Justinian I also showed that eunuch slaves (*eunuchi*) should be valued much more highly than non-eunuch slaves as table 3 shows, when he listed specific figures of slave prices as a guide to dividing property among several heirs,¹⁶⁹ and to compensate a share of the price of a slave who had been manumitted by one co-owner with another or others of the co-owners.¹⁷⁰

Table 3: Price of slaves in *CJ* 6.43.3 and 7.7.1.5

Status	Age	Skill		Price (<i>solidi</i>)
Non-eunuch	Less than 10 years old			10
	10 years of age and more	Unskilled		20
		Skilled	Doctor	60
			Notary	50
			Others	30
Eunuch	Less than 10 years old			30
	10 years of age and more	Unskilled		50
		Skilled		70

In the other laws, the problem of male infertility was discussed when a question arose as to whether those who could not have sexual intercourse or father children were able to carry out certain legal acts or not. These laws show that marriage and adoption of castrated men had already been prohibited by 533, when the *Institutes* was promulgated, at the latest.¹⁷¹ In most of these stipulations, jurists and emperors distinguish between non-castrated infertile men

¹⁶⁷ *Dig.* 21.1.6-7, 21.1.38.7.

¹⁶⁸ *Dig.* 9.2.27.28, 39.4.16.7; *CJ* 6.43.3, 7.7.1.5

¹⁶⁹ *CJ* 6.43.3.1.

¹⁷⁰ *CJ* 7.7.1.5.

¹⁷¹ *Dig.* 1.7.2.1, 1.7.40.2, 23.3.39.1, 40.2.14.1; *Inst.* 1.11.9.

(*spadones*) and castrated men (*castrati*), and give permission only to the former.¹⁷² However, *spado* might be legally asked for divorce by a wife and her parents if he was not able to have sexual intercourse with his wife for a certain period from the date of their marriage.¹⁷³ On the other hand, jurists and emperors did not seem to have considered that male infertility might hinder them from making their testament and becoming a tutor.¹⁷⁴ Finally, Justinian I, who was interested in matters of the church and monasteries, gave a role in convents to eunuchs together with elderly men in his novel probably because he put great value on their chastity.¹⁷⁵

The legal compilations and novels of Justinian I were transmitted variously soon after their completion. The major contributor of the transmission was a rich literature concerning Justinian's legislation written in Greek by law professors (*antecessores*).¹⁷⁶ In the eastern part of the empire in the sixth century, the main difficulty for law students, most of whom were Greek speakers, was to use the fruits of Justinian I's codification projects because a major part of them was written in Latin.¹⁷⁷ Thus, *antecessores* taught the law in the two courses: 1) *index*, in which word-for-word translation (*kata poda*) were provided in order to support the understanding of original Latin texts of law; and 2) *paragraphai*, *parapompae*, 'legal explanations of certain words and references to other parts of Justinian's legislation'.¹⁷⁸ It is generally accepted that the Greek paraphrases or translations, which had been made for the teaching of law students, were used in the later compilations of Justinian's legislation, i.e. the

¹⁷² *Dig.* 23.3.39.1, 40.2.14.1; *Inst.* 1.11.9.

¹⁷³ *CJ* 5.17.10; *Nov.Jus.* 22.6. *Dig.* 24.1.60.1 had already mentioned that a husband's sterility could be a reason for divorce.

¹⁷⁴ *Dig.* 27.1.15.pr., *CJ* 5.62.1, 6.22.5.

¹⁷⁵ *Nov.Jus.* 133.5, ed. Krueger *et al.*, 672.23-5, tr. Miller and Sarris, 885. ἄνδρας γεγηρακότας καὶ ἤδη τὸν μοναχικὸν ἄθλον ἀγωνισαμένους καὶ οὐ ῥαδίως τὰς σωματικὰς ἐπιρρείας ὑφισταμένους, οἱ τοῖς πράγμασι καὶ ταῖς αὐτῶν ἀπησχόληνται χρεΐαις. 'These are to be men of advanced age who have already fought the monkish fight and are hardly likely to be subject to the assaults of the flesh, and who have had full experience of business affairs'.

¹⁷⁶ For general accounts of works of *antecessores*, see Scheltema 1970.

¹⁷⁷ Stolte 2015, 358.

¹⁷⁸ Kaiser 2015, 126; Stolte 2015, 358-9. Cf. Scheltema 1970, 7-16.

Ecloga and the *Basilika*.¹⁷⁹ In particular, the *Paraphrase of Institutes*, a translation and commentary of the *Institutes*,¹⁸⁰ written by Theophilos Antecessor is important for the present thesis due to his detailed commentary on the prohibition of adoption by castrated men in *Inst.* 1.11.9. The author Theophilos is identified with a person with the same name who joined in the compilations of the first edition of the *Justinian Code*, the *Digest*, and the *Institutes*.¹⁸¹ Accordingly, it is reasonable to consider that he was well-informed with the legal projects of Justinian I. Thereafter, as Haldon mentions, *antecessores* gave up their role in legal education to the *scholastikoi*, practical lawyers or barristers, after the death of Justinian I.¹⁸² According to him, the latter taught the law using summaries or paraphrases of the original legislation along with its commentary written in Greek and the original text.¹⁸³ In addition to Justinian I's three compilations, his novels were collected in the Greek Collection of 168 novels, which seems to be relied upon by the Isaurian and Macedonian legislators.¹⁸⁴ Therefore, the provisions concerning eunuchs were also transmitted in these legal texts from the reign of Justinian I through to the Macedonian dynasty.

Transition of Law and Society from Justinian I to Leo III

Two hundred years after the death of Justinian I, the situation of the empire had changed significantly.¹⁸⁵ Justinian I's military success in the west was short-lived. The coastal region of Spain came under the control of the Visigoths again soon after its recovery and the invasion of Italy by the Lombards after 568 resulted in their rule of much of northern Italy,¹⁸⁶ while the

¹⁷⁹ Kaiser 2015, 127; Humphreys 2017, 4, 14.

¹⁸⁰ Lokin et al. 2010, xviii.

¹⁸¹ Lokin et al. 2010, xviii-xxii.

¹⁸² Haldon 1997, 265.

¹⁸³ Haldon 1997, 265.

¹⁸⁴ Sarris 2018, 16-20.

¹⁸⁵ For general accounts on the changes, see Haldon 1997; Louth 2008b, 221-50; Sarris 2011, 169-306; Brubaker and Haldon 2011.

¹⁸⁶ Haldon 1997, 33-4; Louth 2008b, 221.

empire kept control of the exarchate of Ravenna, created at that time.¹⁸⁷ In the east, the Persians still threatened the empire in the sixth century and even approached Constantinople with the Avars in 615-6.¹⁸⁸ Although the emperor Herakleios (610-41) achieved some military successes against them, the new threat of the Islam arose from the 630s.¹⁸⁹ The empire finally lost Syria, Palestine, Mesopotamia, Armenia, and Egypt by the year 642.¹⁹⁰ Constant warfare and such reduction of territory of the eastern Roman state, especially Egypt, caused a serious reduction in tax revenue, which changed state administrative structures from the middle of the seventh century.¹⁹¹ The crisis also affected the economic situation of the empire and led to the localisation of provincial economic relationships.¹⁹² Moreover, the situation of the social elite changed, which increased the power of the emperors. Brubaker and Haldon argue that such political and economic turmoil seemed to reduce the power and independence of the late Roman senatorial elite and made this old elite an ecclesiastical and governmental service elite, particularly in and around Constantinople;¹⁹³ on the other hand, the imperial civil and military offices outside the capital tended to be held by the new social elite from provincial or middling social origins, whose position depended on their household and kin, and the prestige of court and imperial posts.¹⁹⁴

The legislative activity of emperors also changed significantly during the seventh century. The emperors, especially from the reign of Herakleios on, hardly ever promulgated novels as before.¹⁹⁵ In his monograph on the seventh-century empire, Haldon discussed the reason for this in detail, emphasising the symbolic aspect of Justinianic legislation and

¹⁸⁷ Brown and Kinney 1991, 1773-4.

¹⁸⁸ Haldon 1997, 45; Louth 2008b, 226-7.

¹⁸⁹ For detailed accounts on the military affairs of Herakleios, see Haldon 1997, 41-91; Kaegi 2003, 156-91; Louth 2008b, 221-50.

¹⁹⁰ Haldon 1997, 50-1.

¹⁹¹ Louth 2008b, 236-41; Brubaker and Haldon 2011, 457.

¹⁹² Brubaker and Haldon 2011, 528-30.

¹⁹³ Brubaker and Haldon 2011, 573.

¹⁹⁴ Brubaker and Haldon 2011 574, 623.

¹⁹⁵ Haldon 1997, 254-80; Louth 2008b, 241; Stolte 2015, 82-5; Humphreys 2015, 26-36. Stolte comments on the apparent diminishment of 'the omnipresence of law' in the same period. Stolte 2015, 84.

codification, which offered ‘a (more or less) consistent world view, a moral system, or whatever, regardless of its practical relevance in day-to-day terms’.¹⁹⁶ Thus, he suggests that emperors were unwilling to tamper with Justinian I’s legacy by promulgating their own novels because the legal system in the laws of Justinian had already become an ideal which the emperors and their subjects hoped to fulfil again.¹⁹⁷ Humphreys adds several factors to Haldon’s argument; for example, the seventh-century emperors probably had no time and political capital for changing the traditional laws due to the constant warfare for the survival of the empire.¹⁹⁸ As a result, imperial legislation seemed less important as an effective tool for governing the empire than that in the reign of Justinian I, but the later legal texts such as the *Ecloga* and the *Basilika* show Roman law, or the codification and legislation of Justinian I, often played a significant role as a symbol of the Roman state.¹⁹⁹

The *Ecloga* promulgated under the names of Leo III and Constantine V could be contextualised in the political recovery from the seventh-century crisis and the reorganisation in the judicial, financial, and military system as Humphreys argues.²⁰⁰ The accession of Leo III, the *strategos* of the *Anatolikon* army in 717, saw an end of the political instability caused by short-time regimes of seven emperors between 695-717.²⁰¹ His long-lived reign until his death in 741 with the succession of his son Constantine V to the throne was the launch of the Isaurian dynasty, until the exile of Irene (797-802) in 802.²⁰² In addition, the warfare for survival of the empire changed its nature after the last attempts of the Arabs, the sieges of Constantinople, failed in 718.²⁰³ Although the empire had to continue to cope with yearly raids by their forces, the strategy of the Arabs shifted from the conquest of imperial territory to a series of wars over limited areas such as frontier zones and places of strategic and

¹⁹⁶ Haldon 1997, 258.

¹⁹⁷ Haldon 1997, 256-61; Louth 2008b, 241; Humphreys 2015, 35.

¹⁹⁸ Humphreys 2015, 34-5.

¹⁹⁹ Haldon 1997, 258, 279. Stolte stresses that such a function of Roman law did not appear from the seventh century but was already visible long before. Stolte 2015, 83-4.

²⁰⁰ Humphreys 2015, 261-5. For detailed accounts of the latter, see Brubaker and Haldon 2011, 665-771.

²⁰¹ Brubaker and Haldon 2011, 69-73; Humphreys 2015, 80.

²⁰² For general accounts of this period, see Brubaker and Haldon 2011.

²⁰³ Haldon 1997, 82-4; Brubaker and Haldon 2011, 74-5.

economic importance.²⁰⁴ In such a stabilised situation in comparison with the previous period, according to Humphreys, Leo III performed both retrenchment and reorganisation of both imperial ideology and administration in the 720s.²⁰⁵ Humphreys convincingly argues that the *Ecloga*, probably promulgated at the end of Leo III's reign,²⁰⁶ can be regarded as a part of his program and as an important tool for certifying the succession to the throne of his son, Constantine V.²⁰⁷

The *prooimion* of the *Ecloga* explains the motives for its promulgation mainly from the perspective of imperial judicial administration. The emperors problematised the situation as follows, that although the laws of previous emperors, especially Justinian I, were recorded in many books and thus available, the meaning of these laws was hard to understand for some or completely impossible to do for those who were outside of Constantinople.²⁰⁸ So, they organised a commission and ordered it to assemble laws and new legislation published before then, to examine it and select useful contents, and to organise these provisions in a clearer and more comprehensible fashion so that judges could easily use these laws in a correct manner.²⁰⁹ Moreover, they took measures against the corruption of those who were in charge of judicial matters, deciding to provide them with salaries from the imperial fisc in order that they did not receive a bribe and give unfair judgement.²¹⁰ Humphreys points out a possibility that the promulgation of the *Ecloga* reflected an increasing tendency of specialisation in judicial officers after the seventh century, which could strengthen judicial administration in the provinces.²¹¹ In any case, it is highly possible that, as Humphreys mentions, the *prooimion* of the *Ecloga* suggests the emperors' desire for reimposing imperial power over both provinces and frontier regions through reforming the judicial administration and offering

²⁰⁴ Brubaker and Haldon 2011, 75.

²⁰⁵ Humphreys 2015, 83, 261-5.

²⁰⁶ Burgmann 1983, 10-2.

²⁰⁷ Humphreys 2015, 84.

²⁰⁸ *Ecloga*, pr., ed. Burgmann, 162.32-40; tr. Humphreys, 35.

²⁰⁹ *Ecloga*, pr., ed. Burgmann, 162.40-52; tr. Humphreys, 35-6. For the commission, see Burgmann 1983, 3-4.

²¹⁰ *Ecloga*, pr., ed. Burgmann, 164-8; tr. Humphreys, 35-8.

²¹¹ Humphreys 2015, 88. He referred to Brubaker and Haldon 2011, 671-9.

judicial officers a practical and useful collection of the laws of Justinian I and his successors.²¹²

The *Ecloga* clearly shows the continuity of the tradition of Roman law from the reign of Justinian I, although they were largely rewritten and reorganised.²¹³ Its *prooimion* initially demonstrates that the *Ecloga* was ‘a selection (ἐκλογή) of laws compiled in a concise form ... from the *Institutes*, *Digest*, *Code* and *Novels* of Justinian the Great, and corrected to be more humane’.²¹⁴ Burgmann and Humphreys indicate that the commission probably used the Greek works of *antecessores*, who commented, paraphrased, and translated the Justinianic laws in the sixth century, instead of working directly from the Justinianic text written in Latin.²¹⁵ The members of the commission examined, truncated, amalgamated, and emended the laws of Justinian I.²¹⁶ As a result, they seem to have intended to make their work more practical than the Justinianic works by compressing and simplifying the text; according to Humphreys, Justinian’s *Digest* contains some 150,000 lines of Latin but the *Ecloga* is under 1,000 lines of Greek.²¹⁷ Humphreys also argues that providing magistrates with clear compendia of legal guidelines of likely cases was the aim of the *Ecloga* and its *appendices*, mentioning the bias of these Isaurian works towards practical issues like property law and delict.²¹⁸

On the other hand, the *prooimion* also mentions that the emperors ordered the commission to gather their new decrees.²¹⁹ This means that the Isaurian emperors not only reworked the Justinianic laws, but incorporated novel material, reflecting interests in the middle of the eighth century; indeed, several categories of laws in the *Ecloga*, especially

²¹² Humphreys 2015, 264-5; Humphreys 2017, 8-9. For the *Ecloga*’s practicality, see Humphreys 2015, 105-13.

²¹³ Humphreys 2015, 250. He also provides a useful table of specific provisions in the *Corpus* of Justinian I recorded in each book of the *Ecloga*. Humphreys 2015, 91.

²¹⁴ *Ecloga*, pr., ed. Burgmann 160.1-6; tr. Humphreys 34. Ἐκλογή τῶν νόμων ἐν συντόμῳ γενομένη ... ἀπὸ τῶν ἰνστιτούτων, τῶν διγέστων, τοῦ κώδικος, τῶν νεαρῶν τοῦ μεγάλου Ἰουστινιανοῦ διατάξεων καὶ ἐπιδιόρθωσις εἰς τὸ φιланθρωπότερον

²¹⁵ Burgmann 1983, 4-7; Humphreys 2015, 90; Humphreys 2017, 14.

²¹⁶ Humphreys 2015, 90-2; 250.

²¹⁷ Humphreys 2017, 15.

²¹⁸ Humphreys 2015, 251.

²¹⁹ *Ecloga*, pr., ed. Burgmann, 162.45; tr. Humphreys, 36.

provisions of marriage law and criminal law, show notable differences from the laws of Justinian.²²⁰ However, it should be noted that, as Burgmann mentions, the *Ecloga*, which definitely had the power of law, was not intended to repeal earlier laws as the emperors themselves described it as ‘a selection of laws’.²²¹

It should be noted that a significant difference of the *Ecloga* from the earlier laws promulgated by Justinian I is its ideological overtones of Christianity, especially the model of the Old Testament.²²² According to Magdalino and Nelson, the Bible became an important source of inspiration and provided models for the Christianised people in the empire from late antiquity onwards.²²³ In particular, the seventh-century crisis caused by non-Christian enemies, such as Persians and Avars, and Arabs, strengthened a connection between the Old Testament history of Israel and the contemporaneous crisis which the Christian empire faced.²²⁴ During this crisis, the Islamic conquests, which challenged Roman hegemony in the Near East and Mediterranean, seem to have forced Christians, as the Chosen People of God, to reconsider their religious practice and morality in order to quell God’s wrath and gain divine support,²²⁵ more significantly than Justinian I did in some of his novels.²²⁶ In particular, Justinian II (685-95, 705-11), who had to confront the expansion of the Islamic world, summoned a new church council, the Council of Trullo or the Quinisext council, in 691/2, in which the emperor identified himself with the shepherd of the Christians and attempted to purify Christian

²²⁰ Burgmann 1983, 5-6; Humphreys 2015, 105-25, 252. Humphreys also examines the other two categories of laws of judicial procedure and military law.

²²¹ Burgmann 1983, 9-10.

²²² Brubaker and Haldon 2011, 78-9; Humphreys 2015, 258.

²²³ Magdalino and Nelson 2010, 14-5.

²²⁴ Magdalino and Nelson 2010, 15-8; Humphreys 2015, 26-36. Both studies argue that the Old Testament ideology became more visible during the reign of Herakleios.

²²⁵ Magdalino and Nelson 2010, 19-20; Brubaker and Haldon 2011, 29; Humphreys 2015, 268.

²²⁶ *Nov.Jus.* 77, 141. In *Nov.* 77, which was probably promulgated after the outbreak of bubonic plague, the legislator mentions that blasphemous acts and behaviours contrary to nature, such as homosexuality, invite divine chastisement in the form of earthquakes and plague. However, he did not seem to depend on the Old Testament model as much as his successor from the seventh century. Magdalino and Nelson 2010, 14-5.

morality and practice in order to win heavenly support.²²⁷ Thereafter, the Isaurian emperors, who, like Justinian II, experienced warfare with Islam for survival, such as the sieges of Constantinople, inherited the Old Testament ideology and adapted it to their legal collection much more definitely than their predecessors.²²⁸ Humphreys indicates that the *Ecloga* is the first civil law code to use quotations and language of the Old Testament extensively.²²⁹ Indeed, its *prooimion* reshapes the image of the imperial office and the nature of law in accordance with a biblical model rather than a Roman one,²³⁰ for it made the law of Justinian I, which is referred to in the title of the *Ecloga*, incorporated into ‘the biblical past of God’s covenant with the Chosen people’ through declaring God as the original legislator.²³¹ Thus, not only law but also emperors were more sacralised by a notion that the Isaurian emperor were entrusted with the rule of the empire by God and, at the same time, were ordered to be shepherds of Christian communities.²³² Humphreys, who analysed the *prooimion* with the biblical citations in it, convincingly argues that it clearly shows ‘a world in which the emperors are Moses and Solomon reborn, morally reforming their peoples through corrected law and its just administration’.²³³ In addition, according to Humphreys, the imperial laws are considered to have not only emanated from God but to be elided with the law of the prophets and, at the same time, the Scriptures are granted the status as a quasi-legal text.²³⁴ As a result of such changes in the ideological nature of the Roman law, the earlier law as a whole came to be valued as one of the means of quelling the God’s wrath and bringing future salvation to the New Israelites. In that respect, it might be inferable from the *prooimion* that this ideology urged Leo III, who is known as a founder of ‘iconoclasm’ by iconophile writers in the later period, to be suspicious of icon veneration.²³⁵ Finally, considering the nature of the *Ecloga*, it

²²⁷ Magdalino and Nelson 2010, 18-9; Humphreys 37-80, esp. 79-80. Cf. Stolte 2009, 84-5.

²²⁸ Magdalino and Nelson 2010, 19-21; Humphreys 2017, 7-10.

²²⁹ Humphreys 2015, 103-4.

²³⁰ Dagron 2003, 184; Humphreys 2015, 257.

²³¹ Humphreys 2015, 96.

²³² *Ecloga*, pr., ed. Burgmann, 160.21-162.32; tr. Humphreys, 35. Humphreys 2015 96-7.

²³³ Humphreys 2015, 105.

²³⁴ Humphreys 2015, 103-4, 128.

²³⁵ Haldon 1997, 87-8; Brubaker and Haldon 2011, 122. The traditional image of ‘iconoclasm’ of the Isaurian emperors, created by iconophile — anti-iconoclast — writers, is reconsidered by

seems to be an undeniable fact that this Old Testament model declared in the *prooimion* of the *Ecloga* influenced individual clauses in it, especially regarding marriage law and criminal law.²³⁶ This ideological nature of the *Ecloga* will be dealt with again in the next chapter.

The Weak Presence of Eunuchs and Castration in the *Ecloga*

It is difficult to find any trace of Justinian's stipulations concerning eunuchs and castration in the Isaurian laws. As a result of the large-scale legal projects of Justinian I, about thirty clauses concerning castration or impotence of men are compiled in the Justinianic laws.²³⁷ However, these stipulations were scarcely collected in the Isaurian laws, which Humphreys defines as the *Ecloga*, the *Decision Concerning Soldiers Who Are Sons-in-Law*, the *Soldier's Law*, the *Appendix Eclogae*, the *Rhodian Sea Law*, the *Farmer's Law*, the *Mosaic Law*, and the *Novels of Irene*.²³⁸ One exception is *Nov.Jus.* 22.6 adopted in *Ecloga* 2.9.3. In this novel, Justinian I decided that a wife, or her parents, shall be permitted to get a legal divorce from her husband if he was unable to copulate with her within three years from the date of the wedding. The absence of eunuchs in the Isaurian law is probably a major reason why previous studies which consider laws concerning eunuchs in Byzantium skip laws promulgated by the Isaurian dynasty, and focus instead on the stipulations of Leo VI. The present thesis, however, considers that close research of Isaurian law, especially the *Ecloga*, is significant for clarifying how the stipulations concerning eunuchs and infertile men were changed or unchanged from the reign of Justinian I through to that of Leo VI, examining the reasons for the scarcity of stipulations concerning eunuchs in Isaurian law.

The absence of eunuchs in the Isaurian law does not probably mean that eunuchs had disappeared from the imperial court and society after the death of Justinian I. Although there is not much information about eunuchs and castration during the period from the seventh century to the middle of eighth century due to the scarcity of literary sources, it seems to be

recent scholars represented by Brubaker and Haldon. Brubaker and Haldon 2011; Humphreys 2017, 10-2.

²³⁶ Brubaker and Haldon 2011, 78; Humphreys 2015, 113-27.

²³⁷ Kontani 2018, 306-7.

²³⁸ Humphreys 2015, 81-248; Humphreys 2017, 13-33.

certain that eunuchs persisted in the empire. For example, Phokas (602-10) had a Syrian eunuch named Leontios. The chronicler Theophanes describes him as ‘a eunuch and one of the emperor’s magnates (εὐνούχῳ καὶ μεγιστάνῳ αὐτοῦ)’.²³⁹ Leontios is also mentioned as being a *sakellarios* in other sources.²⁴⁰ Smaragdus who was exarch of Italy under Phokas, was probably a eunuch judging from his former offices of *chartularius sacri paratii* and *praepositus sacri palatii*.²⁴¹ In addition, historiographical sources mention the chamberlains (*koubikoularioi*) of the emperors. It might be true that not all chamberlains, including those whom authors did not describe as eunuchs, were eunuchs, but it is possible to consider that eunuchs more or less constituted an important number of them, like the eunuch *cubicularii* in the later Roman period. Most of the chamberlains featured in sources are known as commanders or exarchs. It is no wonder that eunuchs played these roles, for the military role of eunuchs notably appeared in the reign of Justinian I, such as the famous figures of Solomon and Narses.²⁴² In particular, the *Liber Pontificalis*, which is the record of pontificates from Peter to the late ninth century,²⁴³ reports that *cubicularii* and sometimes eunuchs were appointed as the eparch of Italy. According to McCormick, the *Liber* was based on information in the papal archives, but, from the middle of the seventh century, the papal biographies were composed by contemporaries.²⁴⁴ The *eunuchus* and *cubicularius* Eleutherios in the reign of Herakleios (610-41),²⁴⁵ the *cubicularius* Olympios in that of Constans II (641-68),²⁴⁶ the *cubicularius* Theophylact in that of Tiberius II (698-705),²⁴⁷ and the *cubicularius* Scholastikios in that of Anastasios II (713-5), are known to have been exarchs of Italy.²⁴⁸ In

²³⁹ Theoph. AM 6096, ed. de Boor, vol. 1, 292.15-6.

²⁴⁰ John of Antioch, fr. 321 Rob., ed. Roberto, 554.40. *PLRE* 3, Leontius 29, 780.

²⁴¹ *PLRE* 3, Smaragdus 2, 1164-6.

²⁴² Concerning military roles of eunuchs, see Stewart 2017.

²⁴³ McCormick 1991, 1223.

²⁴⁴ McCormick 1991, 1224.

²⁴⁵ *Liber pontificalis*, 70-1, ed. Duchesne, vol. 1, 319.2, 321.7. *PLRE* 3, Eleutherius, 435-6.

²⁴⁶ *Liber pontificalis*, 76.4, ed. Duchesne, vol. 1, 337.7. *PBE* 1, Olympios 1. Available at: <http://www.pbe.kcl.ac.uk/person/p6021> [Accessed: 3 September 2021].

²⁴⁷ *Liber pontificalis*, 87.1, ed. Duchesne, vol. 1, 383.1-2. *PBE* 1, Theophylaktos 58. Available at: <http://www.pbe.kcl.ac.uk/person/p8125> [Accessed: 3 September 2021].

²⁴⁸ *Liber pontificalis*, 90.11, ed. Duchesne, vol. 1, 392.16-7. *PBE* 1, Scholastikios 1. Available

addition, there were three commanders who held the office of *koubikouarios* in the reign of Herakleios: (1) Theodore Trithyrios, who was also a *sakellarios* and general of the east, is described as a eunuch in an Armenian source written in the seventh century,²⁴⁹ (2) Marianos, who was sent to Egypt in 640, was defeated and killed in the battle,²⁵⁰ and (3) Kakorhizos led a Roman force against Mu`awiya in Cyprus in 648/9, then withdrew and attacked Arados.²⁵¹ Moreover, the eparch of Constantinople Gregory was known as a eunuch in 652 even though the ninth-century *Kletorologion* of Philoteos mentions that eunuchs could not become the eparch of Constantinople.²⁵² Herakleios also had *koubikouarioi*, such as Philaretos (*koubikouarios* and *chartouarios*) and Synetos (*castrensis sacri paratii*).²⁵³ The other chamberlains played the same role as court eunuchs in the later Roman Empire. The *koubikouarios* and eunuch Andrew was sent as an envoy to the caliph Mu`awiya by Constans II.²⁵⁴ In the reign of the same emperor, there was an Armenian eunuch named Manuel who was a commander in Egypt, although his eunuchism seems to be open to question.²⁵⁵ Stephen the Persian was a *sakellarios* in the first reign of Justinian II (685-95); the chronicler

at: <http://www.pbe.kcl.ac.uk/person/p6742> [Accessed: 3 September 2021].

²⁴⁹ *PLRE* 3, Theodorus 164, 1279-80. *PLRE* 3 and this thesis depend on the French translation of the source. Sebeos 30, French tr. Macler, 96.

²⁵⁰ Nikephoros, 23; ed. Mango, 70.4-5. *PLRE* 3, Marianus 5, 829-30.

²⁵¹ Theoph. AM 6140, ed. de Boor, vol. 1, 344.1-10. *PBE* 1, Kakorhizos 1. Available at: <http://www.pbe.kcl.ac.uk/person/p4199> [Accessed: 3 September 2021].

²⁵² Theodore Spudaeus, 8, ed. Allen and Neil, 160.3-4. *PBE* 1, Gregorios 149. Available at: <http://www.pbe.kcl.ac.uk/person/p3242> [Accessed: 3 September 2021]. Tougher 2008, 59.

²⁵³ *Chronicon Paschale*, 348, ed. Dindorf, vol. 1, 703.6-7. *PLRE* 3, Philaretus 1, 1019, Synetus, 1214.

²⁵⁴ Theoph. AM 6159, ed. de Boor, vol. 1, 349.4. *PBE* 1, Andreas 1. Available at: <http://www.pbe.kcl.ac.uk/person/p324> [Accessed: 3 September 2021].

²⁵⁵ *PLRE* 3, Manuel 3, 811. Martindale asserts that Manuel was a eunuch, but, as I checked the sources he refers to, the eunuchism of Manuel is mentioned only in the Latin translation of the Arabic chronography written by the tenth-century Melkite patriarch of Alexandria, Eutychios of Alexandria. Eutychios of Alexandria, col. 1112. Cf. Theoph. AM 6126, ed. de Boor, vol. 1, 338.20. There seems to be a necessity for further studies, especially of sources written in Syriac and in Arabic.

Theophanes describes him as ‘πρωτοευνούχον (chief eunuch)’.²⁵⁶ He was a man of great power and influence, but the chronicler reports that the cruel eunuch caused Justinian II to be hated through his evil deeds against citizens and was finally burnt in alive by rioters after the dethronement of the emperor.²⁵⁷ Moreover, the *koubikoularios* Theophylact was sent in 705 by Justinian II (second reign: 705-11) to Khazaria to bring back the emperor’s wife, Theodora, and his baby son to Constantinople.²⁵⁸ Moreover, a canon of the Council in Trullo suggests that eunuchs existed in the seventh-century empire; the canon stipulates that eunuchs, whether clergymen or laymen, shall not be permitted to live with unrelated women. This clause concerning eunuchs is unprecedented in existing canons, so it is highly possible that those who had attended the council discussed the problem of eunuchs who lived with women as a real issue.²⁵⁹ Finally, the reign of Leo III offers little information about eunuchs, compared with reigns of other emperors before and after him, but it does not seem that the situation of eunuchs dramatically changed during his reign. The castration of patriarch Germanos I (715-30) in his childhood after the execution of his father, the patrician Justinian, seems to be questionable due to the lack of reference to it in contemporary sources.²⁶⁰ However, the *Liber Pontificalis* reports that the eparch of Italy and *patrikios* Eutychios, was a eunuch.²⁶¹

There is indeed a hypothesis about why no provision concerning eunuchs was collected in the *Ecloga*; namely, it might be because eunuchs had become more integrated into Byzantine society, possibly as males, compared to the earlier period. This hypothesis could be supported by an argument of Tougher and Messis that the presence of eunuchs from within imperial territory, especially Paphlagonia, was gradually increased from the eighth century

²⁵⁶ Theoph. AM6186, ed. de Boor, vol. 1, 367.15-6. *PBE* 1, Stephanos 4. Available at: <http://www.pbe.kcl.ac.uk/person/p7066> [Accessed: 3 September 2021].

²⁵⁷ Theoph. AM6186, 6187, ed. de Boor vol. 1, 397.13-22, 369.26-30. Guiland 1943, 219.

²⁵⁸ Theoph. AM 6198, ed. de Boor, vol. 1, 375.26-7. *PBE* 1, Theophylaktos 1. Available at: <http://www.pbe.kcl.ac.uk/person/p8068> [Accessed: 3 September 2021].

²⁵⁹ This canon will be discussed again in chapter 6.

²⁶⁰ Kazhdan 1999, 57; Tougher 2008, 70-1. Cf. Messis 2014, 126. It seems safe to say that this story of the castration of Germanos I was known during the reign of Leo VI and Constantine VII at the latest. Dmitrievskij 1895, 72 (12th May); *Synaxarion of Constantinople*, 12th May, ed. Delehay 678; Symeon, 113, ed. Wahlgren, 167.

²⁶¹ *Liber pontificalis*, 91.19, ed. Duchesne, vol. 1, 405.1.

and became visible after the period between the ninth and tenth centuries.²⁶² However, this hypothesis has a significant drawback that the matter of eunuchs was often discussed in canons and imperial legislation before and after the *Ecloga*. At the end of the seventh century, canon 5 of the abovementioned Council in Trullo prohibited eunuchs, both clergy and laymen, from living with unrelated women.²⁶³ Moreover, the prohibition of castration was discussed in canon 8 of the Council in Constantinople in 861.²⁶⁴ Finally, it is notable that Leo VI promulgated a series of novels concerning eunuchs even when the presence of native eunuchs became much more undeniable than in the eighth century. Accordingly, it should be concluded that the absence of eunuchs in the *Ecloga* may suggest that judicial officials who depended on the *Ecloga* had sometimes dealt with a legal case concerning eunuchs as that of men, but this does not necessarily prove the hypothesis that such an absence of eunuchs was a sign of their integration into eighth-century society.

It is more reasonable to think that the difference in the treatment of eunuchs between the legal projects of Justinian I and the Isaurian laws was a result of the difference in the aims and the character of each legal project. As mentioned above, the Isaurian emperors gathered earlier laws together in order to make a compendium of the Justinianic laws, not to review and compile an enormous number of legal stipulations, like Justinian I. They selected limited numbers of important and practical clauses, and some clauses were compressed or simplified. For example, *Ecloga* 9.1 on written and unwritten sale and purchase says that neither seller nor purchaser could turn back from the sale unless after the sale it was discovered that the person sold was a freeman or mad. This clause, however, was an omitted version of *Dig.* 21.1, in which various factors in recession of sales, including the eunuchism of slaves (*Dig.* 21.1.6-7), were discussed. Consequently, almost all clauses concerning eunuchs collected in the reign

²⁶² Magdalino 1998, 149; Tougher 2008, 63-6; Messis 2014, 48-52. Tougher indicates that Aetios, who was a powerful eunuch of the empress Irene, was a native eunuch. In addition, he mentions Niketas, the iconophile saint and a monk born in 761/2 in Paphlagonia, and Leo, *sakellarios* and *patrikios* in the reign of Eirene as native eunuchs during the Isaurian era.

Tougher 2008, 63. *PBE* 1, Aetios 1, Niketas 160, Leo 14. Available at: <http://www.pbe.kcl.ac.uk/person/p71>, <http://www.pbe.kcl.ac.uk/person/p5900>, <http://www.pbe.kcl.ac.uk/person/p4829> [Accessed: 16 October 2021].

²⁶³ See chapter 6.

²⁶⁴ See chapter 4.

of Justinian I have not been compiled in the Isaurian laws except for the *Ecloga* probably because the Isaurian emperors and their commissioners considered that the issues of the physical defect of castrated men or sexual impotency were secondary things to the more general issues which cover ‘ordinary’ men. Moreover, focusing on the structure of the *Ecloga*, it seems natural that there are few stipulations of Justinian I concerning eunuchs, for the compiler(s) of the *Ecloga* were not interested in collecting the Justinianic stipulations concerning slaves and adoption, in which eunuchs were especially mentioned. This also suggests a reason why *Nov.Jus.* 22.6 about legal divorce due to a husband’s incapacity for sexual intercourse for three years had been collected in the *Ecloga*; Leo III and Constantine V, like the previous emperors, stipulate about marriage—a fundamental issue to society—in detail in book 2 of the *Ecloga*. In addition, the absence of laws about eunuchs probably reflects the situation that the number of eunuchs was far less than that of ‘ordinary’ men, especially outside Constantinople,²⁶⁵ considering that the *Ecloga* was promulgated for making up shortcomings of present legal knowledge in provinces and in the frontier. Therefore, the weak presence of eunuchs in the Isaurian laws had mainly resulted from the context of the Isaurian codification projects.

Conclusion

The comparison between the legal project of Justinian I and that of Leo III shows remarkable differences in context and character between them, such as the simplification of the Justinianic laws and the greater influence of the Old Testament model of law. This chapter has argued that the character of the *Ecloga* as a practical compendium of Justinian’s *Corpus* probably caused a difference in treatment of stipulations concerning eunuchs: the lack of reference to eunuchs in the *Ecloga* in comparison with that of the Justinianic laws. It is true that the Isaurian emperors hardly mentioned eunuchs in their codification projects and their legislation, but this does not necessarily signify the decline of the use of eunuchs by the emperors nor the complete assimilation of eunuchs into the ‘ordinary’ men at that time. Instead, it probably means that the difference between men and impotent men like castrated men mattered less—with the exception of marriage issues—when the legislators had to make

²⁶⁵ For the connection between eunuchs and the capital, see Sidéris 2006.

a practical guidebook of the civil law. As a result, the lack of stipulations concerning eunuchs in the *Ecloga* possibly suggests that judicial officials who depended on the legal collection treated legal matters concerning eunuchs as akin to those of men in general, or any other way they thought reasonable although the lack of sources makes it hard to judge whether a problem of eunuchism or male infertility was taken up on a daily basis by judicial officers outside of the capital.

The absence of eunuchs in the legal collection promulgated by the central authority might give us a suggestion that Byzantines around the eighth century could not have had much knowledge about the legal status of eunuchs as reasserted in the reign of Justinian I. It is true that the *Ecloga* did not intend to repeal the earlier laws; in other words, people could theoretically use different provisions of Justinian's *Corpus* from those included in the *Ecloga*. However, if we believe the *prooimion* of the *Ecloga* which problematises the lack of understanding of the Justinianic laws especially outside of Constantinople, it seems possible that the earlier rules concerning eunuchs established in the *Corpus* such as prohibition of castration, marriage, and adoption, were also relatively unknown in a major part of the empire before and even after the *Ecloga*. If that is true, three novels of Leo VI concerning eunuchs, which will be discussed below, may be considered as a backlash against their absence in the Isaurian collection.

On the other hand, it should be noted that the *Ecloga* shows a remarkable novelty concerning genital mutilation; *Ecloga* 17.39 introduced mutilation of the penis as a punishment for bestiality. Why was such a penalty introduced in the middle of the eighth century? How did this clause interact with the concept of castration in society? This stipulation will be examined in the next chapter in order to answer these questions.

Chapter 2

Penal Mutilation and Mutilation of the Penis

Introduction

Ecloga 17.39 punishes those who commit bestiality (κτηνοβασία) with καυλοκόπησις. Humphreys translates this as ‘those who become irrational, that is those who commit bestiality, shall have their penis cut off’.²⁶⁶ ‘Καυλός’ means a stem, so it clearly indicates a penis.²⁶⁷ A seventh-century physician, Paul of Aegina uses the word καυλός in distinction from testicles (δίδυμος).²⁶⁸ This is also suggested by the description of the ninth-century chronicler George the Monk; when he refers to the story of the sixth-century chronicler John Malalas about the ‘καυλοτόμησις’ of a bishop, he adds that a reed pipe was inserted into a hole in the genitals after mutilation.²⁶⁹ There is, however, no hint that this word means a penis only or male genitals including testicles in some medical texts,²⁷⁰ so it is safe to define καυλοκοπέω/καυλοτομέω as ‘cutting off a penis or male genitals’. It seems to be true that, as some scholars suggest,²⁷¹ such mutilation of a penis is different from castration (e.g. ευνουχίζω or ἐκτέμνω). Normal castration in Byzantium, especially for making eunuchs, tended to be limited to testicles, not including the penis, as Paul of Aegina explained.²⁷² Such

²⁶⁶ *Ecloga* 17.39, ed. Burgmann, 238.896; tr. Humphreys, 75. Οἱ ἀλογεούμενοι ἡγουν κτηνοβάται καυλοκοπείσθωσαν.

²⁶⁷ Rufus, 101, ed. Daremberg, 146. Τῶν δὲ αἰδοίων, τοῦ μὲν τοῦ ἄρρενος ἢ μὲν ἀποκρεμῆς φύσις, καυλός, καὶ στῆμα·

²⁶⁸ Paul of Aegina, 6.69, ed. Heiberg, vol. 2, 112; tr. Adams, 381. ἐπὶ δὲ τῶν γυναικῶν ἀνωτέρω τοῦ αἰδοίου κατὰ τὸ ἐφήβαιον ἀνδρείου πολλάκις αἰδοίου θέσις εὐρίσκεται τριῶν τινῶν ἐξεχόντων σωμάτων, ἐνὸς μὲν ὥσπερ καυλοῦ, δυοῖν δὲ καθάπερ διδύμων,

²⁶⁹ Georg. Mon. ed. de Boor, vol. 2, 645.2-5. ὁ δὲ βασιλεὺς διάταξιν ἐξεφώνησεν ἔχουσιν οὕτως· πάντας τοὺς εὐρισκομένους τοὺς μὲν καυλοτομεῖσθαι, τῶν δὲ καλάμους ὀξεῖς ἐμβάλλεσθαι εἰς τοὺς πόρους τῶν αἰδοίων αὐτῶν, καὶ οὕτω κατὰ τὴν ἀγορὰν γυμνοὺς θριαμβεύσθαι.

²⁷⁰ Galen, 14.12, ed. Helmreich, vol. 2, 324.

²⁷¹ Mesis 2014, 98-9; Krsmanović 2017, 42. Cf. Tougher 2008, 28; Humphreys 2015, 121-2.

²⁷² Paul of Aegina, 6.68, ed. Heiberg, vol. 2, 111-2, tr. Adams, 379-80.

difference in the nature of genital mutilation could be one of the reasons why *Ecloga* 17.39 or penal mutilation of the penis in the Byzantine empire have not been examined deeply in previous studies.²⁷³ There is, however, no reason to neglect mutilation of the penis since it could be considered as castration in a broader sense of the injury to male genitals. Therefore, this chapter will focus on *Ecloga* 17.39 in order to shed light on the view of the Isaurian emperors towards eunuchs and castration regarding such an act of quasi-castration in this clause. Moreover, this analysis will reveal in more detail how the laws of Justinian I concerning castration had been transmitted with modifications to the middle of the eighth century.

Mutilation of the penis in the *Ecloga* was stipulated as a part of the reform of penalties in the Isaurian era. It is true that penal mutilation had already been inflicted on criminals in the late Roman world whether it was used officially or unofficially, but book 17 of the *Ecloga*, which is a compact catalogue of penal law, systematically introduced mutilation of the tongue, hand, and nose, and blinding for punishing criminals in the form corresponding to each criminal act (table 4). Accordingly, there is a need to start an analysis of the context of the introduction of penal mutilation of the penis with an examination of the Isaurian reform of punishment, comparing this with cases of bodily mutilation in the later Roman empire. The studies of Roman and Byzantine penal law represented by MacMullen, Sinogowitz, Troianos, and Humphreys, and the study of Patlagean concerning bodily mutilation in Byzantium help this examination, although these studies do not pay especial attention to the penal mutilation of male genitals.²⁷⁴ Firstly, we will look at penal mutilation, especially genital mutilation, up to the death of Justinian I, examining both legal and historiographical sources. This is helpful for understanding the genital mutilation in the *Ecloga* from the perspective of both transformation and continuity. Then, this chapter will examine *Ecloga* 17.39 in detail together with the treatment of bestiality by the Church, considering examples of mutilation performed on enemies of the reigning emperors after the sixth century and the impact of Christianity on punishments in book 17 of the *Ecloga*. As a

²⁷³ Some scholars comment briefly on penal mutilation in the *Ecloga*. Tougher 2008, 28; Messis 2014, 98-9.

²⁷⁴ Sinogowitz 1956, 18-22; MacMullen 1986; Patlagean 1984; Troianos 1992; Humphreys 2015, 118-25. Zachariä von Lingenthal 1892, 330-49 also offers the overview of Byzantine penal system.

result of this examination, it will be revealed that penal mutilation, including that of the penis, was gradually introduced into the normative texts, reflecting the conventional use of such mutilation in actual cases from the later Roman period and the Isaurian reform of punishments affected by Christian thought on sin.

Mutilation in the Later Roman Empire: 4th-6th Centuries

Penal Mutilation in the Laws of Justinian I

It should be noted that penal mutilation is not invented first in the *Ecloga*, for it is mentioned in the laws of the later Roman empire.²⁷⁵ In principle, however, the classical jurists and later Roman emperors did not seem to consider penal mutilation a popular punishment. In general, the punishment in the Roman laws seems to aim to make criminals pay for their offence and to deter crime.²⁷⁶ The *Digest* mainly presents three kinds of punishment: capital punishment like decapitation, punishment which takes away freedom such as exile and condemnation to the mines, and pecuniary punishment, i.e. fines and confiscation of property.²⁷⁷ Thereafter, it is evident that emperors sometimes commanded their officials to impose a unique punishment, e.g. pouring molten lead into the criminal's mouth and throat.²⁷⁸ As for mutilation, only two imperial laws of Constantine I (306-37) mention it before the reign of Justinian I. In one clause in the *Theodosian Code*, the emperor ordered that the hands of greedy apparitors shall be cut off if they did not heed the warning.²⁷⁹ He also promulgated a law which is compiled in the *Justinian Code* that fugitive slaves, who had been seized on the way to the barbarians,

²⁷⁵ Sinogowitz 1956, 20-2; Patlagean 1984, 405-27; MacMullen 1986, 147-66; Troianos 1992, 66-7; Humphreys 2015, 119-20.

²⁷⁶ Sitzia 1990, 211-2; Troianos 1992, 55-7; Harries 2001, 136.

²⁷⁷ *Dig.* 48.19. Humphreys 2015, 122-3.

²⁷⁸ *CT* 9.24.1. For punishments in the later Roman empire, see MacMullen 1986, 147-66; Harries 2001, 118-52.

²⁷⁹ *CT* 1.16.7.

shall be subjected to the amputation of a foot, condemnation to the mines, or some other punishment.²⁸⁰

However, it is highly possible that mutilations were used in different situations at the discretion of judges. Literary sources record mutilations by imperial authority during the third-century persecutions of Christians. According to Harries, mutilation was probably used in the course of interrogation (*quaestio*) of these Christians.²⁸¹ Moreover, the fourth-century historian Ammianus Marcellinus presents two episodes of mutilations performed at the command of Valentinian I (364-75) and his military commander Theodosius in order to emphasise the brutality of the emperor.²⁸² It is true that these limited numbers of examples does not prove that many criminals were mutilated in that period, but, as the *Digest* suggests that punishment was changeable depending on various aspects such as the relationship between an offender and his/her victim,²⁸³ the abovementioned cases show a probability that emperors and their officials were able to condemn people to penal mutilations.

In the *Novels of Justinian I*, there is an increasing number of existing stipulations, in which the emperor sentences people to penal mutilation.²⁸⁴ This might suggest that penal mutilation became more popular in the reign of Justinian I at the latest, although there are still a lot of different points in comparison with from the *Ecloga*. As for stipulations against individual crimes, *Nov.Jus.* 17.8 approves provincial governors to threaten tax-agents (πρακτῶρες) with a heavy fine and with amputation of one of their hands in order to make them clarify in their receipts the required items concerning their tax collection;²⁸⁵ *Nov.Jus.* 30.8.1 prohibits individuals from fixing any notices in order to claim their ownership over properties of others and orders the proconsul of Cappadocia to confiscate their property and to cut off their hands;²⁸⁶ *Nov.Jus.* 42.1.2 stipulates that a hand of those who copy the writings of

²⁸⁰ *CJ* 6.1.3.

²⁸¹ Eusebius, *Ecclesiastical History*, 8.14.13, ed and tr. Oulton, vol. 2, 308-9. MacMullen 1986, 156; Harries 2001, 131.

²⁸² Ammianus, 28.6.20, ed. Rolfe, vol. 3, 178-80; 29.5.22, 31, 49, ed. Rolfe, vol. 3, 258-9, 265, 274-6; 30.5.19, ed. Rolfe, vol. 3, 346. MacMullen 1986, 158.

²⁸³ *Dig.* 48.19.16 (Claudius Saturninus, *Penalties of Civilians*, sole book).

²⁸⁴ For general accounts of Justinian's novels concerning penal law, see Sitzia 1990, 211-20.

²⁸⁵ *Nov.Jus.* 17.8, tr. Miller and Sarris, 201.

²⁸⁶ Miller and Sarris 2018, 328, n. 37.

Severus, who had been deposed as Patriarch of Antioch by Justin I, shall be cut off; *Nov.Jus.* 154.1 attempts to prevent the people in Mesopotamia and the province of Osrohene from contracting illicit marriage by imposing various penalties against the man, his wife, and their children, in which the deprivation of a part of their body (μέρος τοῦ σώματος) is included.²⁸⁷ In addition, *Nov.Jus.* 142.1 punishes men who castrated others with what they have done, namely, castration. As Messis mentions, punishment may not have been carried out by a doctor, so the death of culprits might have been almost inevitable.²⁸⁸ The legislator, however, does not seem to equate this castration with the death penalty. The novel adds that if the culprit should survive, he shall be sent into exile and his property shall be confiscated.²⁸⁹ Rather, the ambiguous expression of ‘the same operation’ suggests that the central purpose of the castration of the culprit was not to sentence him to death, but to take vengeance upon those who castrated others in the same way as they did.²⁹⁰ This principle seems to be exceptional compared with other laws that stipulate any bodily part by which a culprit committed a crime should be cut off.

More remarkable is that the legislator mentioned mutilation not only as a penalty against individual crimes, but also as one of the measures that magistrates in Constantinople and the provinces could take, which may suggest that mutilation was common as a judicial penalty in the reign of Justinian I. The first novel is *Nov.Jus.* 13 which was promulgated in 535 for instituting *praetor plebis*/πραιτωρ τῶν δήμων in place of *praefectus vigilum*.²⁹¹ The

²⁸⁷ *Nov.Jus.* 17.8, tr. Miller and Sarris, 201; *Nov.Jus.* 30.8.1, tr. Miller and Sarris, 328-9; *Nov.Jus.* 42.1.2, tr. Miller and Sarris, 380; *Nov.Jus.* 154.1, tr. Miller and Sarris, 976-7.

²⁸⁸ Messis 2014, 98-9.

²⁸⁹ Castration as sanctions and the culprit’s exile to mines is also mentioned in Eusebius’ *Martyrs in Palestine* 328-9 in *PG* 20, cols. 1484-5, in which a prosecutor castrated some confessors who were in mature life and sent to mines in Phaeno in Palestine. ἄλλους δ’ αὖ πάλιν τελείων ἀνδρῶν φέροντας ἡλικίαν εἰς εὐνούχους ἐκτεμῶν, τοῖς αὐτοῖς κατακρίνει μετάλλοις, ... For Eusebius’ descriptions of mutilation, see MacMullen 1986, 156.

²⁹⁰ Sitzia 1990, 128-9. Herodotus tells of the revenge of the eunuch Hermotimus against Panionius who castrated him. Panionius was, however, compelled to castrate his four sons, not himself. Herodotus, 8.105-6, ed. Bowie, 70-1.

²⁹¹ *Nov.Jus.* 13.pr. The present author referred to the translation of *Nov.Jus.* 13 in Miller and Sarris, 173-9.

duty of this office was the maintenance of public order in the capital.²⁹² The duty is similar with that of the urban prefect of Constantinople, while Miller and Sarris, who translated this novel, notes that the office was ‘a new judicial and policing magistracy ... directly answerable to the emperor rather than to the Urban Prefect of Constantinople’.²⁹³ In this novel, *Nov.Jus.* 13.6.pr. explains one of the duties of *praetor plebis* as follows:

Should someone be referred to them to undergo punishment, even from the court of the Most Distinguished prefect of this fortunate city, they are to enquire strictly into the case, and find out for what offence they are putting the man to death, amputating a limb, or something of the kind. They are also to make enquiries from the Most Illustrious prefect himself, should they so decide, to ensure that they are correct in carrying out the sentence that deprives the person referred to them of life or limb.²⁹⁴

The novel seems to show that the emperor had already considered penal mutilation as one of the penalty options as well as capital punishment in 535. The legal courts in Constantinople could decree the mutilation of a part of the criminal’s body and the praetor was permitted to carry out penal mutilation according to the result of his enquiries. Regarding the provinces, *Nov.Jus.* 128.20 in 545 permits both civil or military governors, before arriving in the provinces, ‘to appoint deputies for themselves, with the duty of carrying out all the functions that governors are empowered to do, short of extreme punishment and amputation’ of a limb.²⁹⁵ This might suggest that the emperor generally permitted provincial governors to

²⁹² *Nov.Jus.* 13.pr.-1.

²⁹³ Miller and Sarris 2018, 173, n.1.

²⁹⁴ *Nov.Jus.* 13.6.pr., ed. Schöll and Kroll, 104.18-26; tr. Miller and Sarris, 178. Ἀλλὰ κὰν εἰ παραπεμφθείη τις αὐτοῖς ἐκ τοῦ δικαστηρίου τοῦ λαμπροτάτου ἐπάρχου τῆς εὐδαίμονος ταύτης πόλεως, ἐφ’ ᾧ τιμωρίαν ὑποσχεῖν, ἀκριβῶς ἀναζητεῖτωσαν τὴν αἰτίαν καὶ μανθανέτωσαν, ἐφ’ οἷς ἀναιροῦσι τὸν ἄνθρωπον ἢ ἀφαιροῦνται μέλους ἢ τινος τοιούτου, πυκνὰ καὶ παρ’ αὐτοῦ τοῦ ἐνδοξοτάτου ἐπάρχου, εἰ καὶ τοῦτο συνίδοιεν, ὥστε αὐτοὺς ἀκριβῶς ἐξενεγκεῖν τὴν ψῆφον ἢ ψυχῆς ἢ μέλους τινὸς ἀφαιρουμένην τὸν παραπεμπόμενον.

²⁹⁵ *Nov.Jus.* 128.20, ed. Schöll and Kroll, 644.16-21; tr. Miller and Sarris, 855. πρὶν δὲ ἐν ταῖς ἐπαρχίαις παραγένωνται οἱ ἄρχοντες, δίδομεν αὐτῶν ἐν ταῖς ἁδαιαν τοποτηρητὰς ἑαυτῶν προβάλλεσθαι πάντα ὀφείλοντας μέχρι τῆς αὐτῶν παρουσίας διαπράττεσθαι, ἅτινα δύνανται

inflict penal mutilation if necessary. Therefore, although there remain only a few clauses mentioning penal mutilation, the frequency of sentencing to penal mutilation in the empire's courts should not be underestimated.

In addition, Van der Wal indicates a possibility that the phrase of εἰς σῶμα ποινᾶι (corporal punishment) in other novels of Justinian I suggests, arguably, mutilation.²⁹⁶ Although the third-century jurist Callistratus explains that corporal punishment includes beating with rods, lashing, or flogging with chains,²⁹⁷ *Nov.Jus.* 134.13, which will be analysed later, seems to show that the phrase was used with the meaning of penal mutilation, at least in the reign of Justinian I. Van der Wal classifies the novels in which the phrase εἰς σῶμα ποινᾶι is used into two and explains that corporal punishment with exile means beating on the one hand, but that in the novels which impose the punishment only means mutilation.²⁹⁸ Although this thesis will not add these laws to the cases of penal mutilation due to the lack of detailed information behind this phrase, this ambiguous phrase perhaps suggest that penal mutilation could be flexibly imposed on many more crimes than those in the novels listed above.

The preface of *Nov.Jus.* 134.13 had finally brought wider provisions concerning penal mutilations to the Roman penal law. This novel promulgated in the last decade of the reign of Justinian I (556) forbids the amputation of both hands and feet, and the tortures by which the joints are separated, which is a much more serious penalty than the amputation of both hands. The legislator explains that he aims to reduce corporal punishment, being concerned about the frailty of the human body. Then, he continues as follows:

We therefore command that in the case of a crime such that the law condemns the guilty to death, the criminal is to suffer the penalty imposed by the force of law, but if the offence is not such as to merit death, he is to be chastised by other means, or sent into exile; and if the character of the offence demands amputation of a member,

οἱ αὐτοὶ ἄρχοντες ποιεῖν, δίχα μέντοιγε ἐσχάτης τιμωρίας ἢ μέλους ἀποκοπῆς.

²⁹⁶ Van der Wal 1964, 48; Sinogowitz 1956, 20-1.

²⁹⁷ *Dig.* 48.19.7 (Callistratus, *Judicial Examinations*, book 6). Berger, 1953, 382, 'Castigare (castigatio)'.

²⁹⁸ According to his argument, corporal punishments mentioned in *Nov.Jus.* 8.12.1, 52.1, 85.5, 134.7, 146.1.2 mean penal mutilation. Van der Wal 1964, 48. This seems to be partly accepted in Miller and Sarris 2018, 900, n. 33.

only one hand is to be amputated. For theft, we absolutely do not wish the amputation of any member, nor the death penalty; the theft is to be chastised by other means. ‘Thieves,’ in our use of the term, are those who steal covertly, unarmed; for violent assault, with or without weapons, indoors, on the highway or at sea, we command that offenders are to undergo the penalties of the law.²⁹⁹

MacMullen judges that penal mutilation in the fifth and sixth centuries was used ‘rarely as a statutory sanction, more often as an expression of rage or infliction of insult’.³⁰⁰ This novel, however, indicates that the legislator presupposed that penal mutilation could be used as one of the statutory sanctions. Therefore, this novel should be regarded as a significant preliminary to book 17 of the *Ecloga*.³⁰¹

These general rules on penal mutilation in *Nov.Jus.* 134.13 seem to be prescribed for two purposes. Firstly, Justinian I probably aimed to establish the detailed rules of determining punishments for provincial officials. It is known that Justinian I worked on provincial reform from early in his reign in order to remove the disadvantages of taxpayers.³⁰² The emperor attempted to strengthen the connection between imperial authority and his provincial officers in order to take them away from the influence of local magnates.³⁰³ He also wished repeatedly

²⁹⁹ *Nov.Jus.* 134.13.pr.-1, ed. Schoell and Knoll, 688.8-31; tr. Miller and Sarris, 900. διὸ κελεύομεν, εἰ μὲν τοιοῦτό τι ἀμαρτηθεῖν ἐξ οὗ οἱ νόμοι θάνατον τοῖς ἀμαρτάνουσιν ἐπάγουσιν, κατὰ τὴν τῶν νόμων δύναμιν ὑπέχειν αὐτὸν τὰς ποινάς, εἰ δὲ τοιοῦτο εἴη τὸ ἔγκλημα ὥστε θανάτου ἄξιον μὴ εἶναι, ἄλλως αὐτὸν σωφρονίζεσθαι ἢ εἰς ἐξορίαν πέμπεσθαι, εἰ δὲ ἡ τοῦ ἐγκλήματος ποιότης μέλους ἀποτομὴν ἀπαιτήσῃ γενέσθαι, μίαν μόνην χεῖρα τέμνεσθαι. Ὑπὲρ κλοπῆς δὲ οὐ βουλόμεθα παντελῶς οἰονδήποτε μέλος τέμνεσθαι ἢ ἀποθνήσκειν, ἀλλ’ ἐτέρως αὐτὸν σωφρονίζεσθαι. κλέπτας δὲ καλοῦμεν τοὺς λάθρα καὶ ἄνευ ὅπλων τὰ τοιαῦτα πλημμελοῦντας· τοὺς γὰρ βιαίως ἐπερχομένους ἢ μετὰ ὅπλων ἢ χωρὶς ὅπλων, ἐν οἴκῳ ἢ ἐν ὁδῷ ἢ ἐν θαλάσῃ τὰς ἀπὸ τῶν νόμων κελεύομεν ὑπομένειν ποινάς.

³⁰⁰ MacMullen 1986, 158.

³⁰¹ Sinogowitz 1956, 20-2; Patlagean 1984, 408-9, 411; Troianos 1992, 66-7; Humphreys 2015, 123.

³⁰² For Justinian’s administrative reforms, see Jones 1964, 282; Haldon 2005, 51-3; Sarris 2011, 152-3; Sarris 2018, 41-4.

³⁰³ *Nov.Jus.* 8, 17.

to correct the discipline of officers in his novels, confirming their duties as judges and punishers.³⁰⁴ Thus, it is probable that *Nov.Jus.* 134 was promulgated as an extension of these past novels of Justinian I, for the first half of the novel repeats the past stipulations in novels of Justinian I concerning provincial officials.³⁰⁵ Moreover, it is notable that some preceding clauses in *Nov.Jus.* 134 mention corporal punishments; namely, *Nov.Jus.* 134.7 orders that those who had kept a free person in custody for a debt or treated him as a slave shall be subjected to corporal punishment,³⁰⁶ and *Nov.Jus.* 134.11, which prohibits consensual divorce without legal reason, stipulates that those abettors and accomplices of this divorce shall be subject to corporal punishments and exile.³⁰⁷ The same is true of another punishment in *Nov.Jus.* 134.13, for moderate financial penalties mentioned in *Nov.Jus.* 134.13.2-3 had already been introduced in preceding clauses against specific crimes in *Nov.Jus.* 134.³⁰⁸ Based on this fact, it is reasonable to consider that the detailed rules concerning penal mutilations in *Nov.Jus.* 134.13 were designed to instruct imperial officials what corporal punishment meant in the preceding clauses and to confirm how they should decree various punishments in general. As the abovementioned novels show, Justinian I seemed to permit penal mutilation as a sort of statutory punishment, but there was no general rule about its execution.³⁰⁹ Actually, *Nov.Jus.* 134.13 seems to suggest that the legislator had the following concerns about such circumstances; (1) the magistrates could impose more brutal mutilation than the emperor expected, (2) they could sentence a criminal to death even though the law did not require with his/her death, and (3) they could apply mutilation to inappropriate crimes such as ordinary theft. It should be noted that this situation derived not only from the ignorance of provincial governors about penal law but also, as the ambiguous phrase of ‘corporal punishment’ in

³⁰⁴ *Nov.Jus.* 8.10-2, 17.5, 128.21, 134.2. Jones 1964, 282; Sitzia 1990, 212; Humfress 2005, 177.

³⁰⁵ *Nov.* 134.pr.-4. E.g. *Nov.* 128.20.

³⁰⁶ *Nov.Jus.* 134.7, tr. Miller and Sarris, 895.

³⁰⁷ *Nov.Jus.* 134.11, tr. Miller and Sarris, 899.

³⁰⁸ *Nov.Jus.* 134.10-2. Cf. *CJ* 9.9.29.4; *Nov.* 117. *Nov.Jus.* 128 shows a similar structure with *Nov.Jus.* 134, namely, the last clause of *Nov.Jus.* 128.25 provides a detailed commentary on how to execute the punishment, which the other preceding clauses in the novel impose on specific crimes.

³⁰⁹ Cf. Troianos 1992, 73.

Justinian's novels suggest, from the lack of detailed rules concerning penal mutilation in existing laws. Therefore, it is highly possible that this ambiguous situation concerning corporal punishment inspired Justinian I to provide clearer guidelines for magistrates.

Secondly, it is suggested that the emperor wished to make punishment more moderate as a whole. At the beginning of *Nov.Jus.* 134.13, the legislator, who is concerned with the fragility of the human body, claims that he reduces corporal punishment. The other part of *Nov.Jus.* 134.13 concerning financial penalties also shows that the author had the intention to lighten conventional punishments; namely, *Nov.Jus.* 134.13.2-3 changed the previous law promulgated in 545 that confiscated property should be accrued to the public treasury,³¹⁰ permitting wives, descendants, or ascendants of those who had been accused to take their dowry and the marital gift, and have a part of the property of the accused under some conditions.³¹¹ Therefore, there seems to be no doubt that the legislator stipulates *Nov.Jus.* 134.13 in order to show his lenience towards criminals and their families at the same time as he modified the previous situation concerning both corporal and financial punishments.

In addition, it is necessary to consider how *Nov.Jus.* 134.13 is important for the introduction of penal mutilation in Roman law. It is remarkable that the novel had established a detailed but simplified way to select the penalty; those who have committed a crime that the law orders capital punishment for must be sentenced to death, and the other culprits must be chastened and banished. If mutilation of a part of the body is needed, one hand should be enough. In conclusion, this stipulation could be seen as a watershed in the history of Roman penal law because the clauses proved that penal mutilation could be partly incorporated in the penal system.³¹² However, the impact of this novel should not be overestimated. It is true that the clauses concerning corporal punishment in this novel had offered a clearer guideline concerning penal mutilation than old laws to judges, but it should be noted that the judges had a number of options about which penalties they should pronounce on criminals. On the matter of fact, *Nov.Jus.* 134.13 leaves room for several interpretations. For example, there is a question whether the expression of 'only one hand' means that all penal mutilations must be conducted by an amputation of one hand or it just suggests the prohibition of imposing a much more serious penalty than the amputation of both hands. Although Manfredini supports

³¹⁰ *Nov.Jus.* 128.25.

³¹¹ *Nov.Jus.* 134.13.2-3, tr. Miller and Sarris, 900.

³¹² Cf. Patlagean 1984, 408.

the former,³¹³ Theodore Scholastikos, who wrote an abridged text of the *Novels* in the second half of the sixth century, modified it to ‘one hand or one foot only’.³¹⁴ On the other hand, there remains another ambiguous point; what were the offences that demanded the amputation of a limb? It is certain that several offences that the Justinianic laws inflict the amputation of a limb for were included in this category, but culprits who commit other offences could perhaps be punished with bodily mutilation when magistrates determined that it was necessary. Considering that the legislator’s prime concern was to prevent magistrates from amputating the body of culprits excessively, not to limit the use of amputation itself, the ambiguous mention of mutilation might permit magistrates to impose moderate mutilation at their own discretion in some cases, whether the law demanded mutilation or not.

After its promulgation, *Nov.Jus.* 134.13 was transmitted through the works of judicial writers such as Athanasios of Emesa and Theodore Scholastikos.³¹⁵ The only thing which is common to them is the prohibition of amputating both hands or both feet, and of separating the joints; they did not question the validity of penal mutilation itself. This might mean that mutilation was transmitted as one of the penalties, leading to the *Ecloga*.

Mutilation of the Penis in Historiographical Sources

No law compiled and promulgated in the reign of Justinian I refers clearly to the mutilation of the penis as punishment. It should, however, be noted that John Malalas and Prokopios, contemporaries of Justinian I, report stories about mutilation of the penis against those who were accused of committing paederasty (παιδεραστέω), which could be identified with male homosexuality (ἀρσενικοιτέω), during his reign.³¹⁶ Firstly, Malalas tells of an event in 528 as follows:

³¹³ Manfredini 1995, 463-9.

³¹⁴ Theodore Scholastikos, 134, ed. Zachariä von Lingenthal, 149.

³¹⁵ Athanasios of Emesa, 4.22, ed. Heimbach 61-6; Theodore Scholastikos, 134, ed. Zachariä von Lingenthal, 149. Patlagean 1984, 408-9.

³¹⁶ Malalas expresses the sin by the words ἀρσενικοιτέω and παιδεραστέω although Prokopios uses the word παιδεραστέω only.

In that year some of the bishops from various provinces were accused of living immorally in matters of the flesh and of homosexual practices. Amongst them was Isaiah, bishop of Rhodes, an *ex-praeфекtus vigilum* at Constantinople, and likewise the bishop from Diospolis in Thrace, named Alexander. In accordance with a sacred ordinance they were brought to Constantinople and were examined and condemned by Victor the city prefect, who punished them: he tortured Isaiah severely and exiled him and he amputated Alexander's genitals and paraded him around on a litter. The emperor immediately decreed that those detected in pederasty should have their genitals amputated. At that time many homosexuals were arrested and died after having their genitals amputated. From then on there was fear amongst those afflicted with homosexual lust.³¹⁷

He describes the mutilation of the penis or male genitals by the word ‘καυλοτομέω’, which is probably the first example of the use of the similar word with that found in the *Ecloga* 17.39.³¹⁸ After that, this story was transmitted in later sources.³¹⁹ The same story is also

³¹⁷ Malalas, 18.18, ed. Thurn, 364-5; tr. E. Jeffreys, M. Jeffreys and Scott, 253. Ἐν αὐτῷ δὲ τῷ χρόνῳ διεβλήθησαν τινες τῶν ἐπισκόπων ἀπὸ διαφορῶν ἐπαρχιῶν ὡς κακῶς βιοῦντες περὶ τὰ σωματικὰ καὶ ἀρσενικοιτοῦντες. ἐν οἷς ἦν Ἡσαΐας ὁ τῆς Ῥόδου ὁ ἀπὸ νυκτεπάρχων Κωνσταντινουπόλεως, ὁμοίως δὲ καὶ ὁ ἀπὸ Διὸς πόλεως τῆς Θράκης, ὀνόματι Ἀλέξανδρος. οἵτινες κατὰ θείαν πρόσταξιν ἠνέχθησαν ἐν Κωνσταντινουπόλει, καὶ ἐξετασθέντες καθηρέθησαν ὑπὸ Βίκτωρος ἐπάρχου πόλεως, ὅστις ἐτιμωρήσατο αὐτούς, καὶ τὸν μὲν Ἡσαΐαν πικρῶς βασανίσας ἐξώρισεν, τὸν δὲ Ἀλέξανδρον καυλοτομήσας ἐπόμπευσεν εἰς κραβαταρίαν· καὶ εὐθέως προσέταξεν ὁ αὐτὸς βασιλεὺς τοὺς ἐν παιδευαστίαις εὕρισκομένους καυλοτομεῖσθαι. καὶ συνεσχέθησαν ἐν αὐτῷ τῷ καιρῷ πολλοὶ ἀνδροκοῖται, καὶ καυλοτομηθέντες ἀπέθανον. καὶ ἐγένετο ἔκτοτε φόβος κατὰ τῶν νοσοῦντων τὴν τῶν ἀρρένων ἐπιθυμίαν.

³¹⁸ The fragment numbered Malalas, 18.150 is translated as a case of ‘castration’ for punishment. Malalas 18.150, ed. Thurn, 431; tr. E. Jeffreys, M. Jeffreys and Scott, 305. This is a story of a member of the Green faction who was accused for raping a daughter of the imperial curator Akakios. He ‘was due to be castrated for raping a girl (ἐπόμπευσέ τις ὀφειλὼν ἀποτμηθῆναι ὡς φθείρας κόρην)’ but a disturbance against this sentence made Justinian show his clemency. This might be true, but it seems that the verb ἀποτέμνω means

reported by Prokopios in his *Secret History*, although the historian describes the mutilation by the more ambiguous word of genitals (αἰδοῖα) and emphasises more Justinian I's political motivation for the condemnation of homosexuals.³²⁰ Moreover, Prokopios tells another story about the accusation of sodomy in order to attack the empress Theodora:

She was also furious against a certain Basianos, a young Green of high social status, because he was slandering her everywhere. Basianos took refuge in the church of the archangel, for he did not long remain unaware of her rage. She immediately set loose on him the magistrate in charge of the populace but specified that Basianos was not to be accused of slandering her, but rather of sodomy. The official pulled the man from the man from the sanctuary and began to torture him with a vicious form of punishment, but when the entire populace saw such misfortune being inflicted on a body that was noble and raised in luxury all his life, they could not bear the sight of it and groaned their lament up to heaven, demanding that the young man be pardoned. But she made his punishment even worse: he lost his genitals and then his life, though without a trial, and his property was confiscated to the treasury. And so it went every time this bitch got worked up: no sanctuary was safe, no law could offer any protection, and it seemed that not even an entreaty by the entire city was sufficient to shield anyone who had given her offence. There was nothing, anywhere, that could stand up to her.³²¹

‘behead’ or ‘cut off’ and not necessarily ‘castrate’.

³¹⁹ Theoph. AM6021, ed. de Boor, vol. 1, 177; Georg. Mon., ed. de Boor, vol. 2, 645.1-8; Michael the Syrian, 9.26, ed. Chabot, vol. 2, 221; Leo Grammatikos, ed. Bekker, 128.17-129.2; Kedrenos, ed. Bekker, vol.1, 645.17-646.2.

³²⁰ Prokopios, *SH*, 11.34-6, ed. Dewing, 140; tr. Kaldellis, 55. For the political motivation of the persecution, see Sarris 2006, 207-8.

³²¹ Prokopios, *SH*, 16.18-22, ed. Dewing, 194-6; tr. Kaldellis, 74-5. Καὶ Βασιανὸν δέ τινα Πράσινον, οὐκ ἀφανῆ νέον ὄντα, αὐτῇ διαλοιρησάμενον δι’ ὀργῆς ἔσχε. διὸ δὴ ὁ Βασιανὸς οὐ γὰρ ἀνήκοος ταύτης δὴ τῆς ὀργῆς ἐγεγόνει ἐς τοῦ ἀρχαγγελοῦ τὸν νεῶν φεύγει. ἡ δέ οἱ ἐπέστησεν αὐτίκα τὴν τῷ δήμῳ ἐφεστῶσαν ἀρχήν, οὐδὲν μὲν τῆς λοιδορίας ἐπικαλεῖν ἐπαγγείλασα, ὅτι δὲ παιδεραστοίη ἐπενεγκοῦσα. καὶ ἡ μὲν ἀρχὴ ἐκ τοῦ ἱεροῦ τὸν ἄνθρωπον ἀναστήσασα ἠκίζετο ἀνυποίστω τινὶ κολάσει, ὁ δὲ δῆμος ἅπας ἐπεὶ ἐν τοιαύταις συμφοραῖς

It is difficult to figure out the legal basis and credibility of the genital mutilation in these stories, because these historiographical sources, especially the *Secret History*, have the purpose of criticising Justinian I and Theodora; namely, there is a possibility that these episodes about amputation of genitals of free citizens, of which savagery probably shocked their audiences, might be created or exaggerated to serve such a purpose. However, the above-mentioned novels, especially *Nov.Jus.* 13.6.pr., could lend credibility to the idea that these mutilations of genitals were a part of legal procedures, although there seems to be no doubt that these mutilations were devastating for the authors and their audiences.

The similarity of procedures in these events should be noted. Malalas mentions that the city prefect of Constantinople examined and condemned the culprits. On the other hand, as for the condemnation of Basianos, Dewing and Kaldellis note that ‘the magistrate in charge of the populace (τὴν τῷ δήμῳ ἐφεστῶσαν ἀρχήν)’ means *κοιαισίτωρ/quaesitor*, whose duty, according to Prokopios, was to punish those who were practising sodomy and those who had such intercourse with women as was prohibited by law.³²² However, the office of *quaesitor* was instituted in *Nov.Jus.* 80 (of 539), which assigns the duty of controlling the influx of people into the capital, and does not mention sodomy. As Meier argues, considering that *Nov.Jus.* 77, which probably dated to after the bubonic plague in 541-2,³²³ orders the city prefect to arrest those guilty of homosexuality, there is a possibility that the duty of *quaesitor* changed between *Nov.Jus.* 77 and the point of time when Prokopios wrote his work.³²⁴ It might, however, be more reasonable to consider that the magistrate in Prokopios’ report was the city prefect as Malalas mentioned, because Prokopios uses the same phrase ‘ἡ τῷ δήμῳ

εἶδε σῶμα ἐλευθέριον τε καὶ ἀνειμένη ἄνωθεν διαίτη ἐντραφέν, ἀπὴλγησάν τε τὸ πάθος εὐθὺς καὶ ξὺν οἰμωγῇ ἀνέκραγον οὐράνιον ὅσον ἐξαιτούμενοι τὸν νεανίαν. ἡ δὲ αὐτὸν ἔτι μᾶλλον καλάσασα καὶ τὸ αἰδοῖν ἀποτεμομένη διέφθειρεν ἀνεξελέγκτως, καὶ τὴν οὐσίαν ἐς τὸ δημόσιον ἀνεγράψατο. οὕτως ἡνίκα ὀργῶν τὸ γύναιον τοῦτο, οὔτε ἱερὸν ὄχυρὸν ἐγεγόνει οὔτε νόμου του ἀπαγόρευσις οὔτε πόλεως ἀντιβόλησις ἐξελέσθαι τὸν παραπεπτωκότα ἱκανὴ ἐφαίνετο οὐσα, οὔτε ἄλλο αὐτῇ ἀπῆντα τῶν πάντων οὐδέν.

³²² Prokopios, *SH*, 20.9, ed. Dewing, 236; tr. Kaldellis, 90-1.

³²³ For the date of *Nov.Jus.* 77, see Miller and Sarris 2018, 540, n.5.

³²⁴ Meier 2003, 597-8.

ἐφεστῶσα ἀρχή' several times in the sense of the urban authorities or the city prefect.³²⁵ If so, this shows that the process of condemning those who were accused of paederasty or sodomy is common to both stories; the examination and the condemnation through mutilation of a part of the body by the city prefect of Constantinople.³²⁶ Considering *Nov.Jus.* 13.6.pr. in which Justinian I ordered the *praetor plebis*/πραιτωρ τῶν δήμων to examine a criminal sent even from the city prefect and carry out the sentence of capital punishment or mutilation according to the result of the enquiry, the event in 528 might suggest that the city prefect could sentence people to penal mutilation even before the introduction of the *praetor plebis* in *Nov.Jus.* 13.6.pr. (of 535). As for the case of Basianos, although it is uncertain when he was accused and even whether this story was true or not, the lawsuit does not contradict the novel, for *Nov.Jus.* 13.6.pr. and the event in 528 suggest that the city prefect could sentence people to penal mutilation before and after the creation of the office of *praetor plebis*.

It is also necessary to consider the last part of Malalas' story, that after the event in 528 Justinian I immediately ordered those detected in pederasty to have their genitals amputated. There is no clause that imposes genital mutilation in the Justinianic laws. Accordingly, there is nothing to tell us whether the law mentioned by Malalas is a missing constitution against sodomy that imposes mutilation of the penis, or one of the specific laws that punish such culprits by the death penalty.³²⁷ There is another problem, that it is difficult to determine mutilation of the genitals from the death penalty in these cases, for both Malalas and Prokopios suggest that those who have their genitals mutilated were dead sooner or later. However, even if Justinian I had not promulgated the specific law about mutilation of the genitals, it does not mean that the mutilation of Alexander was fictional, because *Nov.Jus.* 134.13 suggests that the magistrates could decree various punishments including corporal mutilation with due consideration of the character of the offence. Malalas himself states that another accused bishop, Isaiah, was sent into exile after his torture, so a difference from the treatment of Alexander. As a result, it might be compatible to consider that genital mutilation

³²⁵ Prokopios, *SH*, 7.19, 20.7, ed. Dewing, 82, 236; tr. Kaldellis, 33, 90, n.16.

³²⁶ Prokopios, *SH*, 16.23-8 is another case about the accusation of male intercourse against a certain Diogenes, but does not mention any magistrate. He was examined, but finally judges in a public trial acquitted him on the ground that the charge was unsupported by evidence. Prokopios *SH*, 16.23-8, ed. Dewing, 196; tr. Kaldellis, 75.

³²⁷ Cf. *CJ* 9.9.30; *Inst.* 4.18.4; *Nov.Jus.* 77, 141.

was imposed on some accused at the discretion of judges who followed the laws that condemn homosexuals to death, such as *Inst.* 4.18.4 or *Nov.Jus.* 77.

***Ecloga* 17.39: Bestiality and Mutilation of the Penis**

The abovementioned examples enable us to consider that penal mutilation in the *Ecloga* was partly based on the laws in the later Roman empire, especially the reign of Justinian I. Although there is no sure sign that the editor(s) of the *Ecloga* knew *Nov.Jus.* 134.13, it might be suggested that the framework demonstrated in the novel had been shared with that of the *Ecloga* from two facts: that the punishments in book 17 of the *Ecloga* mainly consist of death, corporal punishments (i.e. mutilation and beating), and exile, and that there is no mutilation of both hands or both feet in the *Ecloga*. Moreover, as for the mutilation of the penis, it is notable that both legal and historiographical sources suggest that such mutilation had already been used as a sort of punishment in a limited number of cases. It is, however, true that the *Ecloga* is different from the Justinianic laws in many ways; the trace of *praetor plebis* disappeared after the reign of Maurice (582-602), penal mutilation became more divergent and was imposed on various crimes, especially those relating to sexual immorality in *Ecloga* 17.19-39 (table 4), and mutilation of the penis was officially introduced in the penal system.³²⁸ Patlagean also states ‘la Novelle de 556 n’est encore qu’une ébauche du système que présentera l’*Eklogê*’.³²⁹ Therefore, it is necessary to fill in the gap between the Justinianic laws and the penal law in the *Ecloga*, focusing on the question of how mutilation of the penis was officially adopted as a punishment against bestiality.

Table 4: Penal mutilation in the *Ecloga*³³⁰

No.	Mutilation	Crime
17.2	Tongue	Perjury
17.10	Hand	Stealing of a horse in camp or on the march

³²⁸ Concerning *praetor plebis* after the death of Justinian I, see Bury 1911, 70-1.

³²⁹ Patlagean 1984, 409.

³³⁰ The present author used the translation of Humphreys for creating this table. Humphreys 2017, 69-76.

17.11	Hand	Stealing performed by the poor (second time)
17.13	Hand	Rustling of cattle from another's herd (third time)
17.14	Hand	Stripping the dead in their graves
17.15	Blinding	Entering a sanctuary and stealing from the priests
17.16	Hand	Stealing and Selling of a free person
17.18	Hand	Forgery of money
17.24	Nose	Abduction and corruption of a nun or any secular virgin
17.25	Nose	Intention of marriage with their godparent or sexual intercourse with them
17.26	Nose	Marriage with their godparent
17.27	Nose	Adultery
17.28	Nose	Same
17.30	Nose	Overpower and corruption of a girl
17.31	Nose	Corruption of a girl before thirteen
17.32	Nose	Corruption of another's fiancée
17.33	Nose	Incest of a father with his son's wife, a son with his father's wife, a stepfather with his stepdaughter, a brother with his brother's wife, an uncle with his niece, or a nephew with his aunt
17.34	Nose	Sexual intercourse with another's mother and her daughter
17.39	Penis	Bestiality
17.46	Hands	Striking with a sword
17.47	Hand	Causing death by means of a stick, or a stone or by kicking in a fight

There seem to be various factors complexly intertwined lying behind the introduction of amputation of the penis of those who commit bestiality in *Ecloga* 17.39. Firstly, the practicality of bodily mutilation, including of the penis, needs be considered. As Humphreys argues, the *Ecloga* attempts to ordain precise punishments and thereby to assert imperial control over criminal proceedings.³³¹ The *prooimion* explains how and why the legislator collected the previous laws in the *Ecloga* as follows:

³³¹ Humphreys 2015, 92, 123.

...we ordered that these books should be gathered together before us, and having examined them all with careful scrutiny for the useful content both in these books and in our own new decrees, we deemed it fitting that judgements on everyday matters and contracts and appropriate penalties for crimes should be gathered up in this book in a clearer fashion and in greater detail, for the purpose of making the knowledge of the meaning of such pious laws easily comprehensible, for the solution of cases requiring fine judgement, for the just punishment of perpetrators, and for the restraint and correction of those favourably disposed towards sin.³³²

In addition to the purpose for deterrence, the *prooimion* mentions that penalties in the *Ecloga* are practical for judges. In this point, the penal law in the *Ecloga* is similar with *Nov.Jus.* 134.13 which probably attempted to make how to practice corporal punishments known to magistrates. The *Ecloga*'s practical aspect is further emphasised by the mention in the *prooimion* suggesting that the Isaurian emperors understood that the meaning of previous laws was difficult or impossible to understand, especially for those who lived outside Constantinople. As a matter of fact, the aspiration to the practicality of punishments is also suggested from the simple structure of book 17 in which the editor lists major offences with punishments for them in a concise manner. Regarding penal mutilation, table 4 shows that there seems to be an understandable regularity in the choice of which body part shall be damaged; namely, those who had committed perjury were to have their tongue cut off, those who had committed a crime with their hands such as thieves and murderers were to have their hand amputated, and those who had been condemned for their sexual immorality were to have

³³² *Ecloga* pr., ed. Burgmann, 162.43-52; tr. Humphreys, 35-6. ...πάσας τὰς αὐτὰς βίβλους συναθροισθῆναι παρ' ἡμῖν ἐκελεύσαμεν καὶ πάσας μετ' ἐπιμελοῦς ἐπισκέψεως ἀνακρίναντες διὰ τε τῶν ἐν ταῖς αὐταῖς βίβλοις εὐθέτως ἐμφερομένων διὰ τε τῶν παρ' ἡμῶν νεαρῶς θεσπισθέντων τῶν ἐπισυχναζόντων πραγμάτων καὶ συναλλαγμάτων τὰς κρίσεις καὶ τὰς καταλλήλους τῶν ἐγκλημάτων ποινὰς ἐν τῇδε τῇ βίβλῳ φανερωτέως τε καὶ λεπτοτέρως ἀναληφθῆναι ἀρμόδιον ἡγησάμεθα πρὸς εὐσύνοπτον τῆς τῶν τοιούτων εὐσεβῶν νόμων δυνάμεως εἶδῃσιν καὶ τὴν ἐν εὐκρινείᾳ τῶν πραγμάτων εὐλύτῳσιν καὶ τὴν δικαίαν τῶν πλημμελούντων ἐπεξέλευσιν καὶ τὴν τῶν ἐπιρρεπῶς πρὸς τὸ πλημμελεῖν διακειμένων ἀναστολὴν καὶ διόρθωσιν.

their nose slit or to have their penis amputated.³³³ In addition, Humphreys speculates that physical punishment, including beating, was relatively easy to execute and an effective public deterrent.³³⁴ Therefore, it is likely that the mutilation of the penis as a punishment was possibly instituted for practical use, although there seems to be no historical source which reports that those who commit bestiality had their penises cut off.

The aspect of practicality could be supported from the fact that almost all mutilations in the *Ecloga* had already been used for punishment or disqualification of emperors and their families.³³⁵ In addition to the amputation of the hand that had been mentioned in the Justinianic laws, amputation of nose and tongue, blinding, and castration notably appeared between the sixth and eighth centuries, especially in Constantinople.³³⁶ For example, the chronographer Theophanes reports that the emperor Heraklonas (641), a son of Herakleios, had his nose amputated, and his mother Martina had her tongue cut off after his fall.³³⁷ The seventh century chronicler John of Nikiu, however, states that both the emperor and his mother had their noses cut off, together with his two younger brothers.³³⁸ Although this chronicle, which may have been written in Greek, has been transmitted to the present day as only the Ethiopic version translated from Arabic,³³⁹ it is noticeable that John reports that the youngest son of Martina was castrated at the same time. This is probably one of the oldest cases of political castration (see the detailed survey in the appendix). Moreover, Theophanes reports several cases of political mutilation; Constans II ordered Maximos the Confessor to have his hand and tongue cut off;³⁴⁰ Constantinos IV (668-85) deposed his brothers and co-emperors Herakleios and Tiberios after slitting their noses.³⁴¹ One of the most well-known cases of political mutilation in Byzantium is that of Justinian II. He was dethroned in 695 and

³³³ Sinogowitz 1956, 18-20; Patlagean 1984; Troianos 1992, 66-8; Humphreys, 118-25.

³³⁴ Humphreys 2015, 123.

³³⁵ Patlagean 1984, 412-3; Krsmanović 2017, 45-8.

³³⁶ Patlagean 1984, 412-21.

³³⁷ Theoph. AM6133, ed. de Boor, vol. 1, 341-2.

³³⁸ John of Nikiu, 120.52-4, tr. Charles, 197-8.

³³⁹ Brand 1991, 1066. This thesis uses English translations of Charles with reference to the French translation of Zotenberg.

³⁴⁰ Theoph. AM6160, ed. de Boor, vol. 1, 351.

³⁴¹ Theoph. AM6161, ed. de Boor, vol. 1, 352, 6173, ed. de Boor, vol. 1, 360.

sent to Cherson after his nose and tongue had been cut off.³⁴² However, he returned to the throne in 705 and blinded the patriarch Kallinikos I (694-706) who had helped to depose him in 695.³⁴³ The mutilation of the penis as a punishment might not be reported after the reign of Justinian I except for the political castration of a son of Martina, but it was imposed on the emperor Phokas and Anastasios the patriarch of Antioch after their deaths in the seventh century, probably in order to humiliate them.³⁴⁴ Mutilation of Phokas was, according to John of Nikiu, the wages of the dishonour and shame he had brought on the wife of Photios,³⁴⁵ so there is a possibility that this mutilation was carried out as a sort of revenge against Phokas' own immoral act. Although these cases of bodily mutilation seem to be rare and are not based on written laws, these various mutilations after the sixth century perhaps offered precedents for the practical penalties in the *Ecloga*.

Another factor is the influence of the Christian ideology of the Isaurian emperors. Humphreys states that the model of penal law in the *Ecloga* against sexual immortality is not Roman but biblical; the catalogue of sin in *Ecloga* 17.19-39, in which eight chapters are entirely new to Roman legal tradition, bears a resemblance to Leviticus 18-20.³⁴⁶ Moreover, while he admits that the use of corporal punishment in the *Ecloga* is not a great novelty, he also argues that the prominence of penal mutilation in the *Ecloga* might emanate from a strict interpretation of Mt. 5:28-3: 'if your right hand causes you to sin, cut it off and throw it away. It is better for you to lose one part of your body than your whole body to go to hell'.³⁴⁷ Therefore, the penalties in the *Ecloga*, the removal of the polluted limb, seem to fit with the Isaurian ideology as a process of purification and healing of the sin of the Byzantines as the Christians in order to appease God's wrath and to acquire divine support.³⁴⁸ It is likely that the

³⁴² Theoph. AM6187, ed. de Boor, vol. 1, 369, 6198, ed. de Boor, vol. 1, 374-5.

³⁴³ Theoph. AM6198, ed. de Boor, vol. 1, 375.

³⁴⁴ Theoph. AM6101, ed. de Boor, vol. 1, 296-7; John of Nikiu 110. 6, tr. Charles, 197-8; John of Antioch, fr. 321 Rob., ed. Roberto, 554.

³⁴⁵ John of Nikiu, 110.6, tr. tr. Charles, 197-8. John of Antioch also mentions that Photios plotted against Phokas because of his wife without explaining what Phokas had done to her. John of Antioch, fr. 321 Rob., ed. Roberto, 552-4; tr. Roberto, 57.

³⁴⁶ Humphreys 2015, 122.

³⁴⁷ Humphreys 2015, 123-4.

³⁴⁸ Humphreys 2015, 124-5.

penalties against sexual immorality were stipulated not only for practical application by judges, but also for deterrence or for ideological expression.

This argument is undoubtedly applicable to *Ecloga* 17.39. First, the sin of bestiality was punished in the context of Christianity before the promulgation of the *Ecloga*. As compiled in the *Nomos Mosaikos* (*Mosaic Law*), a collection of extracts from the *Septuagint* produced by the Isaurians in association with the *Ecloga*,³⁴⁹ Leviticus 20:15-16 and Exodus 22:19 state that those who slept with a beast shall be put to death.³⁵⁰ The canons 16 and 17 of the Synod of Ancyra in 314 firstly stipulate about ‘those who are guilty of bestial lusts (ἀλογευσσάμενων/ἀλογευσσόμενων)’. Bestiality is also observed in canons of church fathers in the fourth century, namely Basil the Great and Gregory of Nyssa. Basil states that ‘those who defile themselves with beasts (ζωοφθόροι)’ are condemned in the same way as those who commit homosexuality, murder, poison, adultery, and idolatry.³⁵¹ He then stipulates that ‘a man who confesses his impious conduct with beasts (ὁ ἐν ἀλόγοις τὴν ἑαυτοῦ ἀσέβειαν ἐξαγορεύων)’ shall do penance for the same period as that for homosexuality and adultery.³⁵² Gregory of Nyssa states that the time of the penance for those who defiled themselves by adultery, bestiality, or homosexuality is counted double that of those who are polluted by fornication.³⁵³ The fact that these canons consist of a part of the *Canons of the Fathers* in the second canon of the Council of Trullo in 691/2 suggests that their thoughts about bestiality were known even in the Isaurian era.³⁵⁴ On the other hand, although traditional Roman law did not punish copulation with animals,³⁵⁵ *Nov.Jus.* 77 of Justinian I threatens those who behave contrary to nature or those who utter blasphemous acts with the death penalty, because, as the legislator mentions, such actions invite divine chastisement in the form of earthquakes

³⁴⁹ Humphreys 2015, 171-9; Humphreys 2017, 29-31. The editors of the *Mosaic Law*, Burgmann and Troianos, show that this text was created during the period between the eighth century and the ninth century. Burgmann and Troianos 1979, 126-37. Humphreys also argues that the *Mosaic Law* was created in the mid-to-late eighth century. Humphreys 2015, 178.

³⁵⁰ *Mosaic Law*, 29, 42.

³⁵¹ Canons of Basil, canon 7 = *Letter*, 188.7, ed. and tr. Defferrari, vol. 3, 28-9.

³⁵² Canons of Basil, canon 63 = *Letter*, 217.63, ed. and tr. Defferrari, vol. 3, 250-1.

³⁵³ Canons of Gregory of Nyssa, canon 4, ed. Joannou, 212-6.

³⁵⁴ Ohne 2012, 84-9, 97-105.

³⁵⁵ Troianos 1980, 36.

and plague. Scholars tend to consider that the novel was mainly against homosexuality,³⁵⁶ but, as Troianos points out, bestiality might be punished as a behaviour contrary to nature.³⁵⁷ In any case, the fear of divine wrath shows the highly Christian nature of *Nov.Jus.* 77.³⁵⁸

Turning our eyes to non-legal sources, some episodes mentioned by the seventh-century theologian John Klimax or the twelfth-century monk John of Phoberou, suggest that there was temptation which sometimes led monks and priests to commit bestiality. The first story is an ambiguous one concerning the fourth-century monk Anthony the Great collected in the *Sayings of the Fathers*;

Abba Anthony heard of a very young monk who had performed a miracle on the road. Seeing the old men walking with difficulty along the road, he ordered the wild asses to come and carry them until they reached Abba Anthony. Those whom they had carried told Abba Anthony about it. He said to them, ‘This monk seems to me to be a ship loaded with goods but I do not know if he will reach harbour.’ After a while, Anthony suddenly began to weep, to tear his hair and lament. His disciples said to him, ‘Why are you weeping, Father?’ and the old man replied, ‘A great pillar of the Church has just fallen (he meant the young monk) but go to him and see what has happened.’ So the disciples went and found the monk sitting on a mat and weeping for the sin he had committed. Seeing the disciples of the old man he said, ‘Tell the old man to pray that God will give me just ten days and I hope I will have made satisfaction.’ But in the space of five days he died.³⁵⁹

³⁵⁶ Van der Wal 1964, 46; Humphreys 2017, 75, n. 169; Miller and Sarris 2018, 539, n.1.

³⁵⁷ Van der Wal 1964, 46, n.8; Troianos 1980, 37.

³⁵⁸ Sitzia 1990, 215-6; Miller and Sarris 2018, 539, n.1. See also n. 226 of this thesis.

³⁵⁹ *Sayings of the Fathers*, Anthony the Great 14, *PG* 65, cols. 79-80; tr. Ward, 4. Ἦκουσεν ὁ Ἀντώνιος περί τινος νεωτέρου μοναχοῦ, ποιήσαντος σημεῖον ἐν τῇ ὁδῷ· ὡς τούτου ἑωρακότος γέροντάς τινας ὁδεύοντας καὶ κάμνοντας ἐν τῇ ὁδῷ, καὶ ὀνάγρους ἐπιτάξαντος ἐλθεῖν καὶ βαστάσαι τοὺς γέροντας, ἕως οὗ φθάσωσι πρὸς Ἀντώνιον. Οἱ οὖν γέροντες ἀνήγγειλαν τῷ ἀββᾷ Ἀντωνίῳ ταῦτα. Καὶ λέγει αὐτοῖς· Ὁμοίε μοι ὁ μοναχὸς οὗτος πλοῖον εἶναι μεστὸν ἀγαθῶν, οὐκ οἶδα δὲ εἰ ἔξει εἰς τὸν λιμένα. Καὶ μετὰ χρόνον ἄρχεται ἐξαίφνης ὁ ἀββᾶς Ἀντωνίος κλαίειν καὶ τίλλειν τὸς τρίχας αὐτοῦ καὶ ὀδύρεσθαι. Λέγουσιν αὐτῷ οἱ μαθηταὶ αὐτοῦ· Τί κλαίεις, ἀββᾶ; Καὶ εἶπεν ὁ γέρων· Μέγας στόλος τῆς Ἐκκλησίας ἄρτι

In the seventh century, John Klimax comments on this story in the context of bestiality in his *Ladder of Paradise*; namely, he explains that the young man ‘who formerly was in charge of donkeys but then wretchedly fell under the sway of wild donkeys and was deluded’.³⁶⁰ In another chapter, John explained bestiality as an extreme case of lechery.³⁶¹ Also, Salisbury explains that a story of a bursar of a monastery narrated by John is that of bestiality.³⁶² The bursar said that ‘when he was young and had charge of the animals, I had a very bad spiritual failure’, while he was cured by a healer in the end.³⁶³ Moreover, John of Phoberou, a monk and *hegoumenos* of the monastery of Phoberou, wrote the *Typikon*, in which he cited a story about a priest of the monastery of Kellia who was tempted to sin with a female donkey.³⁶⁴ The editor of this *typikon*, Papadopoulos-Kerameus, notes that other cases quoted in this chapter were from the letter of Paul Helladikos, the abbot of the Elusa monastery in Idumaea, in the sixth-century,³⁶⁵ but, as far as can be read in his letter, Paul Helladikos does not seem to report this event of a priest of the monastery of Kellia.³⁶⁶ Although, as Jordan who translated this

ἔπεσεν (ἔλεγε δὲ περὶ τοῦ νεωτέρου μοναχοῦ)· ἀλλὰ ἀπέλθετε, φησὶν, ἕως αὐτοῦ, καὶ βλέπετε τὸ γεγονός. Ἀπέρχονται οὖν οἱ μαθηταὶ καὶ εὐρίσκουσι τὸν μοναχὸν ἐπὶ ψιαθίου καθημένον, καὶ κλαίοντα τὴν ἀμαρτίαν ἣν εἰργάσατο. Ἐωρακὼς δὲ τοὺς μαθητὰς τοῦ γέροντος, λέγει· Εἶπατε τῷ γέροντι ἵνα παρακαλέσῃ τὸν Θεόν, δέκα μόνas ἡμέρας ἐνδοῦναί μοι, καὶ ἐλπίζω ἀπολογήσασθαι. Καὶ ἐντὸς ἡμερῶν πέντε ἐτελεύτησεν.

³⁶⁰ John Klimax, 15, *PG* 88, col. 885B-C, tr. Luibheid and Russel, 175. Οἶδε τὸ εἰρημένον ὁ τῆς ὀνάγροις πρώην μὲν ἐπιτρέπων· ἔσχατον δὲ ὑπὸ τῶν ἀγρίων ὀνάγρων ἐλεεινῶς ἐπιτραπείς καὶ ἐμπαιχθεὶς, ...

³⁶¹ John Klimax, 29, *PG* 88, col. 1149A, tr. Luibheid and Russel, 283.

³⁶² Salisbury 1994, 88-9.

³⁶³ John Klimax, 4, *PG* 88, col. 697A; tr. Luibheid and Russel, 102. Νέου μου ὄντος, φησὶ, καὶ ἐν τῇ τῶν ἀλόγων φροντίδι διάγοντος, συνέβη πτώμα κατενεχθῆναι [εἰς πτώμα πεσεῖν] βαρύτατον ψυχῆς·

³⁶⁴ *Typikon of Phoberou* 58, ed. Papadopoulos-Kerameus, 82-3; tr. Jordan, 942-3. Jordan 2000a, 67.

³⁶⁵ *Typikon of Phoberou* 58, ed. Papadopoulos-Kerameus, 77.

³⁶⁶ Chapter 5 of this thesis will discuss the case in which the author of the *typikon of Phoberou* quoted the letter of Paul Helladikos.

typikon also points out, the source of this story is not identified,³⁶⁷ John's story perhaps dates back to our period if we believe that Kellia is an early Christian monastic settlement in Egypt, most dwellings of which were built from the sixth to the eighth century and inhabited until about the ninth century.³⁶⁸ These stories seem to show the close connection between the sin of bestiality with the Christianity, especially, Christian asceticism, although people other than ascetics might commit such sexual immorality. As a result, it is reasonable to conclude that the reason why mutilation of the penis against those who commit bestiality was introduced in Roman legal tradition can be explained in terms of Christianity in addition to the practicality of penal mutilation.

A further question is why *Ecloga* 17.39 only imposed mutilation of the penis on those who commit bestiality although the other clauses against sexual immorality punish offenders with slitting of the nose. Examination of the structure of the *Ecloga* 17.19-39 possibly answers this question. The legislator seemed to divide the clauses against sexual immorality in *Ecloga* 17.19-39 into three categories and inflict different penalties respectively. At first, the stipulations about immoral behaviour between men and women are collected together in *Ecloga*. 17.19-37, in which nasal mutilation tends to be used as a heaviest punishment, except for *Ecloga* 17.33 on incest which imposes capital punishment or nasal mutilation. Nasal mutilation might be introduced because it could be inflicted on both men and women, and because it could humiliate sinners and deter repetition without threatening their life or their marital bond.³⁶⁹ Then *Ecloga* 17.38 punishes homosexuality, sexual immorality between men, by capital punishment, and *Ecloga* 17.39 finally imposes mutilation of the penis on those who commit bestiality, immoral behaviour between men and animals. The last two behaviours are punished more severely than immorality between men and women probably because these are considered as acts contrary to nature. It seems to be impossible to answer the question why there is a difference in punishment between

³⁶⁷ Jordan, 2000b, 949, n. 81.

³⁶⁸ Grossmann 1991, 1119-20; Jordan, 2000b, 949, n. 81.

³⁶⁹ Cf. Sinogowitz 1956, 18-9; Troianos 1992, 66-7; Humphreys 2015, 124. *Ecloga* 17.27 on adultery prohibits the adulterer from separating from his wife even though his nose is cut off. In addition, a supposition of Humphreys who refers to cases in Pakistan that nasal mutilation was a form of symbolic castration may be probable although this supposition seems to require further verification. Frembergen 2006, 243-60.

homosexuality and bestiality. Perhaps homosexuals are punished by death because the *Ecloga* punishes not only those who were active but also who were submissive, or it may just follow the previous laws such as *Inst.* 4.18.4 or *Nov.* 77 that punish them by death. On the other hand, those who commit bestiality are punished by mutilation of the penis, following the principle of cutting off the bodily part by which a culprit committed a crime, as a polluted limb, for the legislator seems to consider that this sin is committed only by men.³⁷⁰

To end this examination, it is necessary to return to the issue of castration and eunuchs. The difference of expression between the mutilation of the penis in *Ecloga* 17.39 and castration in other sources seems to show that the Isaurian emperors distinguished between the two different ways of mutilation of male genitals, penis or testicles. However, it should also be noted that the different context of each mutilation might make the legislator use the verb *καυλοκοπέω*. The purpose of *Ecloga* 17.39 was to make culprits atone for their sin and to prevent recidivism by removing their polluted limb (i.e. *καυλός*), not to ‘make them eunuchs (*εὐνονχίζω/facere eunuchus*)’ as the later Roman legislators, including Justinian I, generally expressed in their prohibitions against castration (i.e. *CJ* 42.2.1-2, *Nov.Jus.* 142). Moreover, the expression of penal mutilations in the *Ecloga* must be clear and consistent, making it easier for judges to understand which body part they should cut off, such as *χειροκοπέω*, *ρινοκοπέω*, and *καυλοκοπέω*. On the other hand, the definition of eunuchs in law suggests that those who have their penis mutilated became theoretically a eunuch, because they have had their genitals cut off and could not father children, like *καστράτος* in the commentary of Theophilos.³⁷¹ Certainly, as Malalas and Prokopios report, almost all culprits might have died after the mutilation of the penis; the *Ecloga*, however, seems to leave room for their survival, using a different word from the death penalty (punishment with the sword). In other words, it might be deduced that such sinners were possibly equated with eunuchs in society, some of whom were known as officers or servants of emperors, although there seems to be no mention about specific eunuchs who have had their penis mutilated because of their sin. However, looking at the different character of each mutilation, it seems that penal mutilation is compatible with the existence of eunuchs. The sources in the later Roman empire seem to suggest there were two different thoughts about genital mutilation: involuntary

³⁷⁰ *Mosaic Law* 29 mentioned the bestiality committed by women, referring to Leviticus 20:16. *Mosaic Law* 29, ed. Burgmann and Troianos, 156.318-21; tr. Humphreys, 156.

³⁷¹ See pages 145-6.

mutilation on the one hand, and voluntary mutilation on the other. Indeed, canon 1 of the First Council of Nicaea criticised those who were castrated voluntarily, although it permitted those who were forced to be castrated by a physician for treatment, by barbarians or by masters. The imperial legislation imposes a severe punishment upon those who castrated others, but subjects those who were castrated under unavoidable circumstances to no punishment.³⁷² In addition, literary sources tend to mention that court eunuchs were castrated in their childhood by accidents or by slave traders, such as Eutherius, Mamas, and Solomon.³⁷³ These examples might show that the involuntariness and unavoidability of those castrated were important elements in defining mutilation for making eunuchs. On the other hand, mutilation for punishment is certainly involuntary, but culprits could have avoided this punishment by controlling their sexual desire. In addition, such mutilation is probably in contrast with castration for making eunuchs in the points of culprits' sexual ability and their age; namely, penal mutilation of the penis is a result of their sexual desire and they were probably adults, although, as Paul of Aegina suggests, most eunuchs were possibly castrated before puberty and perhaps expected to be chaste.³⁷⁴ These different ideas probably enable these two kinds of mutilation to exist without contradiction.³⁷⁵

Conclusion

This chapter showed the gradual steps towards the introduction of bodily mutilation, including mutilation of the penis, into the Roman penal system. *Ecloga* 17.39 could be regarded as an unprecedented law in the context of civil law, but it has been clarified that this clause was probably a product of the Isaurian legal trend (i.e. simplification of the Justinianic laws for practical use and emphasis of the Old Testament) combined with both social and legal circumstances up to that time in which mutilation of the penis could sometimes be performed as punishment.

³⁷² *Dig.* 48.8.4.2; *Nov.Jus.* 142.

³⁷³ Tougher 2008, 29-30. *PLRE* 1, Eutherius 1, 314-5; *PLRE* 2, Mamas 2, 704-5; *PLRE* 3, Solomon 1, 1167-77.

³⁷⁴ Paul of Aegina, 6.68, ed. Heiberg, vol. 2, 111-2; tr. Adams, 380.

³⁷⁵ The same may be said of the talion in *Nov.Jus.* 142.

On the other hand, it seems significant for this thesis that mutilation of the penis was adopted as a legal penalty in the imperial law book because this law suggests that emperors had a different aspect of genital mutilation from castration for making eunuchs. Mutilation of one's penis could be considered as a way of humiliation and prevention of recidivism especially when it is inflicted on an adult. It could also be suggested that this penal mutilation could be expected to have another aspect, that of the purification of one's sin through cutting off the body part which caused one to sin, in the context of the seventh-century crisis, during which emperors attempted to acquire divine support through improving the Christian morals of their subjects. This concept of mutilation of the penis seems to be transmitted even after the promulgation of the *Ecloga*. Compilations in the later period, such as the *Basilika* in the Macedonian era, recorded *Ecloga* 17.39 without any modification.³⁷⁶

The scarcity of sources makes it difficult to connect this legal issue with actual eunuchs and castration in the middle of the eighth century or later. However, it might be possible to speculate what *Ecloga* 17.39 could mean for the Byzantine history, considering the later cases where reigning emperors chose genital mutilation as a tool for removing their potential rivals. This chapter has already indicated that mutilation of the penis in *Ecloga* 17.39 might have originated from actual punishments performed at an emperor's or judge's own discretion. *Nov.Jus.* 142 also implies that people could have been sanctioned to be castrated in the sixth century, although the legislator did not explicitly mention like that. As a result of the promulgation of the *Ecloga*, however, the use of genital mutilation by the imperial authority, including judicial officials, had been officially declared for the first time in the existing laws. Accordingly, this fact suggests a possibility that *Ecloga* 17.39, or a concept behind it that genital mutilation could be used as punishment, became one of the factors that inspiring emperors after the ninth century to choose genital mutilation as a means for removing sons of late emperors from the position of potential rival for the imperial throne.³⁷⁷

This part of the thesis confirmed that political and social situations could influence imperial legislation. This also indicates the possibility that the treatment of eunuchs and castration in law was transformed, reflecting the legislator's interest and society at that time. Such transformations probably occurred not only in the Isaurian laws but also in the Macedonian

³⁷⁶ *Proch.* 39.74; *Bas.* 60.27.28.

³⁷⁷ Krsmanović 2017, 52-9. The issue of political castration will be discussed in pages 136-9.

ones; the Macedonian legal compilations, contrary to those in the Isaurian era, refer to more previous stipulations about eunuchs and infertile men, and the emperor Leo VI promulgated new constitutions about them, changing their status. Therefore, the further examination of the social context of the Macedonian legal project and the comparison of it with that of both Justinian I and the Isaurian emperors will enable us to clarify how and why the status and perception of eunuchs were transformed from the later Roman empire to the Byzantine empire.

Part 2

The Macedonian Era

The Macedonian era from the accession of Basil I in 867 until the death of Theodora in 1056 was probably the most productive period in Byzantine legal history after the death of Justinian I. The first two Macedonian emperors, Basil I and his son Leo VI, carried out a project for codifying and rearranging old stipulations, most of which were compiled during the reign of Justinian, for the purpose of the ‘Cleansing of the Ancient Laws (ἀνακάθαρσις τῶν νόμων)’. The fruits of their codification effort include the *Eisagoge* (*Eisag.*), the *Prochiron* (*Proch.*) and the *Sixty Books/Basilika* (*Bas.*). As a result of their project many stipulations about eunuchs and castration were collected, especially in the *Basilika*, unlike the Isaurian legal project which omitted a large part of the Justinianic stipulations concerning eunuchs. In addition, they not only compiled previous stipulations, but also changed some of them, as Leo VI promulgated new constitutions which were finally collected as the *Novels of Leo VI* (*Nov.Leo.*). In the existing 113 novels, three novels deal with eunuchs and castration. *Nov.Leo.* 26 permits castrated men to adopt children, abolishing a previous restriction in the Justinianic law. *Nov.Leo.* 60 adopts a milder penalty against castration in the empire. Finally, the emperor issued *Nov.Leo.* 98 in which he prohibited the marriage of eunuchs. Therefore, these Macedonian laws, represented by three novels of Leo VI, provide much information about how the Roman legal tradition in Justinian I’s laws had been transmitted to the Macedonian era. Moreover, it is probable that most of these stipulations in the Macedonian era, especially new laws, reflect actual issues concerning eunuchs and castration during that period. Therefore, analysing these stipulations in detail will enable us to clarify how eunuchs lived in the empire and how Macedonian legislators understood and attempted to control them.

There are other legal sources even after the death of Leo VI. For example, Macedonian emperors following Leo VI issued some new laws, in which Basil II had dealt with the ‘powerful’ who accumulated lands of the poor. This novel is noticeable because the legislator describes a case of one of the powerful, the *protovestiarios* Philokales who was probably his court eunuch. In addition, the emperor problematised not only eunuchs included among the powerful, but also a specific eunuch, Basil the *parakoimomenos* who was the great-uncle of the emperor and one of the most influential eunuchs in the middle Byzantine period. Finally, the *Peira*, a private collection of excerpts of the eleventh-century judge, Eustathios Romaïos, offers us a lot of important information about actual practices in the law

court of Constantinople. This contained a decision of Basil II that the inheritance rights of eunuchs should be restricted. These laws and decisions of Basil II which mention eunuchs, however, have been studied by very few eunuch studies due to the shortness or obscurity of these texts and as scholars strongly focus on the novels of Leo VI. Thus, the close examination of what Basil II decided about eunuchs in the present thesis is significant for providing a comprehensive picture of the view of Byzantine emperors towards eunuchs.

The following chapters, as Part 1 did, will examine laws concerning eunuchs, in this case those promulgated in the Macedonian era in order to reveal how and why legal status of eunuchs or infertile men had been transformed and remained unchanged between the reign of Justinian I and the period under the Macedonian dynasty. The method of comparative analysis will continue to be adopted in this part; namely, the present thesis clarifies the context of each law through both reading closely the text itself and comparing it with other stipulations, canonical rules, and actual events described in non-legal sources. Firstly, chapter 3 starts this analysis by inspecting the entire picture of the legal projects of Basil I and Leo VI. The context and content of these projects, which differ from those of Justinian I and the Isaurian emperors, will be shown. At the time of this survey, the present author will mainly depend on the recent study of Chitwood concerning these projects and that of Riedel about the *Novels of Leo VI*. Then, this chapter provides an overview of the situation of eunuchs at the time of these projects, especially in the reign of Leo VI, and examines how the stipulations concerning eunuchs and infertile men in the laws of Justinian I and of the Isaurian emperors were accepted until the Macedonian period. Based on this preparatory research, the following three chapters will reconsider three novels of Leo VI respectively: the prohibition on castration (chapter 4), permission for castrated men to be adoptive parents (chapter 5), and the restriction on eunuchs' marriage (chapter 6). This analysis will reveal that various factors are intertwined behind each novel much more completely than previous studies supposed and that the imperial government used various views about eunuchs for justifying their decisions concerning eunuchs' lives. Finally, two stipulations in the reign of Basil II will be examined in chapter 7. As a result, the analysis of this part will indicate a possibility that the increase of native eunuchs as a result of change in the sources of supply of eunuchs from the eighth century impacted on the decisions of the Macedonian emperors who had probably had to deal with issues concerning those kind of eunuchs.

Chapter 3

Legal Reform and Codification Projects of the Macedonian Dynasty

The Macedonian Dynasty and its Codification Project

The Macedonian era is considered as a period of ‘cultural, economic and political revival after the stabilisation made by the Isaurian emperors’.³⁷⁸ The empire expanded territorially through many important conquests and military victories, except for the gradual decline of imperial authority in southern Italy.³⁷⁹ Consequently, the population, land under cultivation, and trade increased.³⁸⁰ Moreover, after Second Iconoclasm had ended in the triumph of the iconophiles in 843, the defence of Byzantine claims to ‘Romanness’ or *Romanitas* was advanced in a new political climate via a number of massive ‘encyclopaedic’ projects directed by the Macedonian dynasty.³⁸¹ The projects consist of various topics, such as court ceremony, hagiography, historiography, and law.³⁸² The last includes the codification project by Basil I and Leo VI.

The fruits of the project are the *Prochiron*, the *Eisagoge*, and the *Sixty Books/Basilika*.³⁸³ Although there is a scholarly debate concerning the dating of each legal codification, Chitwood argues that the *Prochiron* was firstly codified as a didactic handbook of law between 870-9 and the second version was made towards the end of the reign of Leo VI,³⁸⁴ and then the *Eisagoge* can probably be dated between 880 and 888.³⁸⁵ Finally, the *Sixty Books*, later known as the *Basilika*, which shows the culmination of that project, were

³⁷⁸ Chitwood 2017, 17. For general accounts of the Macedonian dynasty, see Treadgold 1997, 446-579; Gregory 2005, 217-56.

³⁷⁹ Chitwood 2017, 18.

³⁸⁰ Chitwood 2017, 18-9.

³⁸¹ Chitwood 2017, 17.

³⁸² Magdalino 2011, 143-59; Chitwood 2017, 17.

³⁸³ For general surveys of the Macedonian legal project, see Schminck 1986; Pieler 1989, Lokin 1994; van Bochove 1996; Fögen 1998; Chitwood 2017, 16-44.

³⁸⁴ Chitwood 2017, 25-9. For the discussion of the date of the *Prochiron*, see Schminck 1986, 55-107; van Bochove 1996, 29-56.

³⁸⁵ Chitwood 2017, 29.

promulgated in Leo VI's early reign, on Christmas Day 888.³⁸⁶ The Roman law compiled in the Justinianic corpus (i.e. the *Digest*, the *Justinian Code*, the *Institutes*, and the *Novels*) was the basis for these three texts, although some subsequent stipulations like the *Ecloga* were included. When they had to recompile from the legal compilations of Justinian I, especially those mainly written in Latin, it seems likely that the Macedonian compilers tended to use their Greek versions as the Isaurians probably did.³⁸⁷ Moreover, the compilers rearranged them after purging superfluous or contradictory stipulations,³⁸⁸ and Hellenised all Latin terms in Roman law.³⁸⁹ In addition, the *Prochiron* and the *Eisagoge* include some provisions and titles which had no precedent in previous law.³⁹⁰ On the other hand, modern scholars often link the *Epitome (legum)* with these legal projects dating from the ninth and tenth centuries.³⁹¹ This is a private law book collected soon after the death of Leo VI and revised in 921 during the reign of Romanos I Lekapenos (920-44) by a certain Symbarios.³⁹² These legal compilations show a noteworthy fact, that an enormous number of stipulations in the corpus of Justinian I had been collected in these lawbooks. In particular, the sixty books of the *Basilika* was probably the most voluminous collection of civil law published after the death of Justinian I because, according to the author of the proem of the *Prochiron*, the *Basilika* was made in order to keep the original form of all of the old laws, especially the law of Justinian I, which remained valid then.³⁹³ Therefore, its comprehensive character made a strong contrast to the *Ecloga*, probably being made as the legal handbook for judges.

The Macedonian codification project has a purpose of 'Cleansing of the Ancient Laws (ἀνακάθαρσις τῶν νόμων)'.³⁹⁴ Before that period, the *Ecloga* of Leo III and Constantine

³⁸⁶ Chitwood 2017, 33.

³⁸⁷ Fögen 1998, 12-7.

³⁸⁸ *Proch.* pr., ed. Schminck, 60.77; *Eisag.* pr., ed. Schminck, 6.28-40; *Bas.* pr., ed. Schminck, 22.21-4; *Nov.Leo.* pr., ed. Troianos, 42.41-8. For the translation process in the Macedonian period, see Fögen 1998, 12-7.

³⁸⁹ *Proch.* pr., ed. Schminck, 58.52-3. Fögen 1998, 11.

³⁹⁰ Chitwood 2017, 27, 32.

³⁹¹ Lokin 1994, 71; Chitwood 2017, 42-3.

³⁹² Schminck 1986, 109-31; Schminck 1991, 724; Chitwood 2017, 42-3.

³⁹³ *Proch.* pr., ed. Schminck, 60.77-83; tr. Schminck, 59.

³⁹⁴ Pieler 1989; Chitwood 2017, 19. This phrase repeatedly appeared in the proem of the

V, as mentioned above, abridged and simplified the law with a stark emphasis on the model of Old Testament.³⁹⁵ However, the lawbook was tainted by the fact that the legacy of both Leo III and Constantine V were condemned as iconoclasts after the victory of the iconophiles in 843.³⁹⁶ Magdalino argues that tenth-century imperial compilations in various genres was an attempt to create an orthodox imperial culture in order to maintain the triumph of orthodoxy over iconoclasm.³⁹⁷ As for the legal compilations, the proems in the *Prochiron* and the *Eisagoge* announce the denunciations of the Isaurian compilations,³⁹⁸ although, as Humphreys points out, these Macedonian compilations were modelled on the Isaurian *Ecloga*.³⁹⁹ As a result, the project of ‘Cleansing of the Ancient Laws’ in the Macedonian era could be considered as a part of a reworking of the *Ecloga* which had been polluted by the iconoclast emperors.⁴⁰⁰

In addition, this renewed compilation of Justinianic law in the project of ‘Cleansing of the Ancient Laws’ had another important meaning for the ninth-century emperors: ‘the reappropriation of Roman (i.e. Justinianic) law’.⁴⁰¹ As a result of his examination of the proem of each Macedonian compilation, Chitwood convincingly argues that emperors carried out this project as a part of ‘a larger political program directed at the recovery of “Romanness” or *Romanitas*’ when they faced ‘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’.⁴⁰² As a result of the Islamic invasions in the seventh century, the emperors tended to

Prochiron. (e.g. *Proch.* pr., ed. Schminck, 58.61-2, 60.77). This expression of ‘cleansing (ἀνακάθαρσις)’ of law is also found in the proem of the *Eisagoge* and in the *Novels of Leo VI*. *Eisag.* pr. ed. Schminck, 6.31-3; *Nov.Leo.* pr., ed. Troianos, 40.4; *Nov.Leo.* 1, ed. Troianos, 44.40.

³⁹⁵ Humphreys 2015, 249-72.

³⁹⁶ Chitwood 2017, 24.

³⁹⁷ Magdalino 2011, 147.

³⁹⁸ *Proch.* pr., ed. Schminck, 58.64-59.76; *Eisag.* pr. ed. Schminck, 6.33-46. Humphreys 2015, 245; Chitwood 2017, 27-8, 30-1.

³⁹⁹ Humphreys 2015, 245-7.

⁴⁰⁰ Humphreys 2015, 244; Chitwood 2017, 28.

⁴⁰¹ Chitwood 2017, 28.

⁴⁰² Chitwood 2017, 19. He seems to develop the argument of Fögen that the reanimation of

find greater value in the Orthodox Christianity than in ‘Romanness’.⁴⁰³ We have already mentioned that the Isaurian law, as the law of Christians, was strongly influenced by the ideological model of the New Israelites, while most clauses in it were collected from the law for Romans promulgated in the sixth-century. It seems to be true that the Old Testament models were partly used by the Macedonian emperors,⁴⁰⁴ and that the Macedonian compilations of law had accepted the notion in the *Ecloga* that the justice was created by God so that the imperial decision was subordinated, not by the emperor, like Justinian I who was still an independent lawgiver assisted by God.⁴⁰⁵ The model of the Old Testament in the law, however, had become less intense by the ninth century not only because of the condemnation of the iconoclastic emperors in the Isaurian era but also because other political situations arose, and the *Romanitas* of the Byzantines was challenged by the western rivals mentioned above.⁴⁰⁶ Therefore, as Chitwood argues, the ‘Cleansing of the Ancient Laws’ in the legal reform of Macedonian emperors could be considered not only as a restoration of Justinianic law for its practical use but also as an attempt to reassert the Roman identity of the Byzantine Empire.⁴⁰⁷

The Novels of Leo VI

Leo VI issued perhaps about 120 novels but 113 novels have been transmitted to us.⁴⁰⁸ This collection is probably the largest single instance of Byzantine imperial legislative activity after that of Justinian I.⁴⁰⁹

Roman law in the first decades of Macedonian dynasty could be traced back to the tension between Pope Nicholas I (857-67) and Michael III (842-67) or the patriarch Photios over the Roman tradition. Fögen 1998, 17-22.

⁴⁰³ Humphreys 2015, 253-8.

⁴⁰⁴ Magdalino and Nelson 2010, 21-5. They finally suggest the marginalisation of the Old Testament in society during the Macedonian period. Magdalino and Nelson 2010, 28-9.

⁴⁰⁵ Lokin 1994, 74-80. *Proch.* pr., ed. Schminck 56-8.

⁴⁰⁶ Chitwood 2017, 19-21.

⁴⁰⁷ Chitwood 2017, 21-2. Cf. Pieler 1989, 69.

⁴⁰⁸ Signes Codoñer 2009, 8-13; Chitwood 2017, 35.

Recent studies approach the *Novels of Leo VI* from various viewpoints. Chitwood, whose subject is the legal culture of the Macedonian dynasty, considers the promulgation of the novels as one of the Macedonian codification projects. As mentioned above, he emphasises that it was a part of the process of dynastic, ecumenical, and political legitimation, that is ‘the reappropriation of *Romanitas*’.⁴¹⁰ On the other hand, the study of Riedel focuses on the emperor’s religious language in his novels.⁴¹¹ These studies suggest the complicated character of the *Novels of Leo VI*.

Regarding the chronology and composition of Leo’s novels, the convincing study of Signes Codoñer questions the prevailing theory that the collection of the novels was published in 888 along with the *Basilika*.⁴¹² He points out the possibility that Leo VI’s legislation was composed at different points in his reign, arguing that there is little proof that Leo VI considered all his legislative activity as a coherent project.⁴¹³ He finally argues that Leo VI’s *Novels* as they have been transmitted to us consist of four components: Part A (the proem and *Nov.Leo.* 1) is two versions of a promulgatory text written at different points in his reign; Part B (*Nov.Leo.* 2-68) is thematically arranged and likely promulgated between ca. 887 and 893 under the influence of Leo’s trusted advisor and father-in-law Stylianos Zaoutzes; Part C (*Nov.Leo.* 69-104) has no systematic arrangement and was probably written during 893-9; Part D (*Nov.Leo.* 105-113) has no address except *Nov.Leo.* 111, addressed to Zaoutzes, and is the last section in which most laws were perhaps promulgated after Zaoutzes’ death in 899.⁴¹⁴ Chitwood agrees with this chronology.⁴¹⁵ Although Riedel does not mention the study of Signes Codoñer, her opinion seems consistent with his argument. She, referring to the opinion of Troianos, states that recent studies question the theory that Leo VI promulgated the *Novels*

⁴⁰⁹ Chitwood 2017, 22; Riedel 2018, 5.

⁴¹⁰ Chitwood 2017, 43-4.

⁴¹¹ Riedel 2018, 30.

⁴¹² Signes Codoñer 2009. For the discussion about the relation between the *Basilika* and the *Novels of Leo VI* before his study, see Fögen 1989, 23-35; Lokin 1994, 71-92.

⁴¹³ Signes Codoñer 2009, 8.

⁴¹⁴ Signes Codoñer 2009, 1-33.

⁴¹⁵ Chitwood 2017, 36.

of *Leo VI* as one corpus, but most scholars accept the possibility that the novels ‘were codified into one unified text during the lifetime of Leo’.⁴¹⁶

One of the main purposes of the promulgating of such novels was to improve on the current situation of the existing law at the time of Leo VI. Chitwood argues that the purpose of the novels was to adapt Roman law to a distinctly middle Byzantine context, correcting what the emperor considered as flaws of Roman law.⁴¹⁷ The proem states a well-known *topos* that the legislator cannot accept the situation that many of the laws have been forgotten, neglected or become contradictory because this would lead ‘to confusion and the detriment of society’.⁴¹⁸ In order to correct this situation, the proem of *Novels of Leo VI* offers the following plan:⁴¹⁹ the old laws which were judged useful were affirmed again; ‘those laws considered without benefit were either explicitly removed or were left unmentioned’;⁴²⁰ ‘customs which seemed reasonable were granted the force of law’.⁴²¹ In addition to the three ways definitely mentioned, Riedel shows the fourth one separately from the third one that the legislator promulgated entirely new laws with tweaks of old laws.⁴²² It is notable that the proem of the *Prochiron* collected in the reign of Leo’s father, Basil I, already justified the changes of older stipulations for correction and the promulgation of new laws for the cases of which regulations had not been established in law.⁴²³ Accordingly, it is highly possible that the promulgation of Leo’s novels was closely bound up with the Macedonian legal projects started by his father.

Riedel focuses on the religious context of Leo VI’s reign and his novels based on the fact that the emperor, as a second son of Basil I, gained a religious education under the tutelage of the patriarch Photios.⁴²⁴ According to her, the novels suggest that the emperor

⁴¹⁶ Troianos 2012, 154; Riedel 2018, 102.

⁴¹⁷ Chitwood 2017, 22.

⁴¹⁸ Chitwood 2017, 37; Riedel 2018, 98. *Nov.Leo.* pr., ed. Troianos, 38.1-27. Cf. Chitwood 2017, 25.

⁴¹⁹ *Nov.Leo.* pr.41-8, ed. Troianos, 42.

⁴²⁰ Chitwood 2017, 37; Riedel 2018, 98.

⁴²¹ Chitwood 2017, 37.

⁴²² Riedel 2018, 103-11.

⁴²³ *Proch.* pr., ed. Schminck, 58.52-7; tr. Schminck, 59.

⁴²⁴ Riedel 2018, 1.

hoped to publicly inculcate an unimpeachable Orthodox faith in the citizenry as his Isaurian predecessors had tried to do in the *Eclogia*.⁴²⁵ She offers two reasons for this tendency: first, the triumph of the iconophile faction in 843 made the emperor keen to ‘develop unity and harmony in a religious context that had been shredded for more than a century over the iconoclast controversy’;⁴²⁶ secondly, Leo VI, as emperor, was interested in drawing a clearer distinction between the aggressive Muslim neighbours and the peace-loving Byzantines as well as the latter being divinely chosen Orthodox Christians.⁴²⁷ As a matter of fact, as Troianos argues, thirty five novels of Leo VI, that is about a third of the 113 novels, are related to ecclesiastical issues, in most of which Leo VI aims at resolving contradictions between imperial law and canons or other laws of church origin.⁴²⁸ In particular, Troianos concludes that the *Novels of Leo VI* aimed at harmonising the civil law with canon law which were issued after *Nov.Jus.* 131 had allowed the canons of four ecumenical councils (Nicaea, Constantinople, Ephesus, and Chalcedon) to have the status of law.⁴²⁹ Therefore, it is obvious that the *Novels of Leo VI* tend to be closely connected with issues in canon law.

The impact of Leo VI’s novels on Byzantine society is reevaluated by recent studies. According to Chitwood, legal historians tend to minimize their impact, considering that ‘the novels were more an academic exercise than a serious attempt at legislation’, because they judge some points in the novels to be illogical and erratic.⁴³⁰ Although some later sources seem to support this notion, Chitwood criticises this negative verdict of legal historians, emphasising the importance of taking into account the wider social context.⁴³¹ He argues that we could observe Leo VI’s attempts to adapt the late Roman heritage to a middle Byzantine context in the *Novels of Leo VI*, especially in clauses concerning monasteries, provisions which were introduced by Isaurian emperors like marriage law, and laws which granted

⁴²⁵ Riedel 2018, 95.

⁴²⁶ Riedel 2018, 95.

⁴²⁷ Riedel 2018, 95-6.

⁴²⁸ Troianos 2007a, 423-4; Troianos 2017, 181.

⁴²⁹ Troianos 1990; Troianos 2017, 181-2; Chitwood 2017, 40-1. For *Nov.Jus.* 131, see Troianos 2012, 128.

⁴³⁰ Chitwood 2017, 38-9.

⁴³¹ Chitwood 2017, 38-9.

validity to canons issued after Justinian's legal reforms.⁴³² Then, Chitwood concludes that the content of each novel demonstrates that the Macedonian codification program was not 'a mere regurgitation of Roman law', but 'both a mimetic and creative act'.⁴³³ Signes Codoñer also argues that most of Leo's novels were promulgated in response to individual issues.⁴³⁴ This thesis also accepts these revaluations of the *Novels of Leo VI*. The creative character of the novels might enable us to analyse what contemporary issues lay behind these laws and how the emperor and his officials attempted to resolve them according to their political and religious ideology.

Eunuchs and Castration in the Macedonian Legal Project

It is certain that eunuchs played significant roles in the Macedonian era as they did from the later Roman era. Indeed, their presence seems to considerably increase in the imperial court, church, and society. For example, the patriarch Ignatios (847-58, 867-77), who was a son of Michael I (811-13) and became a victim of political castration after the dethronement of his father, was an important figure in Constantinople before and after the accession of Basil I in 867. As for the imperial eunuchs, it is generally accepted that the period between the seventh century to the eleventh century was the golden age for them,⁴³⁵ but there also seem to be no doubt that the political power of eunuchs reached its apogee during the Macedonian period. Macedonian emperors used eunuchs as courtiers and military officers, some of whom served several emperors for many years and exercised great influence, e.g. Constantine the Paphlagonian, Basil Lekapenos, and John the *orphanotrophos*. It should be noted that the *Kletorologion* of Philotheos, which was produced during the reign of Leo VI and was finally appended to Constantine VII's *Book of Ceremonies* with some additions,⁴³⁶ informs us that there were eight eunuch titles and ten offices reserved only for eunuchs as of 899. In addition, Philotheos mentions that eunuchs could be appointed to almost all offices with three

⁴³² Chitwood 2017, 41.

⁴³³ Chitwood 2017, 39-41.

⁴³⁴ Signes Codoñer 2009, 30-2.

⁴³⁵ Tougher 2008, 54-67; Messis 2014, 25.

⁴³⁶ Tougher 2008, 57.

exceptions, i.e. city prefect of Constantinople, *quaestor* (judge and legislator), and *domestikos* (military officer).⁴³⁷ This document suggests that the use of eunuchs in the imperial administration had already been highly institutionalised at the end of the ninth century.⁴³⁸ It seems to coincide with another change in the eunuchs: the shift in their source of supply.⁴³⁹ As mentioned in the introduction, the presence of eunuchs who had been born in imperial territory, especially in Paphlagonia, gradually increased after the later Roman period when eunuchs tended to be supplied as foreign slaves. One of the most famous figures among such native eunuchs is a Paphlagonian eunuch in the eleventh-century, John the orphanotrophos, whose enormous power had enabled him to make his brother and his nephew the emperors Michael IV (1034-41) and Michael V (1041-2). Therefore, it is necessary to consider this political significance and social visibility of eunuchs in the Macedonian period, which was probably greater than that in the Isaurian era, when we examine Macedonian legal sources.

Leo VI, whose reign yielded the *Basilika* and numerous novels, is characterised as an emperor who particularly relied on eunuchs from his early reign.⁴⁴⁰ Tougher shows that many eunuchs, including those who could be regarded as eunuchs on the basis of their offices served Leo VI in both civil and military spheres i.e. the *protovestiaros* Niketas Helladikos, the master of the emperor's table Constantine, the *patrikios* and *protovestiaros* Theodosios, the *protovestiaros* Christopher, the *koitonites* Kalokyros, the *chartoularios* of the drome Sinoutis, and Basil.⁴⁴¹ It is also suggestive that the abovementioned *Kletorologion* was

⁴³⁷ Tougher 2008, 57-9.

⁴³⁸ Cf. Messis 2014, 25-6.

⁴³⁹ Tougher 2008, 60-6; Messis 2014, 25-6.

⁴⁴⁰ For the relationship between Leo VI and his eunuchs, see Tougher 1997, 194-218.

⁴⁴¹ Guiland 1943, 208, 221; Tougher 1997, 199-200. *PMBZ*, Basileios (20917) Available at: <https://www.degruyter.com/database/PMBZ/entry/PMBZ23070/html>; Christophoros (21273) <https://www.degruyter.com/database/PMBZ/entry/PMBZ23426/html>; Kalokyres (23629) Available at: <https://www.degruyter.com/database/PMBZ/entry/PMBZ25783/html>; Konstantinos (23780) Available at: <https://www.degruyter.com/database/PMBZ/entry/PMBZ25934/html>; Niketas Helladikos (25714) Available at: <https://www.degruyter.com/database/PMBZ/entry/PMBZ27868/html>; Sinutes (27090) Available at: <https://www.degruyter.com/database/PMBZ/entry/PMBZ29244/html>; Theodosios (27898)

probably produced during the reign of Leo VI. Finally, two powerful eunuchs, the *parakoimomenos* Samonas and his successor Constantine the Paphlagonian appeared in the second half of Leo's reign.⁴⁴² In particular, the latter maintained his power even after the death of Leo VI and during the regency of Zoe Karbonopsina, the fourth wife of Leo VI, for their son Constantine VII. In addition, Leo VI built a monastery for eunuchs (μονὴν ἀνδρῶν εὐνούχων) as an attachment to the church of St Lazaros near the Great Palace.⁴⁴³ Unfortunately, there is no other source which proves the presence of eunuch monks in that monastery, but it is probable that the emperor's close relationship with his eunuchs made him take this act. Accordingly, it seems to be reasonable to suppose that such a strong presence of eunuchs could affect the laws concerning them, especially those in the *Novels of Leo VI*.

The law books produced in the Macedonian legal project, especially the *Basilika*, had both compiled and rearranged a lot of Justinianic stipulations concerning eunuchs and castration translated into Greek, contents of which the first chapter of the present thesis introduced briefly. Although this presents a striking contrast to the weak presence of laws concerning eunuchs in Isaurian law, such a contrast was probably the natural consequence of the character of the Macedonian compilation project as the 'Cleansing of Ancient Laws', which compiled preceding laws, especially the law of Justinian I, on a vaster scale than the *Ecloga*, of which the primary purpose was to make a concise handbook of preceding laws. On the other hand, it should be noted here that older stipulations not collected in the *Basilika* had not necessarily lost their power of law before and after the promulgation of the *Basilika*.⁴⁴⁴ Stolte mentions that the *Basilika* seemed to primarily aim not to replace the older laws but to facilitate access to their original texts.⁴⁴⁵ In addition, the fact that Manuel I Komnenos (1143-80) granted the *Basilika* the exclusive force of law probably suggests that the authority of the *Basilika* as law was probably unstable until the middle of the twelfth century.⁴⁴⁶ For the

Available at: <https://www.degruyter.com/database/PMBZ/entry/PMBZ30053/html> [Accessed: 23 October 2021].

⁴⁴² Guiland 1943, 221-2; Tougher 1997, 194-218.

⁴⁴³ Theoph.Cont., ed. Bekker, 364-5. Tougher 2006b, 242; Tougher 2008, 73.

⁴⁴⁴ Cf. Chitwood 2017, 34-5.

⁴⁴⁵ Stolte 2015, 360-1; Chitwood 2017, 34. *Proch.* pr., ed. Schminck, 60.77-83; tr. Schminck, 59.

⁴⁴⁶ Chitwood 2017, 35.

present thesis which studies imperial views about eunuchs, however, the *Basilika* is a significant source which informs us which laws concerning eunuchs and infertile men the contemporaneous emperors knew and officially considered valid in their empire.

As table 5 shows, the *Basilika* covers almost all kinds of such stipulations, while the present study has to rely largely on its restitution made by the group of Scheltema.⁴⁴⁷ Moreover, the *Prochiron* and the *Eisagoge* include stipulations concerning the marriage defect due to the three-year impotency of a husband (*Nov.Jus.* 22.6),⁴⁴⁸ the price of castrated slaves (*CJ* 6.43.3.1),⁴⁴⁹ and adoption by eunuchs (*Inst.* 1.11.9)⁴⁵⁰ in addition to the copy of *Ecloga* 17.39 on bestiality.⁴⁵¹ Although the transition process of specific clauses concerning eunuchs will be examined in detail in the following chapters, this brief overview of the Macedonian law definitely shows that the Roman legal tradition in the laws of Justinian I had been mostly transmitted in the Macedonian empire.

Table 5: Justinianic stipulations concerning eunuchs in the *Basilika*⁴⁵²

No.		Theme
4.1.23	<i>Nov.Jus.</i> 133.5	Eunuchs in convents
6.25.4	<i>CJ</i> 12.5.4	Emancipation of <i>cubicularii</i> who were given to the imperial court and their testament
(19.1.87)	<i>CJ</i> 4.42.2	Prohibition of castration
(19.10.6)	<i>Dig.</i> 21.1.6	A slave who is <i>spado</i>
(19.10.7)	<i>Dig.</i> 21.1.7	A slave who is <i>spado</i>
28.7.4	<i>Nov.Jus.</i> 22.6	Divorce due to three-years impotence of husband
29.1.35	<i>Dig.</i> 23.3.39.1	Marriage of eunuchs
(33.1.40)	<i>Dig.</i> 1.7.40.2	Adoption of <i>spado</i>
(33.1.59)	<i>Inst.</i> 1.11.9	Adoption of eunuchs

⁴⁴⁷ For the process of restitution of the *Basilika*, see Stolte 2021.

⁴⁴⁸ *Proch.* 11.2; *Eisag.* 21.2.

⁴⁴⁹ *Proch.* 34.11; *Eisag.* 37.8.

⁴⁵⁰ *Eisag.* 33.24.

⁴⁵¹ *Proch.* 39.74; *Eisag.* 40.67.

⁴⁵² The brackets signify that the provision is reconstructed by the modern editors of the *Basilika* led by Scheltema.

	<i>Theoph.</i> 1.11.9	
(35.8.6)	<i>Dig.</i> 28.2.6	Marriage of <i>spado</i>
38.1.15	<i>Dig.</i> 27.1.15	Tutelage of <i>spado</i>
48.2.14	<i>Dig.</i> 40.2.14.1	Marriage of eunuchs
48.14.4	<i>CJ</i> 7.7.1.5	Price of slaves
49.1.6.2	<i>Dig.</i> 37.14.6.2	Oath of castrated freedmen not to have children
60.3.27.28	<i>Dig.</i> 9.2.27.28	Value of slave boy who had been castrated
60.37.84	<i>Eclog.</i> 17.39	Penal mutilation of penis
60.51.64	<i>Nov.Jus.</i> 142	Prohibition of castration

On the other hand, the novels promulgated by Leo VI show remarkable changes in the stipulations promulgated by Justinian I concerning eunuchs. Leo VI issued three full-length novels concerning eunuchs and castration, in which he reconsidered the previous laws of Justinian I or discussed new issues that had arisen in his time. The large amount of text of each novel and the fact that the emperor, who dealt with various topics in his existing 113 novels, focused on eunuchs in three novels suggest that the emperor and his government had a keen interest in laying down new rules about them in line with the contemporaneous situation. It seems likely that, as mentioned above, Leo's promulgation of these novels was owing to the strong presence of court eunuchs during his reign.⁴⁵³ In any case, these novels are important sources which provide us with valuable information on what issues about eunuchs occurred in the middle Byzantine empire and how authority dealt with them.

Conclusion

This chapter has preparatively surveyed the legal project implemented at the dawn of the Macedonian dynasty. This project is, as the Isaurian one was, characterised by both great respect for the legal texts promulgated by Justinian I and the attempt to change some clauses in those texts to suit the contemporary situation. At the same time, however, the Macedonian legal project probably aimed to announce a farewell to the law of iconoclastic emperors through carrying out new codification projects, which replaced the *Ecloga*, with the issuing of

⁴⁵³ For the general accounts of Leo VI's eunuchs, see Tougher 1997, 194-218.

novels, while it reinforced the ‘Romanness’ of the empire in rivalry with its neighbouring rulers. On the process of such legal reform, the ‘Cleansing of Ancient Laws’, Basil I and Leo VI had led the codification project on a much larger scale than their Isaurian predecessors. As a result, a lot of stipulations concerning castration and eunuchs were collected in their compilations of law, especially in the *Basilika*. This does not mean that these clauses concerning eunuchs were widely known to the inhabitants of the empire because, as Chitwood argues, the regular use of the *Basilika* was probably limited to the courts of Constantinople due to its sheer size.⁴⁵⁴ The present thesis, however, considers that the collection of laws concerning eunuchs in the *Basilika* suggests an important fact that these stipulations about eunuchs and castration were known at least to the central government, and perhaps, the emperor Leo VI himself.

In addition, the *Novels of Leo VI* could reveal the remarkable changes in the situation surrounding eunuchs. If we believe that the *Novels* reflected not only the imperial ideology concerning Romanness and Orthodox Christianity but also the wider social context, it is highly possible that novels concerning eunuchs were promulgated in order to deal with real issues at the end of the ninth century. Therefore, the presence of eunuchs in the imperial court of Macedonian emperors seems to suggest that the legislation of Leo VI was based on the emperor’s own experience with his eunuchs; in the other words, Leo’s novels are worthy of research because they probably reflect the contemporary views of emperors or society towards eunuchs.

The following chapters will examine three novels of Leo VI in detail. The thesis will start the analysis by examining *Nov.Leo. 60* which prohibits illegal castration in the empire although the issue of eunuchs is discussed in *Nov.Leo. 26*. The reason for dealing with *Nov.Leo. 60* first is that the novel, different from the other two novels of Leo VI, could directly affect the very basis of the presence of eunuchs in the empire due to the fact that most eunuchs were created through surgical castration. As a result, *Nov.Leo. 60* could suggest the basic stance of Byzantine rulers towards eunuchs in their empire.

⁴⁵⁴ Chitwood 2017, 129-30.

Chapter 4

The Imperial Position on Castration: *Nov.Leo. 60*

Introduction

Prohibitions of castrating anyone in the empire was one of the oldest and the most famous Roman stipulations concerning eunuchs, which could be traced back to an order of Domitian (81-96). Thereafter, the Roman emperors repeatedly promulgated such prohibitions until the reign of Justinian I, imposing severe penalties including confiscation, deportation, and death, or *lex taliones* on those who had castrated others. Three hundred years later, at the end of the ninth century, Leo VI issued a new stipulation, *Nov.Leo. 60*. The emperor took the same approach against castration as his predecessors but partly modified previous stipulations. The most significant change of his novel is toleration of punishment against offenders as we will see later. Previous scholars show various opinions concerning the reasons for such a modification, especially focusing on the social or political context of the Macedonian period and Leo VI's personal interest in eunuchs. This chapter will inspect such opinions and re-examine *Nov.Leo. 60* from another point of view, that is the intertwining of civil law and canon law in the middle Byzantine period, in order to put this novel in the wider context of Byzantine law and society.

Firstly, this chapter will examine how the Roman emperors until Justinian I attempted to deter illegal castration in the empire and compare their prohibitory decrees with *Nov.Leo. 60*. Secondly, canons concerning eunuchs and castration will be analysed. Above all, I will focus on canon 8 of the Council of Constantinople held in 861 because this canon was the most recent known prohibition on castration before the promulgation of *Nov.Leo. 60*. Considering the background of the issue of this canon such as the rivalry between two patriarchs, Photios and Ignatios, it will be shown that the presence of the eunuch patriarch Ignatios might have caused a growing interest in punishing an act of castration in the Council. This analysis will also reveal how this canon influenced *Nov.Leo. 60*. Then, this chapter will clarify why *Nov.Leo. 60* tolerated the preceding punishment on castration, comparing it with other novels of Leo VI concerning penal law. This will show a possibility that the punishment of castration was made more tolerant in the course of the reform of penal law made by Basil I and his son Leo VI, in which they reconsidered the severe punishments of Justinian I and attempted to rebalance crime with punishment. Finally, we will examine the impact of

Nov.Leo. 60 on the practice of castration in the empire and consider the long-standing contradiction between the prohibitory decrees against castration and the imperial use of eunuchs.

Civil Laws prohibiting Castration before Leo VI⁴⁵⁵

The origin of prohibitory decrees against castration can be traced back to the early Roman empire. The emperors from the first through the sixth centuries promulgated prohibitory decrees against castration, some of which were known to people of the ninth century and thus collected in the *Basilika*. One of the main purposes for these promulgations was to deter such brutal violence as castration.⁴⁵⁶ The first case in the existing sources is the first-century ban of the emperor Domitian. The historian Suetonius narrated in the second century that the emperor prohibited castration and controlled the price of castrated slaves.⁴⁵⁷ Although the text of this decree is not recorded in the Roman and Byzantine collections of civil law, Domitian's action against castration was commented on by historians in the later period, such as Ammianus Marcellinus in the fourth century.⁴⁵⁸

The next source known to us is *Dig.* 48.8 entitled *Ad legem Corneliam de sicariis et veneficis*, which puts several related legal materials in order. This includes some interdicts in the early empire after Domitian and shows in general that those who had committed castration tended to be sentenced to a financial penalty.⁴⁵⁹ *Dig.* 48.8.6, which is a senatorial edict probably enacted in 97 during the reign of Nerva (96-8), orders that those who had handed over their slaves to be castrated shall be punished by confiscation of half of their property.⁴⁶⁰

⁴⁵⁵ The explanation of individual clauses promulgated until the reign of Justinian I mainly depends on my previous article. Kontani 2018, 312-20.

⁴⁵⁶ Kontani 2018, 312-20.

⁴⁵⁷ Suetonius, *Domitian*, 7.1, ed. Rolfe, vol. 2, 352.

⁴⁵⁸ Ammianus 18.4.5, ed. Rolfe, vol. 1, 424. For other sources, see Messis 2014, 97, 247-8.

⁴⁵⁹ In *Dig.* 9.2.27.28 (Ulpian, *Edict*, book 18), which is included in *Bas.* 60.3.27.28, Ulpian determines how slave owners should be financially compensated when their slaves were castrated without their permission.

⁴⁶⁰ *Dig.* 48.8.6 (Saturninus, *Duties of proconsul*, book 1).

Regardless of the validity of the dating of *Dig.* 48.8.6, it should be noted that Byzantines could have associated Nerva with his prohibition against castration because Byzantine historiographical sources sometimes assert that the emperor prohibited castration in the empire.⁴⁶¹ On the other hand, a rescript of Hadrian (76-138) collected as *Dig.* 48.8.4.2,⁴⁶² stipulates that those who had castrated others shall be punished by confiscation of all their property or shall even be punished by death if the perpetrator is a slave. In addition, it is notable that the rescript mentions voluntary castration; namely, the rescript punished both surgeons and their clients who had wished to be castrated. There is no hint what situation the legislator had in mind, but perhaps he supposed the cases of voluntary castration for religious or medical reasons.⁴⁶³ For example, as for the former, eunuch devotees of the goddess Cybele, who were called *galli*, who had castrated themselves in their annual rituals.⁴⁶⁴ Some of the early Christians also hoped to be castrated, as the *Apology* of Justin the Martyr in the middle of the second century reports an unsuccessful petition made by a Christian man who asked the prefect Felix for permission to be castrated by a physician in order to persuade opinion that unrestrained fornication did not exist in his relationship with a female.⁴⁶⁵ *Dig.* 48.8.5 refers to another constitution of Hadrian, which determines that those who have crushed the testicles of others are punished in the same way as those who have cut them off.⁴⁶⁶ Finally, a senatorial edict of unknown date which was mentioned by the third-century lawyer Marcian stipulates that the penalty against those who perpetrate the *Lex Cornelia*, including those who had castrated others, had changed.⁴⁶⁷ The new penalty is that the offender, who is one of the ‘more honourable persons’ (*honestiores*), shall be punished by deportation to an island and confiscation of property in the same way as before, but one who is of ‘humbler persons’ (*humiliores*) shall be punished with a more severe penalty, execution by wild animals.

As for imperial legislation in the later Roman period, the *Justinian Code* contains prohibitory decrees against castration promulgated by Constantine I and Leo I (457-74).

⁴⁶¹ Messis 2014, 273, 280.

⁴⁶² *Dig.* 48.8.4.2 (Ulpian, *Duties of Proconsul*, book 7).

⁴⁶³ Beard 2012, 323-62. This is an updated version of Beard 1994, 164-90.

⁴⁶⁴ Caner 1997, 396-415.

⁴⁶⁵ Just. *Apol.* 29.2, ed. and tr. Minns and Parvis, 160-1. Long 1996, 133.

⁴⁶⁶ *Dig.* 48.8.5 (Paul, *Duties of Proconsul*, book 2).

⁴⁶⁷ *Dig.* 48.8.3 (Marcian, *Institutes*, book 14).

These clauses should be distinguished from those included in the *Digest* on the point they prefer to impose the death penalty on those who had castrated others. In *CJ* 4.42.1, Constantine I stipulates that those who had castrated a slave shall be punished by the death penalty and that whoever had provided his slave to be castrated and the place where castration had been committed are to be punished by confiscation of slave and place.⁴⁶⁸ *CJ* 4.42.2 is a fragment of Leo I's stipulation which prohibits castrating 'Romans (*Romanae gentis homines*)' inside and outside of the empire and possessing such castrated Romans. It orders that capital punishment is inflicted not only those who have dared to perpetrate this crime but also those who had taken part in the transaction, such as notaries who drew up the documents for them and officers who received taxes that accompany the transaction. However, the emperor allows his subjects to own barbarian eunuchs who were castrated outside the empire.

Justinian I issued a new and more detailed prohibitory order against castration, from which *Nov.Leo.* 60 arises. In *Nov.Jus.* 142, the emperor deplores that there are some who dare to castrate others in the empire even though his predecessors determined penalties against them. He emphasises the high mortality rate of castration, mentioning that 'some of those who did survive have deposed, before our eyes, that only just three survived out of ninety'.⁴⁶⁹ Moreover, it is notable that the legislator condemns the act of castration not only as an act contrary to civil law, such as murder, but also as an unholy practice and act contrary to laws of God.⁴⁷⁰ Then, Justinian I introduced new penalties against such offenders according to *lex talionis*. Men who dared to castrate others in the empire are to be punished by exactly what they have done, namely, castration.⁴⁷¹ He might die, but if they should survive, they are to be sent to Gypsus after their property is confiscated for the public treasury.⁴⁷² If the perpetrators are women, they are to be punished by exile and confiscation.⁴⁷³ Moreover, those who made a

⁴⁶⁸ *CJ* 4.42.1. *mancipio tali nec non etiam loco, ubi hoc commissum fuerit domino sciente et dissimulante, confiscando.*

⁴⁶⁹ *Nov.Jus.* 142. pr., ed. Schöll and Kroll, 705.9-10; tr. Miller and Sarris, 313. καὶ τοσοῦτον ὅτι καὶ τινες ἐξ αὐτῶν τῶν περισωθέντων ἐπ' ὄψεσιν ἡμετέραις κατέθεντο, ὅτι ἀπὸ ἐνενήκοντα μόλις τρεῖς περισώθησαν,...

⁴⁷⁰ *Nov.Jus.* 142. pr., ed. Schöll and Kroll, 705.11-4.

⁴⁷¹ *Nov.Jus.* 142. 1, ed. Schöll and Kroll, 705.15-7.

⁴⁷² *Nov.Jus.* 142. 1, ed. Schöll and Kroll, 705.17-9.

⁴⁷³ *Nov.Jus.* 142. 1, ed. Schöll and Kroll, 705.19-20.

profit from castration and commissioned this, or provided any place for castration, are to undergo the same punishments.⁴⁷⁴ It also stipulates that all castrated slaves are to obtain freedom and are permitted to denounce the offenders.⁴⁷⁵ In addition, the novel permits castration for medical treatment; namely, slaves who were made a eunuch as a result of illness will become free and if free men have such an illness and wish to be remedied in that way they are permitted to be castrated.⁴⁷⁶ Therefore, health reasons could remain a key loophole in prohibitory laws against castration.

Justinian I's measures against castration do seem to be limited to 'Romans'. Prokopios informs us that when the empire secured some sovereignty over Abasgia and Abasgians espoused Christianity, Justinian I commanded the kings of Abasgia to halt the creation of Abasgian eunuchs and the selling of them to Romans while Abasgia was the major source of court eunuchs.⁴⁷⁷ However, these measures, which seem to give us the impression that Justinian I aimed to restrict the supply of eunuchs, form a strange contrast with the imperial use of eunuchs in the court. Indeed, the reign of Justinian is known for the important achievements of eunuchs especially in the military sphere, such as Narses' military victories over the Goths although he was a Persarmenian and probably castrated before Justinian I's accession to the throne.⁴⁷⁸ Although Justinian I might have intended to use foreign eunuchs or eunuchs caused by disease or accident, the contradiction between the use of eunuchs and the prohibition of castration in the empire could have grown larger in the reign of Leo VI due to the increase of native eunuchs, especially from Paphlagonia.

Basil I and Leo VI carried out a project to recompile legislation of their predecessors. As for the abovementioned stipulations, however, compilers did not seem to collect all previous laws. The stipulations in *Dig.* 48.8 are included in *Bas.* 60.39, but all clauses concerning prohibition of castration are omitted.⁴⁷⁹ According to the restitution of the *Basilika*, *CJ* 4.42.2 of Leo I is retained in *Bas.* 19.1.87, while *CJ.* 4.42.1 of Constantine I is not.⁴⁸⁰ On

⁴⁷⁴ *Nov.Jus.* 142. 1, ed. Schöll and Kroll, 705.20-5.

⁴⁷⁵ *Nov.Jus.* 142. 2, ed. Schöll and Kroll, 706.1-21.

⁴⁷⁶ *Nov.Jus.* 142. 2, ed. Schöll and Kroll, 706.7-21.

⁴⁷⁷ Prokopios, *Wars*, 8.3.19-21, ed. and tr. Dewing, vol. 5, 80-1.

⁴⁷⁸ For Narses, see Fauber 1990; Tougher 2021, 120-35.

⁴⁷⁹ *Bas.* 60.39.3-4.

⁴⁸⁰ *Bas.* 19.1.87.

the other hand, *Nov.Jus.* 142 is completely preserved as *Bas.* 60.51.64. This fact probably suggests that *Nov.Jus.* 142 was the best known law which penalized the act of castration when Leo VI drafted *Nov.Jus.* 142.

Outline of *Nov.Leo.* 60

*Nov.Leo.*60 which was addressed to the *magister officiorum* Stylianos Zaoutzes prohibits castration in the empire.⁴⁸¹ Firstly, the author of this novel claims that castration, that is the amputation of what God provided nature for the succession of the human race, is perpetrated with an audacity without measure, as if it appeared not to be liable to any divine judgement, whereas on the contrary it fully deserves to be punished.⁴⁸² Then, it introduces old prohibitory decrees which tried to eliminate such criminal invention from the empire. However, although the author himself does not know why, such legislation could not prevent those who believe that this plot against the human race would bring a profit (τῶν ὠφελίμων) to them from amputating the genital organs of others.⁴⁸³ This reference to previous laws and their failure, which is common to the proem of *Nov.Jus.* 142, probably shows that the author of *Nov.Leo.* 60 was sharply conscious of the preceding stipulation of Justinian I.⁴⁸⁴ As a result, the first part of the novel formally emphasises the necessity to stop such daring action.

Compared to his predecessors, Leo VI tends to explain what eunuchs and castration are in detail and in a more Christianised way; namely, he claims that a castrated man is a different creature that the Creator's wisdom had not foreseen.⁴⁸⁵ Messis argues correctly that

⁴⁸¹ *Nov.Leo.* 60, ed. Troianos, 200.2. For this novel, the present author referred to the French translation of Noailles and Dain. Noailles and Dain, 1944, 222-6.

⁴⁸² *Nov.Leo.* 60, ed. Troianos, 200.3-8. Πρᾶγμα τολμώμενον μὲν ἀφειδῶς ὥς μηδεμιᾶς παρὰ Θεῷ δοκοῦν ἔνοχον δίκης, μάλιστα δὲ ὃν ἄξιον δίκης, ἡ ἐκτομή τῆς ἐντεθειμένης ὑπὸ Θεοῦ τῇ φύσει δυνάμεως πρὸς διαδοχὴν τοῦ γένους, πάλαι μὲν τιμωροῦντι νόμῳ διὰ προνοίας ἐγγένοι τοῖς νομοθέταις λαβεῖν ἐκκοπὴν ὥστε τῆς τοιαύτης ἐπινοίας καθαίρειν τὴν ἡμετέραν πολιτείαν.

⁴⁸³ *Nov.Leo.* 60, ed. Troianos, 200.8-14.

⁴⁸⁴ *Nov.Jus.* 142. pr., ed. Schöll and Kroll, 705.4-9.

⁴⁸⁵ *Nov.Leo.* 60, ed. Troianos, 200.12-7.

this novel, which considers castration as an insult to the divine work and an attack against procreation, is a product of the Christianization of Byzantine legislation.⁴⁸⁶ Indeed, Leo's novel uses the words 'God' and 'the Creator' more frequently than that of Justinian. On the other hand, Messis points out that this novel, unlike *Nov.Jus.* 142, does not seem to take into account the mortality rate of castration. Certainly, Roman law tends to treat castration as a kind of murder and injurious assault. Messis adduces two possible reasons for this change; the high mortality referred to by the novel of Justinian I was a mere rhetorical description to threaten his subjects, and the mortality rate had diminished to the point of not preoccupying the legislator in the reign of Leo VI.⁴⁸⁷ However, it might not be absolutely necessary for us to think in this way, for the other novel suggests that the emperor probably knew how dangerous of castration was.⁴⁸⁸ Whatever the actual mortality rate of castration, it seems to be that in the novel of Leo VI simply chose to emphasise the vice of castration from a Christianised point of view, not from the secular viewpoint of mortality.

Then, the legislator turns his attention to the punishment in previous legislation imposed upon those who castrated others: the same harm as their victims.⁴⁸⁹ It is obvious that he supposed that this previous legislation was *Nov.Jus.* 142. Although the author of *Nov.Leo.* 60 appreciates its fairness, he does not accept this punishment because he considers that no one should deform the work of the Creator, even if an imperial official uses castration for punishment.⁴⁹⁰ As a result of this complete ban on castration, the legislator seemed to resolve the contradictions of previous legislation that attempted to stop castration in the empire but ordered officials to castrate criminals. Then, other kinds of punishments in *Nov.Jus.* 142 are repeated; namely, the perpetrator was punished by confiscation and perpetual exile, and the victim of delinquency received freedom if he was a slave.⁴⁹¹ Again, the legislator decrees that

⁴⁸⁶ Messis 2014, 102.

⁴⁸⁷ Messis 2014, 102.

⁴⁸⁸ *Nov.Leo.* 98, ed. Troianos, 278.81-4.

⁴⁸⁹ *Nov.Leo.* 60, ed. Troianos, 200.17-21.

⁴⁹⁰ *Nov.Leo.* 60, ed. Troianos, 200.21-4. The idea that castration is an enemy to the workmanship of God had already appeared in canon 22 of the Canons of the Apostles.

⁴⁹¹ *Nov.Leo.* 60, ed. Troianos, 200.24-202.27.

the talion in *Nov.Jus.* 142 is abolished and the perpetrators are to be punished by other more humane (τὸ φιλανθρωπότερον), punishments.⁴⁹²

The new punishment is stipulated as below; whoever calls on someone to castrate others, if he engages in the imperial service, he shall be struck off the list of officers, and then pay a fine of ten pounds of gold to the public treasury and be exiled for up to ten years from the native lands (ὕπερὸριον τῆς πατρίδος).⁴⁹³ Although this category of criminals is new to the prohibitory decrees against castration, it reminds us of the statement of the seventh-century physician Paul of Aegina, that physicians were ‘sometimes compelled by persons of high rank to perform the operation’ of castration.⁴⁹⁴ Likewise there might have been officials asking physicians to castrate young family members or slaves for some reasons.⁴⁹⁵ On the other hand, there is no stipulation about those who were not imperial officials but did the same thing. They might be included in the following group; namely, the legislator continues that the perpetrator of castration, after being subjected to tonsure and whipping, shall be deprived of his property and exiled from his place for the same period (i.e. ten years).⁴⁹⁶ The victim, if he is a slave, will be freed from his previous status as Justinian I stipulated.⁴⁹⁷ Then, the author adds the stipulation about castration of free persons to *Nov.Jus.* 142 which only mentions that free men should be permitted to be castrated in order to remedy their illness.⁴⁹⁸ As mentioned above, the *Digest* collected Hadrian’s edict that ordered those who had been castrated of his own free will were to be punished with the operators.⁴⁹⁹ This opinion, however, seems to have been forgotten or ignored in the reign of Leo VI, for we could not find this stipulation in the Macedonian law books. On the other hand, *Nov.Leo.* 60 might reflect the different situation from that in the sixth century; namely, the domestic supply of eunuchs (e.g. castration of sons of Byzantine families), who were traditionally supplied from foreign slaves in the later

⁴⁹² *Nov.Leo.* 60, ed. Troianos, 202.27-32.

⁴⁹³ *Nov.Leo.* 60, ed. Troianos, 202.33-7.

⁴⁹⁴ Paul of Aegina, 6.68, ed. Heiberg, vol. 2, 111-2; tr. Adams, 379. ἀλλ’ ἐπειδὴ καὶ ἄκοντες πολλάκις ὑπὸ τινων ὑπερεχόντων εὐνουχίζειν ἀναγκαζόμεθα,...

⁴⁹⁵ Moffatt 1986, 719.

⁴⁹⁶ *Nov.Leo.* 60, ed. Troianos, 202.37-40.

⁴⁹⁷ *Nov.Leo.* 60, ed. Troianos, 202.40-3.

⁴⁹⁸ *Dig.* 48.8.4.2 (Ulpian, *Duties of Proconsul*, book 7).

⁴⁹⁹ *Dig.* 48.8.4.2.

Roman period, became gradually noticeable after the seventh century.⁵⁰⁰ *Nov.Leo.* 60 stipulates that if a free person had voluntarily suffered from castration, while he is not wholly responsible for the injustice done to him, he is not punished and allowed to utilize his state of being a eunuch.⁵⁰¹ Intriguingly, this means that the legislator regarded that castration of a free person tended to be made by mutual consent although the author of this novel did not specify a case of castration performed on the children of free citizens (e.g. the age from when free people could give consent to make themselves castrated, and the validity of consent of parents who hoped for their sons of tender age to be castrated).⁵⁰² At first glance, it seems that the author allows voluntary castration of a free person, but this interpretation is probably different to what he was aiming for. This sentence merely stipulates how those who had been castrated would be treated according to their status and that a free man would not be subjected to any punishment even if he had consented to be castrated. In that point, this sentence seems to be different from the next sentence which claims that castration for medical treatment shall not be prohibited. Moreover, there is no special mention about operators or their accessories of the consented castration, so it seems that those who had been involved in or performed such castration would be threatened with sentencing to the abovementioned punishment. Therefore, it seems to be reasonable to consider that the legislator was still unfavourable to voluntary castration of free men even though he showed a more tolerant attitude towards those who had been castrated voluntarily than the preceding stipulations.⁵⁰³ Finally, it repeats *Nov.Jus.* 142 that castration for medical treatment is not punished, for it does not constitute physical damage but aid to the human body.⁵⁰⁴

⁵⁰⁰ Tougher 2008, 60-6.

⁵⁰¹ *Nov.Leo.* 60, ed. Troianos, 202.43-5. εἰ δὲ τῶν ἐλευθέρων προσώπων, ὡς αὐτὸς ἑαυτῷ δι' ὧν κατεδέξατο οὐκ ὧν τῆς ἀδικίας ἀναίτιος, <ἀπὸ> τῆς οἰκείας γνώμης ὅπερ ἔπαθε τοῦτο κερδήσει.

⁵⁰² Guiland 1943, 200.

⁵⁰³ As for the canon laws, canon 24 of the Canons of the Apostles commands laymen who had castrated themselves when in good health to be excommunicated for three years. However, it is questionable whether this canon was observed or even known in the Macedonian period.

⁵⁰⁴ *Nov.Leo.* 60, ed. Troianos, 202.45-8.

Previous Studies concerning *Nov.Leo. 60*

Nov.Leo. 60 is frequently mentioned by modern scholars, some of whom discuss why Leo VI promulgated the novel. For instance, Vinson, in her study of two hagiographies which probably originated in the court of Leo VI, supposes that *Nov.Leo. 60* was ‘the revival of a statute against castration and was designed, like similar efforts in the past, to restore a sense of order and stability through the affirmation of traditional gender roles’.⁵⁰⁵ It seems, however, doubtful that the novel provided gender roles for eunuchs. As Messis argues, the author of this novel does not seem to indicate that castration entails additional moral considerations in relation to the castrated person,⁵⁰⁶ but rather the eunuch becomes the one who has suffered a wrong, the victim of an offense committed by another on his own body.

In the first place, *Nov.Leo. 60* is not a mere revival of *Nov.Jus. 142*. The major purpose of the novel is to rework the conventional punishment against those who commit or get involved in the illegal castration of others and partly lessen it through abolishing talion. Accordingly, some scholars try to explain why the legislator lessened the punishment like that. Creazzo examines both *Nov.Jus. 142* and *Nov.Leo. 60*, and explains the reason for such a toleration from the viewpoint of the political context. She maintains that imperial prohibition against castration originated not from imperial moral concerns and philanthropy but from political concerns of the emperors.⁵⁰⁷ Referring to *In Defence of Eunuchs* written by Theophylact of Ochrid in the early twelfth century, she states that *Nov.Jus. 142* was issued in order to solve the problem of a decline in natality caused by the twenty-years war and by the plague.⁵⁰⁸ As for *Nov.Leo. 60*, she also explained that the circumstances in which eunuchs found themselves in the ninth century, namely the evolution of eunuchs in their number and political significance, and the contact between eunuch officials and Leo VI, mitigated the

⁵⁰⁵ Vinson 1998, 514-5.

⁵⁰⁶ Messis 2014, 102.

⁵⁰⁷ Creazzo 2008, 164, 173-4.

⁵⁰⁸ Creazzo 2008, 159-66.

punishment of Justinian's novel.⁵⁰⁹ Her approach of focusing on the social and political situation of eunuchs is important. Indeed, the present thesis supposes it highly possible that the tolerant attitude towards castrated freemen in the novel was a result of the changed circumstances of eunuchs in the ninth century. It seems, however, difficult to conclude that the conspicuous existence of eunuchs was the biggest factor for making the penalty against castration less severe because the mitigation of the penalty against castration would be beneficial only for performers of castration but not for eunuchs themselves. Moreover, her hypothesis could not explain why *Nov.Leo. 60* still punishes those who castrate others even when, as she states, eunuchs became important in the empire. As a result, it seems that her study ironically shows the limits of the investigation of the imperial prohibition against castration exclusively from the political perspective. Although Creazzo suggests a binominal confrontation between political rationalism and Christian philanthropy, that does not seem to be a reason for dismissing the latter. As a matter of fact, Riedel, who emphasises the religious ideology of Leo VI, examines the latter aspect of the *Novels of Leo VI* and suggests that Leo's understanding of Christian theology affected the mitigation of punishment in *Nov.Leo. 60*.⁵¹⁰ Therefore, it is certain that Creazzo's analysis of social and political factors in the reign of Leo VI is important in considering the background of the promulgation of *Nov.Leo. 60*, but analysis from other multifaced perspectives is required.

The legal context of *Nov.Leo. 60* should not be ignored, especially the context of canon law and penal law. Considering the fact that the *Basilika* was completed in the reign of Leo VI, it is highly possible that Leo VI promulgated *Nov.Leo. 60* in the course of the Macedonian legal project which collected and reviewed previous stipulations in canon and civil laws. Therefore, the following part of this chapter will compare the novel with other laws which would have been known by Leo VI and his officials, for this approach will enable us to focus more on the legislator's own view towards laws and *Nov.Leo. 60* than previous approaches, and to clarify Leo VI's motivation in issuing the novel against castration from the new point of view. Firstly, the canon laws will be focused on, especially canon 8 of the Council of Constantinople (861), which suggests a growing interest in punishing an act of castration before the promulgation of *Nov.Leo. 60*, and secondly, the stipulations concerning punishment promulgated in Macedonian law will be examined. As already suggested from a

⁵⁰⁹ Creazzo 2008, 166-73.

⁵¹⁰ Riedel 2018, 129-30.

series of prohibitory laws against castration in the Roman empire and the text of *Nov.Leo.* 60 itself, it seems to be reasonable to think that Leo VI problematised an act of castration as a damage to the birth rate in the empire, a violence against inhabitants of the empire, a means to the enslavement of freemen, and a blasphemy against God. This chapter, however, will clarify another motivation of Leo VI for promulgating *Nov.Leo.* 60; namely, he attempted to reconsider penal laws in the course of ‘Cleansing of the Ancient Laws’ and replace old penalties in some stipulations, including *Nov.Jus* 142, with milder ones.

Castration in Canon Law: Canon 8 of the Council of Constantinople (861)

Canon 8 and *Nov.Leo.* 60

The act of castration was problematised not only in the civil law but also in the canon law. *Bas.* 60.51.64, which is a copy of *Nov.Jus.* 142, has been transmitted to the present day with *scholia* which offer us other stipulations related to the prohibition of castration (e.g. *Nov.Leo.* 60 in *schol.* 1) including four canons; namely, *schol.* 2 mentions canon 8 of the Council of Constantinople in 861, *schol.* 3 is the first canon of the First Council of Nicaea, and *schol.* 4 is canon 21 and canon 22 of the Canons of the Apostles.⁵¹¹ The first canon of the First Council in Nicaea (325) and the three canons of the Canons of Apostles (21, 22, and 23) prevent those who have castrated themselves, except for natural eunuchs and those who have been castrated against their will or for medical treatment, from being in or taking holy orders. As for the self-castration of laymen, canon 24 of the Canons of Apostles orders that laymen who have mutilated themselves be excommunicated for three years, but the *scholia* of the *Basilika* and canon 8 of the Council of Constantinople suggest that canon 24 might be regarded as less significant than canons concerning castrated clergy in the middle Byzantine period. Finally, the most important canon for this study is canon 8 of the Council of Constantinople. This canon was issued in 861, five years before Leo VI’s birth although the abovementioned canons were produced during the fourth century and *Nov.Jus.* 142 was promulgated in 556.⁵¹²

⁵¹¹ *Scholia* of *Bas.* 60.51.64, ed. Scheltema et al., ser. B, vol. 9, 3904-6. For the *scholia* of the *Basilika*, see Stolte 2021, 255-7.

⁵¹² For the date of the Canons of the Apostles, see Ohne 2012, 28-33.

The canon is striking not only because it is the latest existing stipulation concerning castration before the promulgation of *Nov.Leo.* 60 but also probably the first canon to punish those who castrated others. This canon seems to show a striking fact that both church and state shared common interests in how to punish those who had castrated others in the empire. Therefore, it is worth examining closely this canon and comparing it with *Nov.Leo.* 60 in order to consider the ninth-century context of prohibiting the act of castration.

The Council of Constantinople, known as *Protodeutera*, was held in 861 after the first ascension of Photios (858-67, 877-86) to the patriarchal throne in the place of the patriarch Ignatios (847-58, 867-77). According to Troianos, the synod probably consisted of seven sessions divided into two cycles; the first cycle was concerning the condemnation of the patriarch Ignatios and the second cycle dealt with the central topic for which the synod was convened, Iconoclasm.⁵¹³ Although we have the minutes concerning the first cycle, there is no detailed information on what the participants discussed concerning dogmatic and disciplinary problems which were dealt with in its canon.⁵¹⁴

Canon 8 firstly cites canon 22 and 23 of the Canons of the Apostles which prohibited a man who has mutilated himself from becoming a priest and deposes a clergyman who has done the same, for he is a self-murderer and an enemy of the workmanship of God.⁵¹⁵ In addition to this canon, the author of canon 8 claims that those who have castrated others are murderers.⁵¹⁶ Then, the synod orders that if a bishop, a priest or a deacon is convicted of having made a man a eunuch, either with his own hand or by ordering it done, he will be subject to deposition; if the one is a layperson, he/she will be excommunicated.⁵¹⁷ Then the canon adds an exceptional clause about those clerics and laypeople who make sick men

⁵¹³ Theoph.Cont. 4.32, ed. Bekker, 195-6; tr. Featherstone and Signes Codoñer, 276-9. Troianos 2012, 147. For the detail of this Council, see Dvornik 1948, 70-90.

⁵¹⁴ Dvornik 1948, 85.

⁵¹⁵ Canons of the Council of Constantinople, canon 8, ed. Joannou, 460.13-8; tr. Cumming, 465.

⁵¹⁶ Canons of the Council of Constantinople, canon 8, ed. Joannou, 460.18-461-4; tr. Cumming, 465.

⁵¹⁷ Canons of the Council of Constantinople, canon 8, ed. Joannou, 461.5-10; tr. Cumming, 465.

eunuchs, citing canon 1 of the First Council of Nicaea which stipulates that those who mutilate male genitals due to illness are not to be condemned.⁵¹⁸

A new stipulation against those who have castrated others in canon 8 of the Council of Constantinople shows the significant shift from the preceding canons which discussed what kind of castrated men could become priests and punished clergy men and laypersons who had castrated themselves. This probably means that the synod attempted to incorporate stipulations in the civil law concerning the prohibition of castration into the context of the canon law. The same trend to make canon law correspond with civil law can also be seen in the *Nomokanon of 14 Titles*, which connected canons concerning the appointment of bishops with certain bodily defects (i.e. castration, deprivation of one eye, physical disabilities, deafness and blindness)⁵¹⁹ with prohibitory laws of castration in the *Corpus Iuris Civilis*.⁵²⁰ According to Troianos, its original was composed between 612 and 629 by an unknown person, and then the second edition was revised in 882/3 with the prologue which was arguably written by the patriarch Photios who had already been a patriarch at the time of the Council of Constantinople.⁵²¹ Therefore, it is highly possible that the complete incorporation of imperial laws against castration into the canon laws in canon 8 was developed from this trend represented by the *Nomokanon of 14 Titles*; namely, the ninth-century canon did not repeat the preceding rules of canons along with civil stipulations which related to them like the *Nomokanon*, but even imposed church punishment on criminals who had been subjected only to secular punishment.

On the other hand, there are also common elements in canon 8 of the Council of Constantinople and *Nov.Leo.* 60. For example, one can find in both the idea that castration is a deformation of the work of the Creator.⁵²² On this point the novel probably depends on the canons;⁵²³ such a claim cannot be found in civil laws, which rather problematised the mortality rate of castration. Moreover, it is noteworthy that both canon 8 and *Nov.Leo.* 60

⁵¹⁸ Canons of the Council in Constantinople, canon 8, ed. Joannou, 461.10-462.4; tr. Cumming, 465.

⁵¹⁹ Canons of Apostles, canons 21, 22, 77, 78; Canons of the First Council of Nicaea, canon 1.

⁵²⁰ *Nomokanon of 14 Titles*, 1.14. It refers *CJ* 42.4.1-2, *Dig.* 48.8.3-6, 11, and *Nov.Jus.* 142.

⁵²¹ Troianos 2012, 139.

⁵²² Canons of the Council in Constantinople, canon 8, ed. Joannou, 461.2-4, 462.1-4.

⁵²³ E.g. Canons of the Apostles, canon 22.

introduced an unprecedented distinction between social groups of accomplices of castration into the old laws concerning castration. Canon 8, the first canon to condemn castration of others, imposes different penalties on clerics and laypeople according to the principle of canon laws. On the other hand, *Nov.Leo.* 60 also introduces a new category of criminals, that is imperial officers who acted as commissioners of castration and imposes on them a different punishment from other criminals. Is this a mere coincidence? In my view, these new stipulations in canon 8 and *Nov.Leo.* 60 reflect the contemporary situation of each law; as for the latter, the legislator, Leo VI, problematised the actual involvement of officials in castration. However, the correspondence between them should not be underestimated because it is highly possible that civil law adopted stipulations of canon law as our analysis of canon 8 suggests that the line between canon law, and civil law seems to be blurred in that period.⁵²⁴ Therefore, there seems to be another possible reason why the author of *Nov.Leo.* 60 unexpectedly mentions the penalty imposed on imperial officers; conceivably Leo, who knew canon 8, adopts the method of canon 8 of the Council of Constantinople which imposed different penalties depending on the social status of perpetrators, chastening lay and cleric differently in accordance with the principle of the canon laws.

There is still the question of why the Council of Constantinople had issued canon 8. Although, as noted above, the minutes concerning this canon do not survive, it might be possible to guess the reason through considering the background of the Council: the condemned patriarchate of Ignatios.

Ignatios, Photios, and Canon 8

In discussing canon 8 of the Council of Constantinople, it is inevitable for us to discuss the patriarch Photios and his views on eunuchs, especially the eunuch-patriarch Ignatios, for both Byzantine authors and modern scholars tend to suppose a fierce rivalry between the eunuch Ignatios and the non-eunuch Photios. As we will see below, it is probably true that Photios was conscious of Ignatios and eunuchs. There is, however, some doubt that canon 8 resulted only from such conflict. Then, the thesis will examine another possibility that the canon was issued as a result of a general change in the situation surrounding the Church: the increasing presence of native eunuchs.

⁵²⁴ For Leo VI's interest in canon law in his novels, see Troianos 2007b, 469-83.

It should be noted that the early-twelfth-century archbishop Theophylact of Ohrid mentions in his work titled *In Defence of Eunuchs* that the Council of Constantinople was the 'Photian' synod and explains the provision against eunuchs in canon 8 as a manifestation of Photios's personal hostility towards Ignatios and his followers.⁵²⁵ It is, however, highly possible that Theophylact, who wrote the text to comfort his eunuch brother, referred to such a relationship in order to neutralise the negative opinion claimed by aggressors against eunuchs that eunuchs were products of the illegal act of castration in the empire. Therefore, Theophylact's information concerning the background of canon 8 should be discounted because it seems possible to suppose that the archbishop had forged such a scenario in order to insist that the prohibitory order of the church council was an insignificant production of the personal hatred of Photios. However, it was probably inevitable for Theophylact to hold such a view, as the alternating appointments of Ignatios and Photios composed an important phase for church and state in the middle Byzantine period. As we will see below, their rivalry became a serious matter, for it reflects political conflicts both within and between the Amorian and Macedonian dynasties.⁵²⁶ Ignatios who was appointed as patriarch by the empress Theodora in 847 was replaced by Photios in 858 soon after her deposition as a result of Ignatios opposing the incestuous marriage of Bardas, one of the brothers of Theodora and an uncle of Michael III (842-67) and a powerful figure at that time.⁵²⁷ Thereafter, Ignatios returned to the patriarchate after the accession of Basil I in 867. Although both Ignatios and Photios reconciled with each other and Photios succeeded to the patriarchate after the death of the former, Photios was finally deposed at the start of the reign of Leo VI.⁵²⁸ As the series of events left a significant impact on contemporaries and posterior generations, it is probable that Theophylact of Ohrid considered such rivalry between the eunuch patriarch and the bearded one as a reason for the issuing of canon 8 against castration.

On the side of Ignatios, the tenth-century author of the *Life of Ignatios*, Niketas David the Paphlagonian, seemed to take a delicate attitude towards the eunuchism of Ignatios.⁵²⁹ He clearly mentions Ignatios' castration made by the iconoclast emperor Leo V

⁵²⁵ Theophylact of Ohrid, ed. Gautier, 315.24-317.6; French tr. Gautier, 314-6.

⁵²⁶ Vinson 1998, 471. For the details of their rivalry, see Dvornik 1948, 1-278.

⁵²⁷ Tougher 1997, 31-2; Vinson 1998, 471.

⁵²⁸ Tougher 1997, 69-78.

⁵²⁹ For Niketas David the Paphlagonian and the *Life of Ignatios*, see Jenkins 1965, 241-7;

after the downfall of Ignatios' father, Michael I, in 813,⁵³⁰ but he does not seem to emphasise his hero's eunuchism in the rest of the *Life*. Vinson and Messis consider that Niketas contrasted the eunuch Ignatios who bore monastic values with the non-eunuch layman Photios, establishing an implicit tension between a 'pious' feminine eunuch and an 'ungodly' bearded man.⁵³¹ According to Messis, Photios in this text is described as a figure with the social stereotypes of masculinities, while Ignatios is illustrated as a person of the new spiritual and Christian masculinity.⁵³² For example, Niketas praises Ignatios' fortitude (ἀνδρία), which had 'meant to him never to be overpowered by sin, but to be free and keep the upper hand over his emotions and not, like the majority, secretly admire the characteristics of those in power,' as one of his virtues.⁵³³ Then, he emphasises the fact that Niketas shows Ignatios' masculinity and fertility, citing miracle stories in which Ignatios gave practical advice and a power to fertilise women.⁵³⁴ Tougher, however, correctly argues that Niketas did not concern himself with Ignatios' eunuchism but presented him as a typical holy man.⁵³⁵ It should be noted that Congourdeau's study about desire for children in the Byzantines shows some other miracles concerning procreation made by non-castrated saints such as Symeon Stylites the Younger and Theodore of Sykeon although she, like Messis, mentions that the miracles made by eunuch patriarchs, Germanos I and Ignatios, could show different kinds of fertility of those who had been deprived of their natural fertility.⁵³⁶ Moreover, Tougher considers that the virtues of Ignatios, including fortitude, are typical ones for holy men and that the abovementioned miracles show lack of interest in or conscious ignorance of his hero's

Karlin-Hayter 1970, 217-9; Paschalides 2004, 161-73; Tamarkina 2006, 615-30.

⁵³⁰ *Life of Ignatios*, 4, ed. Smithies, 8.6-10; tr. Smithies, 9.

⁵³¹ Vinson 1998, 486; Messis 2014, 141-2.

⁵³² Messis 2014, 141-2.

⁵³³ *Life of Ignatios*, 16, ed. Smithies, 22.23-5; tr. Smithies, 3. Ἀνδρία δὲ αὐτῷ τὸ μὴ ἡττᾶσθαι ποτε τῆς ἁμαρτίας, ἀλλ' ἐλεύθερον εἶναι καὶ δεσπόζειν τῶν παθῶν καὶ μὴ κατὰ τοὺς πολλοὺς πρόσωπα κρυφῇ θαυμάζειν τῶν δυναστῶν. Tougher 2004, 101; Messis 2014, 142

⁵³⁴ Messis 2014, 141-2.

⁵³⁵ Tougher 2004, 102.

⁵³⁶ Congourdeau 2009, 38-9. *Life of Symeon Stylites the Younger*, 140, ed. van den Ven, vol. 1, 130; tr. van den Ven, vol. 2, 155; *Life of Theodore of Sykeon*, 93, 140, 145; ed. Fustugière, vol. 1, 76-7, 110-1, 113-4; tr. Fustugière, vol. 2, 70-80, 114-5, 118-9.

condition as a eunuch.⁵³⁷ Indeed, Niketas seems to contrast an unsecular and holy monk Ignatios and a scheming and mercenary sophist Photios rather than comparing eunuch and bearded man.⁵³⁸ As Efthymiadis mentions in his study of Byzantine hagiographies, such a contrast probably derives from a hagiographical tendency from the eighth through the tenth centuries, which values the ascetism or ‘monastic experiences’ as a sign of sainthood of protagonists rather than their secular virtues.⁵³⁹ He also argues that such a view emerged as a result of the power of monks through the iconoclastic controversy.⁵⁴⁰ In conclusion, there is a difficulty in taking the description of the *Life* at face value as evidence of a fierce conflict between eunuchs and non-eunuchs. Thus, it is also hard to believe that the rivalry between Ignatios and Photios was the underlying context behind the issue of canon 8 as Theophylact of Ohrid mentions.

It is true, however, that some of Photios’ letters indicate his gender stereotypes concerning eunuchs.⁵⁴¹ For example, in one of his letters sent to the metropolitan of Laodicea Theodore between 867 and 869, Photios mentions that the Church needs truly brave men, not effeminate men (θηλυδρίας).⁵⁴² According to Messis, Photios here made an insinuation about ‘son grand antagoniste’, the patriarch Ignatios.⁵⁴³ Another letter sent to the patrician and *sakellarios* John Angourios between 867 and 873 is more explicit.⁵⁴⁴ John was a eunuch and, according to another letter of Photios, he was a former friend of Photios.⁵⁴⁵ This shows an

⁵³⁷ Tougher 2004, 101-2.

⁵³⁸ *Life of Ignatios*, 46, 51, 85, ed. and tr. Smithies, 66-7, 74-5, 114-5. Vinson 1998, 471, 487-8.

⁵³⁹ Efthymiades 2012, 171.

⁵⁴⁰ Efthymiades 2012, 169-76. He argues that this tendency originated from the crisis of urban cultures in the mid-seventh century on which episcopal power was based during late antiquity.

⁵⁴¹ For Photios’ view of gender, see Vinson 1998, 488-90.

⁵⁴² Photios, *Letter*, 141, ed. Laourdas and Westerink, vol. 1, 194-5.

⁵⁴³ Messis 2014, 217.

⁵⁴⁴ Photios, *Letter*, 50, ed. Laourdas and Westerink, vol. 1, 95; tr. White, 183-4. Concerning John Angourios, see *PMBZ* Ioannes (3322) Available at:

<https://www.degruyter.com/database/PMBZ/entry/PMBZ14464/html> [Accessed: 23 October 2021].

⁵⁴⁵ Photios, *Letter*, 87, ed. Laourdas and Westerink, vol. 1, 126-7.

important fact that Photios seemed to have established a close relationship with an individual eunuch. It is highly possible that he had made contact with some eunuchs especially in the imperial court, considering his career as *protasekretis*. Photios might have known the eunuch Theoktistos who was a key figure in the Amorian era but was eliminated in 855, two years before Photios' accession to the patriarchate.⁵⁴⁶ The eunuch Baanes was also well-known during the reign of Basil I, when Photios still held the patriarchal throne.⁵⁴⁷ Despite such possible ties with eunuchs, in this letter Photios accuses John Angourios of intruding upon the mysteries of God's church, using a variety of stereotypes concerning eunuchs.⁵⁴⁸ Unfortunately, we do not know exactly which act of John made Photios upset. Ringrose asserts that Photios accused the eunuch 'of laughter aloud during a church service and of allowing his voice to become the tool of the Devil',⁵⁴⁹ whereas Messis suggests that Photios claims that John must be excluded from the clergy due to his eunuchism.⁵⁵⁰ Certainly, Messis' interpretation is interesting because the letter could prove the hostility of Photios towards eunuchs and show the direct connection between this letter and the prohibition of castration in

⁵⁴⁶ Tougher 2008, 55.

⁵⁴⁷ Tougher 2008, 55. During Photios' patriarchate, Michael III (842-67) and Basil I had some eunuchs. *PMBZ*, Basileios (940) Available at:

<https://www.degruyter.com/database/PMBZ/entry/PMBZ12032/html>; Chamaretos (21231)

Available at: <https://www.degruyter.com/database/PMBZ/entry/PMBZ23384/html>; Damianos

(1203) Available at: <https://www.degruyter.com/database/PMBZ/entry/PMBZ12295/html>;

Ignatios (2675) Available at:

<https://www.degruyter.com/database/PMBZ/entry/PMBZ13795/html>; Ionannes (3321)

Available at: <https://www.degruyter.com/database/PMBZ/entry/PMBZ14463/html>; Paul

(5869) Available at: <https://www.degruyter.com/database/PMBZ/entry/PMBZ17062/html>;

Prokopios (26758) Available at:

<https://www.degruyter.com/database/PMBZ/entry/PMBZ28912/html>; Rentakios (6397)

Available at: <https://www.degruyter.com/database/PMBZ/entry/PMBZ17599/html> [Accessed: 13 November 2021].

⁵⁴⁸ Vinson 1998, 488-9; Tougher 2006a, 63.

⁵⁴⁹ Ringrose 2003, 76.

⁵⁵⁰ Messis 2014, 217. 'Ici, c'est l'infécondité qui agit au niveau reel et symbolique, ainsi que le caractère efféminé du personnage, ce qui devrait exclure Jean Aggourios du clergé'.

canon 8. However, it seems to be difficult to assert that the phrase of the intrusion upon the mysteries of God's church means that John had become a clergyman. In any case, Photios mentions eunuchs and John as follows:

Those who are wise among the Greeks liken you to Attis, calling you one of the *galli*. Our wise men confine you in the women's quarters and consider and call you androgynous. Whence [from the women's quarters] you have overstepped the rules on either side and intruded yourself upon the mysteries of God's church, turning everything upside down and through your corrupt nature, making the most fertile and prolific church of Christ fruitless and useless.⁵⁵¹

At the end of the letter, Photios states that 'through these actions [...] you show your kind (γένος) to be even more hated than before and famous throughout for evil'.⁵⁵² As a result, this letter suggests a possibility that negative stereotypes of eunuchs could occur to Photios when he condemned a vice of a specific eunuch. The last sentence of this letter also shows that he did not seem to hesitate to consider the race of eunuchs as hateful and wicked even though Photios probably had a close relationship with some eunuchs. However, this does not necessarily prove that Photios had an anti-eunuch sentiment towards eunuchs in general, considering the ambivalent attitude towards eunuchs in the Byzantine historiographical sources. It should be recalled that Byzantine authors could use either negative or positive stereotypes of eunuchs in the same work; if they wished to condemn the deed of a certain eunuch they could use negative stereotypes, but they also could make a favourable comment

⁵⁵¹ Photios, *Letter*, 50, ed. Laourdas and Westerink, vol. 1, 95.2-8; tr. in Ringrose 2003, 76-7. Τῷ Ἀττιδί μὲν σε ἀναφέρουσι, Γάλλον καλοῦντες, οἱ παρ' Ἑλλησι σοφιοσταί· τῇ γυναικωνίτιδι δέ σε κατακλείουσιν, ἀνδρόγυνον καὶ εἰδότες καὶ ὁωομάζοντες οἱ ἡμέτεροι σοφοί. πόθεν οὖν σὺ τοὺς ἐκατέρωθεν ὅρους ὑπερβὰς εἰς τὰ τῆς ἐκκλησίας θεοῦ μυστήρια παρεισέφησας, ἄνω καὶ κάτω πάντα ποιῶν καὶ τὸ ἐν τῇ σῇ παραφθόρῳ φύσει ἄκαρπὸν τε καὶ ἄχρηστον ἐν τῇ τοῦ Χριστοῦ γονιμότητι καὶ πολυτέκνῳ ἐκκλησίᾳ φιλονεικεῖς καταπράξασθαι;

⁵⁵² Photios, *Letter*, 50, ed. Laourdas and Westerink, vol. 1, 95.17-20; tr. in Ringrose 2003, 77. δι' ὧν γέλωτα ... μισητὸν δὲ τὸ σὸν γένος νῦν μᾶλλον ἢ πρότερον καὶ διαβόητον ἐπὶ κακίᾳ παριστᾷς.

on another eunuch.⁵⁵³ Accordingly, it seems likely that Photios also had such an ambivalent attitude towards eunuchs, while a supposition that the patriarch had hated the very existence of eunuchs and so issued a canon against castration is probably less convincing.

Let us turn to consider the Council of Constantinople. Although we have no surviving minutes concerning canon 8, there are bits of information about the circumstances of the resignation of Ignatios. First and foremost, it seems certain that Photios and his followers did not bring up the eunuchism of Ignatios to support his resignation. Although Ignatios had already been forced to resign in 858, he seems to have had a strong presence in Constantinople at the beginning of the Council.⁵⁵⁴ This possibly made Photios prepare an option to attack his predecessor's eunuchism in order to justify his own accession. However, according to Dvornik, sources show that the main charges against Ignatios were his nomination by the empress Theodora and his condemnation of the group of the bishop of Syracuse, Gregory Asbestos, and not his being a eunuch.⁵⁵⁵ Indeed, the castration of Ignatios made by Leo V, who ousted Ignatios' father, Michael I, does not seem to have been a voluntary castration which was a subject of canon 8.⁵⁵⁶ Therefore, canon 8 probably did not damage Ignatios' dignity as patriarch, as he did indeed return to his patriarchal throne in 867 and kept it until his death, and he was even canonised as a saint soon after his death.

These reflections might show that there was a conflict between Photios and Ignatios, but they also suggest a difficulty in concluding that such rivalry between them was the motive of the issue of canon 8. There is another possibility, that canon 8 originated from a practical matter, not from political conflict: the increasing presence of native eunuchs. As mentioned above, the main purpose of canon 8 is to confirm what kind of castrated men could be permitted to be clerics and to impose canonical punishment on those who had castrated others. This probably suggests that castration was performed in the empire even by clerics and some of its victims hoped to become clerics. Moreover, it does not seem a coincidence that this issue was discussed after the patriarchate of Ignatios, a victim of castration. It is true that there had been eunuch patriarchs before Ignatios such as his predecessor Methodios (843-7). The former is, however, probably a patriarch who was definitely known to contemporaries to have

⁵⁵³ Tougher 2008, 96-117; Messis 2014, 239-320.

⁵⁵⁴ Dvornik 1948, 70-85.

⁵⁵⁵ Dvornik 1948, 85.

⁵⁵⁶ *Life of Ignatios*, 1-4, ed. and tr. Smithies, 3-9.

been castrated by force in the empire, in comparison with the ‘spiritual’ castration of his predecessor.⁵⁵⁷ The eighth-century patriarch Germanos I (715-30) is also described as being a victim of political castration made after the execution of his father, but no contemporary sources mention this story.⁵⁵⁸ Thus, participants of the council might have wished to confirm the old canons and added a new stipulation reflecting civil law and/or something that actually happened: the increasing presence of native eunuchs in the Church. This might be supported by the argument of Troianos that some canons of the Council of Constantinople reflect the actual situation before that council.⁵⁵⁹ He argues that canons 13-15, which, prevent clergy from breaking off from their presiding priests before the synod has decided the priests’ condemnation, were intended for Ignatios’ supporters who had done the same from Photios.⁵⁶⁰ He adds that canons 16 and 17 were also issued in order to resolve specific problems at that time; especially canon 17, which aims at the finalisation of the issue concerning Photios who had been elevated from layman to bishop within a very short period of time.⁵⁶¹ Although Troianos does not include canon 8 in the group of such canons, there seems to be a possibility that canon 8 also reflects the actual situation of castration at the time of the council.

As for the relationship between canon 8 and *Nov.Leo.* 60, it is possible to guess that Leo VI knew canon 8 of the Council of Constantinople, not only from the abovementioned resemblance of punishment but also from the emperor’s relationship with his ex-preceptor,

⁵⁵⁷ It is narrated that Methodios’ miraculous castration was performed by St Peter who incapacitated the lust of the flesh from Methodios when he had been tormented by desire in Rome. Theoph.Cont. 4.10, ed. and tr. Featherstone and Signes Codoñer, 224-9. Tougher 2008, 71. For the other eunuch patriarchs and eunuch saints, see Tougher 2004, 93-108; Tougher 2008, 69-74; Messis 2014, 127-62.

⁵⁵⁸ Kazhdan 1999, 57; Tougher 2008, 70-1. Cf. Messis 2014, 126. It seems safe to say that this story of the castration of Germanos I was known during the reign of Leo VI and Constantine VII at the latest. Dmitrievskij 1895, 72 (12th May); *Synaxarion of Constantinople*, 12th May, ed. Delehay, 678; Symeon, 113, ed. Wahlgren 167.

⁵⁵⁹ Troianos 2012, 148.

⁵⁶⁰ Troianos 2012, 148. Magdalino seems misunderstand canon 17 as canon 12 of a pro-Ignatian synod in 869. Magdalino 2011, 153-4.

⁵⁶¹ Troianos 2012, 148.

Photios until his resignation as patriarch after Leo's accession.⁵⁶² Although Dvornik takes a sceptical view on Photios' influence over Leo VI due to the fact that their teacher-pupil relationship was only for a few years when Leo was eleven or twelve,⁵⁶³ Photios' contribution to Leo VI's policy should not be underestimated. Riedel considers the elite education which the emperor received under the tutelage of Photios an important factor in the emperor's religious ideology.⁵⁶⁴ Moreover, Magdalino emphasises the importance of Photios for tenth-century compilations with an imperial appropriation of a religious ideology of law and order following the triumph over Iconoclasm.⁵⁶⁵ According to him, Photios educated a generation of Byzantine intellectuals, including Leo VI, and as imperial adviser 'he was undoubtedly involved in planning the *anakatharsis* of the laws that Leo brought to fruition'.⁵⁶⁶ Therefore, it seems likely that canon 8 of the Council of Constantinople, a product of Photios, is related to *Nov.Leo.* 60, a product of Leo VI, just like the personal ties between the two figures.

Finally, we turn to consider the perception of Ignatios during and after the reign of Leo VI. Both visual and textual sources suggest that Ignatios and the story of his castration was well known. In 876, Photios reconciled with Ignatios during the latter's second patriarchate.⁵⁶⁷ Ignatios was canonised soon after his death in 877 and a mosaic of him began to be created in the north tympanum of Hagia Sophia in the reign of Basil I. Mango and Hawkins speculate that the mosaic of the Fathers might have been completed before the emperor's death or during the reign of Leo VI.⁵⁶⁸ Moreover, Krsmanović and Milanović, who have studied visual representations of Ignatios, clarify the distinctive individual characteristics of the depicted saint such as his beardlessness and suggest the existence of a cult of the patriarch in Constantinople in the tenth and the eleventh century, 'the period of the most intense activity of the eunuch community at court'.⁵⁶⁹ Although their suggestion of the connection between Ignatios' cult and eunuchs in the imperial court probably needs further

⁵⁶² For the relationship between Leo VI and Photios, see Tougher 1997, 68-88.

⁵⁶³ Dvornik 1948, 85.

⁵⁶⁴ Riedel 2018, 59, 101-2, 141-2, 160.

⁵⁶⁵ Magdalino 2011, 154-5. Cf. Brubaker 1999, 414.

⁵⁶⁶ Magdalino 2011, 155.

⁵⁶⁷ Dvornik 1948, 161-70

⁵⁶⁸ Mango and Hawkins 1972, 38.

⁵⁶⁹ Krsmanović and Milanović 2017, 35.

exploration, it is safe to say that Ignatios was commemorated in the tenth-century church. On this point the *Synaxarion of Constantinople*, a liturgical calendar of the Great Church with hagiographical texts, is suggestive (the first edition was collected by Constantine VII Porphyrogenitos).⁵⁷⁰ This text includes Ignatios's life with the episode of his castration and shows that his feast day was celebrated on 23rd October.⁵⁷¹ However, there seems to be a sign that Ignatios had already been celebrated as a saint during the reign of Leo VI. The manuscript *Patmiacus Gr. 266* includes hagiographical components which, according to Delehaye and Luzzi, seem to 'belong to a period between the end of ninth century and the first decades of the tenth, or, more precisely, to the years around 900'.⁵⁷² The manuscript includes a short notice which shows that Ignatios was commemorated on 23rd October, as in the *Synaxarion of Constantinople*, although the feast day of Methodios was not been recorded in it.⁵⁷³ This might show that the presence of Ignatios as a eunuch saint who had been a victim of an iconoclast emperor had already been important in the reign of Leo VI. As a result, there is a possibility that the presence of Ignatios was one of the reasons for motivating Leo VI, like the Church, to reemphasise the prohibition on castration.

Thus we have clarified that canon 8 of the Council of Constantinople in 861 was an important stipulation precedent to *Nov.Leo. 60*. It suggests that the church, like its secular counterpart, became interested in controlling the increasing number of castrations performed in the empire. Moreover, this canon possibly affected the legislator's choice of categories of criminals in *Nov.Leo. 60*. Now, we will return to the subject of civil law and analyse the novel in the context of penal law.

⁵⁷⁰ Luzzi 2014, 201. For the manuscripts and the dating of the *Synaxarion*, see Luzzi 2014, 197-208.

⁵⁷¹ *Synaxarion of Constantinople*, 23rd October, ed. Delehaye, 158. The is also accepted in the *Menologion* of Basil II, 138 (23rd October), *PG* 117, col. 124.

⁵⁷² Delehaye 1902, liv-lv; Luzzi 2014, 200-1.

⁵⁷³ Dmitrievskij 1895, 15 (23rd October). Τῇ αὐτῇ ἡμέρᾳ τοῦ ἁγίου Ἰγνατίου, ἀρχιεπισκόπου Κωνσταντινουπόλεως.

Reform of Penal Law in the *Novels of Leo VI*

The main purpose of *Nov.Leo.* 60 is to abolish the *lex talionis* of *Nov.Jus.* 142 and introduce milder punishment for castrators and their accomplices. Dalla, who argues that the *Novels of Leo VI* seemed to reflect the increasing number of eunuchs, mentions that the milder punishment in *Nov.Leo.* 60 shows that the Byzantines did not know how to renounce eunuchs.⁵⁷⁴ However, we do not completely accept this idea, considering that there is a marked tendency to impose milder and more proportional punishment in the *Novels of Leo VI* in general.

The tendency towards tolerance and proportionality of punishments seems to be a distinguishing feature of the *Novels of Leo VI*.⁵⁷⁵ Indeed, *Nov.Leo.* 1 mentioned the amelioration of laws which were too severe as one of the aims of his novels.⁵⁷⁶ Moreover, probably from philanthropic reasons, Leo VI problematises some previous stipulations which inflicted a harsher punishment than the fault of culprits demanded.⁵⁷⁷ This tendency had already been seen in the reign of his father, Basil I.⁵⁷⁸ There seem to be two groups of Leo's novels which review the preceding penalties. In the first group, the legislator replaces the death penalty for certain crimes, which are not connected with murder, with milder pecuniary punishment on the theory that the death penalty must be imposed exclusively on those who had caused someone's death.⁵⁷⁹ Troianos rightly indicates that the trend towards the decrease in the number of laws which impose the death penalty begins with the *Ecloga*.⁵⁸⁰ The second group, in which *Nov.Leo.* 60 can be included, shows that the legislator lessens the preceding

⁵⁷⁴ Dalla 1978, 117-8.

⁵⁷⁵ Riedel 2018, 129-32. However, we cannot agree with her interpretation of *Nov.Leo.* 60 that Leo VI 'decrees confiscation of property and exile for ten years for anyone who permits himself to be castrated'. Riedel 2018, 129.

⁵⁷⁶ *Nov.Leo.* 1., ed. Troianos, 46.49-52, tr. Noailles and Dain, 12-4. Riedel 2018, 99.

⁵⁷⁷ For punishment in the *Novels* of Leo VI, see Troianos 2007a, 419-22.

⁵⁷⁸ *Bas.* 60.58 (repeated in *Nov.Leo.* 35). Riedel 2018, 105, 131.

⁵⁷⁹ *Nov. Leo.* 61, 62, 64, 67, 77, 96, 105.

⁵⁸⁰ Troianos 1992, 64-5.

penalty even though he considers that the penalty of his predecessors is totally proportional to the crime.⁵⁸¹ As for *Nov.Leo.* 60, Riedel regards this novel as an exception in the trend towards proportionality, because Leo VI avoids applying the *lex talionis* in spite of its proportionality.⁵⁸² According to her, it shows that Leo VI, who does not consider proportionality as an absolute value, tempers his approach to justice, using his understanding of Christian theology that castration ‘constitutes a rejection of the creation of God’.⁵⁸³ *Nov.Leo.* 60, however, is not the only case. For example, *Nov.Leo.* 32 stipulates that those who had committed adultery are equated with murderers, but the death penalty is too severe for the perpetrators.⁵⁸⁴ For this reason, the legislator decides that both adulterer and adulteress shall be punished by slitting of the nose and that the husband of the adulteress should be compensated with her dowry and a part of her other property after her confinement in a monastery.⁵⁸⁵ *Nov.Leo.* 35 repeats the law of Basil I in abolishing the uniform penalty of death and forfeiture of all property against those who had committed and helped in the abduction of a woman. It stipulates that if the abductor used a sword to accomplish his crime, the death penalty shall be imposed on the perpetrators and his accomplices shall be punished by nose cutting, whipping, and tonsure, while those who had abducted a woman in any other way shall be punished by the cutting off of the hand and the accomplices by whipping, tonsure, and exile.⁵⁸⁶ The more remarkable clause is *Nov.Leo.* 92 which is addressed to Stylianos Zaoutzes. This shows the legislator’s avoidance of using the talion for a different reason. It stipulates that those who have completely blinded others should be punished neither by the removal of both eyes nor the amputation of one hand but by the removal of one of their eyes and the confiscation of two-thirds of their property.⁵⁸⁷ The legislator considers that the financial benefit to the victims would be better compensation for mitigating their misfortune of blindness than the talion, as he stipulates that the victims would receive the confiscated

⁵⁸¹ *Nov.Leo.* 32, 35, 67, 92.

⁵⁸² Riedel 2018, 129.

⁵⁸³ Riedel 2018, 129-30.

⁵⁸⁴ *Nov.Leo.* 32, ed. Troianos, 130.5-16, tr. Noailles and Dain, 126-8.

⁵⁸⁵ *Nov.Leo.* 32, ed. Troianos, 130.17-132.3, tr. Noailles and Dain, 128.

⁵⁸⁶ *Nov.Leo.* 35, ed. Troianos, 140.22-142.40, tr. Noailles and Dain, 142.

⁵⁸⁷ *Nov.Leo.* 92, ed. Troianos, 260.23-262.57, tr. Noailles and Dain, 142.

property.⁵⁸⁸ The author of this novel suggests that this judgement was passed in the court.⁵⁸⁹ He states that he did not intend to make this judgement a rule of law, but ‘the magister in charge of our divine offices, whose opinion I could never dismiss, judged it suitable to pass such a decision as law’.⁵⁹⁰ According to Signes Codoñer, this novel was promulgated at the entreaty of the *magister officiorum* Stylianos Zaoutzes or of the patriarch Stephen (886-93).⁵⁹¹ As a result, it is reasonable to say that the lessening of punishment in *Nov.Leo.* 60 could be contextualised within the trend of reducing the use of the talion and of reconsidering a part of the punishments in previous laws, although it is unknown whether Zaoutzes or Stephen had an influence on this trend.

On the other hand, it is notable that *Nov.Leo.* 92 is different from *Nov.Leo.* 60 in that the former orders the criminal to make financial compensation for the victim’s damage instead of lessening the talion. Although this difference may be made unintendedly by the legislator who focused on the individual case of blinding and introduced the new stipulation, there is another possibility that he did not regard financial compensation for the castration of free people necessary. They may be because he considered that castrated free men were partly responsible for their castration, and, perhaps, that castration was not thought to cause as serious physical and social damage to victims as the loss of both eyes.⁵⁹²

Leo VI did not attempt to abandon penal mutilation. In *Nov. Leo.* 32, 35, and 92 he still adopts it. Moreover, even though *Nov.Leo.* 60 prohibited using the talion against those who had been involved in the surgery of castration, penal mutilation of the penis seems to be still retained in *Proch.* 39.74, i.e. *Ecl.* 17.39, which prohibits bestiality. Historiographical sources inform us that blindings or mutilations were performed on some plotters early in the reign of Leo VI, but the number of such cases of mutilation seems to be less than that of his

⁵⁸⁸ *Nov.Leo.* 92, ed. Troianos, 258.7-15, tr. Noailles and Dain, 302.

⁵⁸⁹ *Nov.Leo.* 92, ed. Troianos, 258.4-7, tr. Noailles and Dain, 302-4.

⁵⁹⁰ *Nov.Leo.* 92, ed. Troianos, 258. 17-9; tr. in Signes Codoñer 2009, 32. Ἐπειδὴ δὲ ὁ τῶν ἐν τοῖς θείοις ἡμεῶν ἀποφερόμενος, οὗ ἐγὼ τῶς ἂν ἀποπέμψαιμι τὴν ἀξίωσιν, εἰς νόμους ἀξιοῖ τὴν τοιαύτην κρίσιν διασκευασθῆναι...

⁵⁹¹ Signes Codoñer 2009, 32.

⁵⁹² For the difference between castration and other forms of physical defects, see Krsmanović 2017, 60-1.

predecessors and his successors.⁵⁹³ Symeon the Logothete mentions that Theodore Santaberenos, who was a friend of Photios and the archbishop of Euchaita, was accused with Photios of planning to make one of Photios' men emperor early in Leo's reign.⁵⁹⁴ Soon after Leo's accession to the throne, the emperor ordered him to be flogged and sent him to Athens, and then blinded him and exiled him to Asia Minor until he was recalled many years later. Leo VI seems to have blinded Theodore in revenge for the latter's past denunciation of Leo which, according to Symeon the Logothete, incited Basil I to imprison Leo and to plan to have him blinded.⁵⁹⁵ In addition, the person who attacked Leo VI in the church of St Mokios in 903 was mutilated in both hands and feet, and then burnt at the stake.⁵⁹⁶ These cases could cast doubt upon the tendency towards the lessening and proportionality of punishments in Leo's novels, but we should probably consider such punishments inflicted on those who had committed high treason early in his reign as exceptional cases. Accordingly, these cases of mutilation do not seem to deny that Leo VI had reformed the penal law.

In conclusion, the reason why *Nov.Leo.* 60 was promulgated could be understood in the context of partial reform of penal law made by Basil I and Leo VI. Leo's hope for more tolerant and proportional punishments probably caused the review of the *lex talionis* of *Nov.Jus.* 142, while, as the legislator emphasises, an image of castration as a malicious and unnatural design against the Creator might play a certain role in the legislator restraining imperial officials from performing such punishment on criminals.

So, what did Leo VI aim at through promulgating the novel? Did the novel actually change society? To observe this, let us now consider the situation of eunuchs during and after the reign of Leo VI.

⁵⁹³ For the mutilation performed on the orders of emperors, Patlagean 1984, 405-27

⁵⁹⁴ Symeon, 133. 6, ed. Wahlgren, 272, tr. Wahlgren, 203. *PMBZ*, Theodore Santaberenos (7729/corr. and 27619) Available at:

<https://www.degruyter.com/database/PMBZ/entry/PMBZ18977/html>;

<https://www.degruyter.com/database/PMBZ/entry/PMBZ29774/html> [Accessed: 23 October 2021]; 27619.

⁵⁹⁵ Symeon, 132.24, ed. Wahlgren, 268-9, tr. Wahlgren, 201.

⁵⁹⁶ GMC, ed. Bekker, 861-2.

Castration in the Empire before and after the Promulgation of *Nov.Leo. 60*

It is an undeniable fact that *Nov.Leo. 60*, as is also the case with *Nov.Jus. 142*, establishes penalties for unjustifiable castration in the empire, even though it lessens the preceding penalty. This can be interpreted as the wish of the legislator to acquire eunuchs from outside of the empire or by those who were born in the empire but were eunuchs by nature or castrated due to their illness, unless he aimed to give up the use of all kinds of eunuchs. Moreover, the author of *Nov.Leo. 60* does not allow any officials to use the talion against those who had castrated others. So, this raises question of how the ‘ideal’ of *Nov.Leo. 60* was permeated and attained in the empire during and after the reign of Leo VI.

The promulgation of *Nov.Leo. 60* itself suggests that castration in the empire was a present matter of concern for the legislator. Although foreign eunuchs, like the *parakoimomenos* Samonas,⁵⁹⁷ still existed, it is true that there were native eunuchs during the reign of Leo VI, such as the *parakoimomenos* Constantine the Paphlagonian who had been castrated by his father probably before the promulgation of the novel. Moreover, it is well-known that Paphlagonia became a major domestic source of eunuch supply in the middle Byzantine period, even after the promulgation of *Nov.Leo. 60*, as was the case for the Paphlagonian brothers Anastasios and Constantine Gongylios, and the *parakoimomenos* Joseph Bringas.⁵⁹⁸ The uncle of Symeon the New Theologian was probably a Paphlagonian eunuch as well.⁵⁹⁹ Although there is a debate about whether Symeon himself was a eunuch or not, Messis argues that he was also a Paphlagonian eunuch.⁶⁰⁰ John the *orphanotrophos* and his brothers George and Constantine should also be included in this group.⁶⁰¹ Nikephoros, who was the bishop of Miletos in the reign of Nikephoros II Phokas (963-9), came from the village of Basileion in the Boukellarion theme and had been castrated by his parents as they wished him to gain a religious career and castration would help attain this.⁶⁰² The

⁵⁹⁷ Tougher 1997, 212-5.

⁵⁹⁸ Magdalino 1998, 141-50. See also n. 115 of this thesis.

⁵⁹⁹ Magdalino 1998, 145; Tougher 2008, 62.

⁶⁰⁰ Tougher 2008, 62; Messis 2014, 147-8.

⁶⁰¹ Tougher 2008, 62. For John the *orphanotrophos* and his family, see chapter 7.

⁶⁰² Patlagean 1984, 421; Tougher 2008, 159.

protovestiaros Philokales in the reign of Basil II was a poor villager by origin.⁶⁰³ One of the most conspicuous and exceptional examples of the domestic supply of eunuchs is the castration of Basil Lekapenos, who was a bastard son of the emperor Romanos I Lekapenos. He had been probably castrated in his early infancy in order to be excluded from having a claim to the imperial throne.⁶⁰⁴ Even though his half-brothers were removed from power in 945, he became *parakoimomenos* under Constantine VII Porphyrogenitos and had influence over emperors until the reign of Basil II, except for the emperor Romanos II (959-63) who favoured another eunuch, Joseph Bringas. The patriarch Theophylact Lekapenos, who was another son of Romanos I and a half-brother of Basil, is also considered a eunuch in some sources.⁶⁰⁵ These cases suggest that castration in the empire was still performed in spite of the prohibition in both canon and civil laws. There seems to be no source which mentions anyone of who had performed these castrations being found guilty. Moreover, it seems to be unreasonable to think that all of these cases of castration were for medical treatment, although the detailed situation of such castrations is unknown.

However, there seem to be no sources which mention that castration was used by Leo VI or his officials. In addition, as far as we know, there is no evidence that Leo's successors imposed castration on any criminal. On the other hand, narrative sources suggest that they occasionally used it against family members of their political opponents, while scholars mention that the Macedonian emperors performed political castration less than their ninth-century predecessors such as Leo V and Michael II (820-29).⁶⁰⁶ It is mentioned that there was a rumour that the emperor Alexander (912-3) planned the castration of his nephew and the son

⁶⁰³ Tougher 2008, 162. Chapter 7 will discuss Philokales in detail.

⁶⁰⁴ Psellos, *Chron.* 1.3, ed. Reinsch, vol. 1, 3. Brokkaar 1972, 200-3; Angelidi 2013, 12. Cf. Wander 2012, 106-11. Wander, who refers to John Skylitzes, Joel, and Zonaras, supposes that Basil had been castrated after puberty as a result of the overthrow of his father, depending on the fact that he was described as having virile virtue in some sources. His argument, however, seems to be baseless because the image of an individual eunuch is changeable according to each author's position. Tougher 2008, 105. Moreover, as Brokkaar points out, these sources do not take into account that Basil had already been *protovestiatios*, which was one of the titles reserved for eunuchs during his father's reign. Brokkaar 1972, 203.

⁶⁰⁵ Tougher 2008, 71.

⁶⁰⁶ Patlagean 1984, 421; Krsmanović 2017, 61.

of Leo VI, Constantine, in order to make his old follower and *patrikios* Basil/Basilitzes his successor.⁶⁰⁷ His plan, however, met with opposition from supporters of the former emperor when Constantine was an infant and when he was feeble. Other sources report a similar rumour in the reign of Nikephoros II Phokas that the emperor planned to remove the genitals of the sons of Romanos II, Basil and Constantine, and to make his brother Leo emperor.⁶⁰⁸ Whether such episodes were true or not, it is clear that political castration of the offspring of a former emperor was highly imaginable for the middle Byzantine writers. In 913, Stephen Doukas, who was a son of rebellious Constantine Doukas, was castrated by supporters of the infant emperor Constantine VII after an unsuccessful usurpation attempt by his father.⁶⁰⁹ Along with the mass executions of the usurper's relatives, Stephen's castration would constitute a terrible blow to the Doukas family. Then, when Constantine VII became sole emperor in 945 he removed family members of Romanos I Lekapenos, with a few exceptions including the *parakoimomenos* Basil Lekapenos and the patriarch Theophylact Lekapenos. He ordered the castration of Romanos Lekapenos, a grandson of Romanos I and a son of Stephanos Lekapenos. However, he seems to have stayed in the court and eventually became *patrikios* and *sebastophoros*.⁶¹⁰ Leo the Deacon reports that the emperor John I Tzimiskes (969-76) was poisoned in the house of this Romanos near to Atroa.⁶¹¹ The editor of

⁶⁰⁷ Theoph.Cont, ed. Bekker, 379; Symeon, 134.4; Wahlgren, 295-6; tr. Wahlgren, 219. For Basilitzes, see *PMBZ* Basilitzes (21126) Available at: <https://www.degruyter.com/database/PMBZ/entry/PMBZ23279/html> [Accessed: 23 October 2021].

⁶⁰⁸ Psellos, *Hist.Synt.* 105, ed. and tr. Aerts, 100-1; Zonaras, 16.28.15, ed. Pinder and Büttner-Wobst, vol. 3, 516.

⁶⁰⁹ Theoph.Cont. ed. Bekker, 385; Symeon, 135.9, ed. Wahlgren, 300-1; tr. Wahlgren, 223. *PMBZ* Stephanos Dukas (27243) Available at: <https://www.degruyter.com/database/PMBZ/entry/PMBZ29397/html> [Accessed: 23 October 2021].

⁶¹⁰ Skylitzes, 11.3, ed. Thurn, 238; Zonaras, 16.21.13-6, ed. Pinder and Büttner-Wobst, vol. 3, 484. *PMBZ* Romanos Lekapenos (26842) Available at: <https://www.degruyter.com/database/PMBZ/entry/PMBZ28996/html> [Accessed: 23 October 2021].

⁶¹¹ Leo the Deacon, 10.11, ed. Hase, 177.1-11.

Prosopographie der mittelbyzantinischen Zeit regarded him and his namesake the grandson of Romanos I as two different figures. The latter was said to be a son of Constantine Lekapenos and a nephew of Stephanos Lekapenos, who was also castrated in infancy after the fall of his grandfather.⁶¹² It is noticeable that the emperor appointed him as *patrikios* and *praipositos*,⁶¹³ for, as Krsmanović argues, political castration in the ninth century was accompanied by other ways of social marginalisation such as tonsure and exile.⁶¹⁴ He seems to have stayed in office even in the reign of John I Tzimiskes, when he commanded the imperial army in the campaign against the Rus' in 971.⁶¹⁵ Regardless of whether these Romanoī Lekapenoī were one and the same person or two different people, it seems to be obvious that Constantine VII ordered the castration of the grandson(s) of the former emperor and gave the castrated Romanos a secular office and title. These cases show that castration was more likely in particular political circumstances. Finally, Michael V allegedly had his male relatives, including adults, castrated in order to secure his throne.⁶¹⁶ These examples make our understanding of the impact of *Nov.Leo. 60* difficult: did these emperors know Leo's novel? Even if, however, they knew the stipulation of *Nov.Leo. 60*, they might not have felt the necessity to follow it, considering that castration for disqualification is different from that for benefit or for punishment. In any case, castration of an enemy's heirs, especially if they are minors, continued to be a useful tool for the imperial authority to eliminate the possibility of usurpation without using the most severe way – death.⁶¹⁷

Finally, in response to the above-mentioned cases of castration in the empire, we have to consider the long-standing contradiction in the history of the Roman and Byzantine

⁶¹² Theoph.Cont. ed. Bekker, 426.10. *PMBZ* Romanos Lekapenos (26841) Available at: <https://www.degruyter.com/database/PMBZ/entry/PMBZ28995/html> [Accessed: 23 October 2021].

⁶¹³ Theoph.Cont. ed. Bekker, 426.11-2.

⁶¹⁴ Krsmanović 2017, 60.

⁶¹⁵ Skylitzes, 15.16, ed. Thurn, 308.91-7.

⁶¹⁶ Krsmanović 2017, 61.

⁶¹⁷ When the author of the *Chronicle* of Theophanes Continuatus describes the blinding of Leo Phokas the Younger and his sons made by John Tzimiskes, he mentions that blinding was preferred to death because the former is more humane than the latter. Theoph.Cont. ed. Bekker, 395. Patlagean 1984, 414.

empire that emperors used eunuchs and prohibited castration at the same time. It is noticeable that most emperors, including Leo VI, who had promulgated prohibitory decrees against castration gave eunuchs important positions in their court. Leo's situation seems slightly different from that of his later Roman predecessors, for, unlike the later Roman eunuchs most of whom could be supplied from outside of the empire, the number of native eunuchs increased during the middle Byzantine period and such a change in the source of supply of eunuchs made eunuchs more integrated in imperial society.⁶¹⁸ Leo VI, however, had never intended to reverse his predecessors' decisions against those who castrated his subjects even in such changed situation and in spite of his use of eunuchs in the imperial court. This is probably because Leo VI considered the act of castration, especially when performed on his healthy subjects, was that against Roman legal tradition in the law of Justinian I, and even the law of God which tended to be regarded superior to the emperor. It is probably true that he intended to stop forced castration in the empire, as he himself mentioned at the beginning of *Nov.Leo.* 60. It is, however, questionable whether Leo VI himself aimed at eliminating completely the act of castration in the empire and at abandoning the use of native eunuchs, for his primary concern in *Nov.Leo.* 60 was to rebalance the condemned act and the punishment for it, lessening the punishment of *Nov.Jus.* 142. The legislator knew that the strict punishment of Justinian I could not prevent illegal castration, but he did not introduce the same or more strict punishment than Justinian I. Moreover, *Nov.Leo.* 60 kept a key loophole in the prohibitory laws through permitting castration for health reasons and overlooking natural eunuchs although there was probably no way to distinguish those who had been castrated for remedying their diseases from other victims of castration especially if their castrations were performed when they were children. On the contrary, the mention of castrated freemen added to *Nov.Jus.* 142 seems to mean that the legislator officially recognised the existence of native eunuchs in the empire in spite of the illegality of such castration. Other novels of Leo VI, which will be examined in the following chapters, also suggest that the emperor seemed to take it for granted that the empire has eunuchs including castrated men, promulgating novels relating to the real life of eunuchs. These ambiguous situations surrounding eunuchs could be increased by the ambivalent image of eunuchs; for example, *Nov.Leo.* 60 describes eunuchs as creatures against nature whereas the legislator would have known of the holiness of the eunuch saint Ignatios. In conclusion, it is safe to say

⁶¹⁸ Tougher 2008, 67.

that the prohibitory law against castration had been expected to be a means of regulating the act of castration, but it is doubtful whether the legislator had aimed to uproot it. The emperor possibly wished to deter anyone from castrating others without sufficient reason, but he did not refuse the presence of eunuchs, even if they had been illegally castrated in the empire, due to the irreversibility of the operation of castration and the absence of a total ban on castration.⁶¹⁹

Conclusion

This chapter has re-examined *Nov.Leo.* 60 mainly from the legal viewpoint and has attempted to explain why Leo VI promulgated the novel. The conclusion of this analysis is as follows. At the forefront, a major purpose for the promulgation of *Nov.Leo.* 60 was to introduce a new punishment modifying the Justinianic prohibitory law against castration. Leo VI's mitigation of punishment against those who castrated others should be considered a product of the tendency to ameliorate severe laws in the Macedonian legal project, the 'Cleansing of the Ancient Laws'. Although the legislator agreed with Justinian I on preventing illegal castration in the empire, he felt the talion in *Nov.Jus.* 142 against male perpetrators too severe and replaced it with a more humane one, as he did in some other penal stipulations of previous laws. Moreover, it has been clarified that an increasing interest in the prohibition of castration can be observed in the ninth-century canon of the Council of Constantinople. Based on this, this chapter argued that this canon had shared the same context as Leo VI's promulgated *Nov.Leo.* 60: the increasing number of castrations performed in the empire. The presence of Ignatios, who was a victim of castration, and the conventional interest in relating canon law with civil law could also raise the issue about how those who had castrated others should be treated in canon law. As for the vision of Leo VI, it seems to be unreasonable to think that he had the intention to expel castrated men as there must have been an increasing number of native eunuchs in his court, such as Constantine the Paphlagonian. The present author considers that the legislator might have projected to keep controlling the operations of castration in the empire, but that does not seem to mean that the legislator projected to stop recruiting eunuchs as imperial officials.

⁶¹⁹ For the same contradiction in the Justinianic law, see Kontani 2018, 312-20..

It is a long-standing contradiction in the history of the Roman and Byzantine empires that emperors used eunuchs on the one hand and prohibited castration on the other. Most of the emperors who had promulgated prohibitory decrees against castration gave eunuchs important positions in their court.⁶²⁰ This chapter has suggested a possibility that imperial promulgation of laws against castration in the empire could be compatible with imperial use of eunuchs in the imperial court, considering, as the present author did in the study of the Justinianic law,⁶²¹ the act of illegal castration and its victims separately. It should be also noted that this prohibition had a key loophole for those who castrated themselves or others. This analysis of *Nov.Leo.* 60, however, does not seem to be enough to explain such a contradiction. Therefore, it is important to examine the other novels concerning the real lives of eunuchs, *Nov.Leo.* 26 about eunuchs' adoption and *Nov.Leo.* 98 about eunuchs' marriage. These novels discuss the character of eunuchs from the supposition that eunuchs actually lived in the empire, unlike *Nov.Leo.* 60, so they will offer us different suggestions of how the legislator thought about the eunuchs surrounding him.

⁶²⁰ Guiland 1943, 196-201; Tougher 2008, 9; Rotman 2015; Kontani 2018.

⁶²¹ Kontani 2018, 312-20..

Chapter 5

Eunuchs as Disabled People: Adoption by Eunuchs in *Nov.Leo. 26*

Introduction

Adoption is one of the categories of kinship ‘by arrangement (θέσει)’, which was an additional measure to biological kinship and used to bring people who were outside the biological family into it.⁶²² In addition, in his commentary on the *Institutes*, Theophilos explained the purpose of adoption as follows:

An act of the civil law imitating nature and devised for the solace of childless men. For example: a man that had no children, whether because he did not marry or because, though he did marry, he did not beget children, or because though he did beget children, such children died, wishing to lighten the defect of nature or the stroke of misfortune adopted a child.⁶²³

On the other hand, adopted children could benefit from their adoptive parents, for they could acquire a right of intestate succession, dowry, and other necessities of life.⁶²⁴ Accordingly, from our point of view, the institution of adoption seems to be almost the only way that eunuchs, who had no chance to have a biological child, could have their legislative offspring.

Unlike the other two novels, *Nov.Leo. 26* regarding adoption by eunuchs had stipulates in direct opposition to the law of Justinian I. In *Nov.Leo. 26* and 27 addressed to Stylianos Zaoutzes, Leo VI abolished old restrictions on adoption and permits eunuchs and

⁶²² Macrides 2008, 652-3.

⁶²³ Theoph. *Inst.* 1.11.pr., ed. Lokin et al., 84.3-8; tr. Murison, 85. νομίμη πρᾶξις μιμουμένη τὴν φύσιν πρὸς <ἀ>παίδων παραμυθίαν ἐπινενοημένη. τυχὸν γὰρ οὐκ ἔχων παῖδας, διὰ τὸ μὴ ἐλθεῖν ἐπὶ γάμον, ἢ ἐλθεῖν μὲν, μὴ παιδοποιῆσαι δέ, ἢ παιδοποιῆσαι μὲν, ἀποβαλέσθαι δὲ τούτους, τὸ ἐκ τῆς φύσεως ἐλάττωμα ἢ καὶ τὸ συμβὰν δυοτύχημα βουλόμενος ἐπικουφίσαι ἔλαβεν εἰς υἱοθεσίαν τινά.

⁶²⁴ Theoph. *Inst.* 1.11.2, ed. Lokin et al., 86-8; tr. Murison, 87-9; *Bas.* 28.4.11. Macrides 2008, 657. Macrides argues that the formulas for adoption contracts in the later Byzantine period show the inequality between the blood children and the adopted child.

women who had not had a child by blood to adopt children; namely, these novels modify the stipulations in the *Institutes* of Justinian I and its commentary written by the sixth-century law professor Theophilos.⁶²⁵ Thus, it is important for our study of eunuchs in the legal sources to research why the legislator had changed the stipulation concerning adoption in the interest of eunuchs and how much this change could affect eunuchs' lives.

In this chapter, *Nov.Leo.* 26 will be examined in the same way as the previous chapter: re-examination of the text and comparison with preceding and contemporary stipulations. At the same time, the issue of adoption of women will also be considered because *Nov.Leo.* 26 on eunuchs' adoption is a counterpart of *Nov.Leo.* 27 concerning adoptions made by women. Then, arguments concerning the contexts of these novels from various viewpoints, e.g. eunuch studies and studies of the Byzantine family, will be inspected and incorporated with each other. This will show a possibility that *Nov.Leo.* 26 was derived both from Leo VI's personal attitude towards eunuchs or childbearing and from modifications of the institution of adoption from the reign of Justinian I. In particular, the present thesis focuses on the Christianisation of the way of adoption in other novels of Leo VI as an important factor explaining why eunuchs' adoption was permitted in *Nov.Leo.* 26, referring to several cases of other kinds of arranged kinship made by eunuchs, such as baptismal sponsorship. Then, the origin of the concept concerning eunuchs used in the novel that castrated men could have a right to make up for their loss of male genitals and childlessness by adoption will be considered. This chapter will show a possibility that such a sympathetic notion, different from the prohibition against castration in *Nov.Leo.* 60, also emerged mainly from the changes in the character of adoption from the reign of Justinian I. Finally, the impact of these novels on the later period will be considered from a few cases of adoption made by women and eunuchs and legal sources made after the promulgation of the *Novels of Leo VI*, which will show that Leo's permission of eunuchs' adoption was transmitted along with Justinian's restriction on it. As a result of these analyses, another side of the imperial view towards eunuchs, sympathy for castrated men as disabled people, will be revealed.

⁶²⁵ *Inst.* 1.11.9-10; Theoph. *Inst.* 1.11.9-10.

Laws about Adoption by Eunuchs before *Nov.Leo. 26*

Castrated men had not been permitted to adopt in existing laws promulgated before *Nov.Leo. 26*. There was a principle in the tradition of classical Roman legal texts that *spadones* could adopt,⁶²⁶ while whether castrated men could be included in the category of *spado* remained unclear. In the sixth century, however, Justinian I asserted that those who had been castrated were different from *spadones*, who were defined as uncastrated impotent men in this stipulation, and could not adopt.⁶²⁷ In addition, the sixth-century law professor, Theophilus, who was one of the members of Justinian's codification project, explained in detail why adoption by castrated men was not permitted in his Greek summary and commentary on the *Institutes* entitled *Paraphrasis Institutionum*. According to him, the Greek word εὐνούχος contains all categories of impotent men and can be divided into three categories: σπάδων (*spado*), καστράτος (*castratus*), and θλιβίας (*thlibias*). He probably makes a correspondence between *spado* in *Inst. 1.11.9* and σπάδων and between *castratus* and καστράτος and θλιβίας respectively, for he explains as follows:

Now *spadones* are those that are prevented from begetting children by some derangement or chillness troubling the genital organs, but when relieved of this, are capable of begetting children. *Thlibiae* are those that have had their testicles crushed by their nurse or by their mother. *Castrati* are those that have had their genital organs excised. With these preliminary explanations, turn now to the further consideration of the matter before us. The question was submitted whether a eunuch, then, can adopt. Our answer is that neither a *castratus* nor a *thlibias* can adopt either an independent person by authority of the Emperor or a dependent person by order of a magistrate. For to those to whom nature has denied the power of begetting children the law, following in the steps of nature, has also denied it; for such persons are beyond the hope of begetting children. A *spado*, however, since there is a good

⁶²⁶ *Dig. 1.7.2.1* (Gaius, *Institutes*, book 1), 1.7.40.2 (Modestinus, *Distinctions*, book 1). For the adoption of eunuchs in the Roman law, see Kontani 2018, 321-8.

⁶²⁷ *Inst. 1.11.9*, ed. Krüger, 5. Sed et illud utriusque adoptionis commune est, quod et hi, qui generare non possunt, quales sunt spadones, adoptare possunt, castrati autem non possunt.

chance that he may be relieved of his derangement and so be capable of begetting children, will be able to adopt a person whether dependent or independent.⁶²⁸

As a result, this comment of Theophilus that castrated men could not adopt due to incurability of their power for begetting biological offspring had become the standard explanation of the reason why *castrati* were not permitted to take advantage of the adoption system.

These stipulations were probably transmitted to the reign of Leo VI. *Bas.* 33.1.40 refers to *Dig.* 1.7.40.1 about *spado*'s adoption although we have only the restitution. Moreover, Theophilus' commentary on *Inst.* 1.11.9 was probably compiled in the *Basilika* and reconsidered in *Nov.Leo.* 26.⁶²⁹ In addition to these, the *Eisagoge*, the law book published shortly before *Nov.Leo.* 26, states 'neither woman nor eunuch can adopt'.⁶³⁰ This shows that the editor of the *Eisagoge* did not take any difference in 'eunuchs' into account, but rather he probably used εὐνούχος as a meaning of *castratus*. Based on these stipulations, *Nov.Leo.* 26 was finally promulgated.

⁶²⁸ Theoph. *Inst.* 1.11.9, ed. Lokin *et al.*, 92.4-15; tr. Murison, 93. καὶ σπάδωνές εἰσιν οἵτινες διὰ τι πάθος ἢ ψῶξιν ἐνοψγήσασαν τοῖς γονίμοις μορίοις παιδοποιεῖν κωλύονται, τούτου δὲ ἀπαλλαγέντες παιδοποιοῦσιν. Θλιβίας δὲ οἵτινες ὑπὸ τῆς τροφοῦ ἢ τῆς μητρὸς τυχὸν ἔκθλιψιν τῶν διδύμων ὑπέστησαν. καστράτοι δὲ εἰσιν ἐφ' ὧν γέγονεν ἐκτομή τῶν γεννητικῶν μορίων. ἐπειδὴ σοι ταῦτα προτεθεώρηται, ὅρα λοιπὸν τὸ προκείμενον. ἐζητήθη εἰ ἄρα εὐνούχος δύναται υἱοθετεῖν. καὶ λέγομεν ὅτι ὁ μὲν καστράτος καὶ ὁ θλιβίας οὐ λαμβάνουσιν εἰς θέσιν, οὐδὲ αὐτεξούσιον παρὰ βασιλέως, οὐδὲ ὑπεξούσιον παρὰ ἄρχοντος. οἷς γὰρ ἡ φύσις ἡρνήσατο τὸ παιδοποιεῖν, τούτοις καὶ ὁ νόμος, κατὰ πόδα βαδίζων τῆς φύσεως· ἀνέλπιστα γὰρ αὐτοῖς τὰ τῆς παιδοποιίας. ὁ δὲ σπάδων, ἐπειδὴ τούτων ἐλπίς —εἰκὸς γὰρ τοῦ πάθους ἀπαλλαγέντα δύνασθαι παιδοποιεῖν—, εἰς θέσιν λήγεται καὶ αὐτεξούσιον καὶ ὑπεξούσιον.

⁶²⁹ *Bas.* 33.1.59 (*restitutus*) = *Synopsis Basilicorum Maior*, E. 43.3, Y.3.5. Fögen 1990, 91-2.

⁶³⁰ *Eisag.* 33.24, ed. Zepos, 337. οὔτε γυνὴ οὔτε εὐνούχος δύναται υἱοθετεῖν,... Cf. Fögen 1990, 92.

Contents of *Nov.Leo. 26* and *Nov.Leo. 27*

At the beginning of *Nov.Leo 26*, the legislator firstly emphasises the importance of marriage and its contribution to the perpetuity of mankind through childbearing.⁶³¹ He also stresses the joy brought from children and the usefulness of children who assist their old parents.⁶³² Accordingly, the legislator regards childbearing significant not only for human society as a whole but also for individual parents.

Then, the legislator explains that previous law established a system of adoption with a philanthropic mind in order to benefit those who did not have children through marriage.⁶³³ It is true that the sixth-century jurist Theophilos comments that adoption was devised ‘for the solace of childlessness’.⁶³⁴ However, Leo VI was not satisfied with the previous law because it did not allow some people to enjoy such a benefit even though it offered the right to adopt to unmarried men.⁶³⁵ The law excluded ‘those who had been deprived of the most vital part of the body and to whom people seem to show compassion because of their deprivation of the power to engender’.⁶³⁶ The author of *Nov.Leo. 26* mentions that the previous law excluded

⁶³¹ *Nov.Leo. 26*, ed. Troianos, 110.5-9. For these two novels, the present author referred to the French translation of Noailles and Dain. Noailles and Dain, 1944, 100-10.

⁶³² *Nov.Leo. 26*, ed. Troianos, 110.9-112.13. The latter point is unique compared with other stipulations in Roman law, but such an idea might not be unusual as a hagiographic tale about a Paphlagonian farmer Metrios who was a father of Leo VI’s *parakoimomenos* Constantine the Paphlagonian, shows. According to the fourteenth-century manuscript of the *Synaxarion of Constantinople*, Metrios, who felt jealous of his neighbours who had male children castrated and sent to the capital, prayed for a son as a support (βακτηρία) for his old age. *Synaxarion of Constantinople*, ed. Delehaye, 721.26-9. Messis 2014, 184-5.

⁶³³ *Nov.Leo. 26*, ed. Troianos, 112.13-22.

⁶³⁴ Theoph. *Inst.* 1.11.pr., ed. Lokin *et al.*, 86.14-5; tr. Murison, 87. ἀλλ’ εἶπον ἐνταῦθα πρὸς παραμυθίαν ἀπαιδίας ἐπινενοῖσθαι τὴν θέσιν, ἵνα δηλώσω τὸ γιγόμενον ὡς ἐπὶ τὸ πλεῖστον.

⁶³⁵ For the adoption of unmarried men, see Theoph. *Inst.* 1.11.pr, ed. Lokin *et al.*, 84-6; tr. Murison, 85-7.

⁶³⁶ *Nov.Leo. 26*, ed. Troianos, 112.22-5. Ἀλλ’ οὐχ οὕτω βούλεται, ἀποπέμπεται δὲ τούτους οἱ τὰ καιριώτατα ἐζημίωνται καὶ οὓς ἦν εἰκὸς ἡδίκημένους καὶ τῆς παιδοποιοῦ ἀφηρημένους δυνάμεως οἰκτεῖρειν. I referred to the French translation of Noailles and Dain. Noailles and

such people for the reason that those who have been refused to have offspring by nature could not be allowed to do so by law.⁶³⁷ It is unquestionable that the abovementioned comment of Theophilos is what the legislator criticises. *Nov.Leo.* 26 opposes this argument, stating that it is human injustice that deprives these people of offspring, not nature.⁶³⁸ The expression ‘human injustice (ἀνθρώπων ἀδικία)’ might suggest the act of castration prohibited in laws because *Nov.Leo.* 60, which prohibits castration, sometimes uses the word of ἀδικία with the meaning of castration.⁶³⁹ As a result, *Nov.Leo.* 26 is not only based on the traditional concept of adoption but also extends the coverage of such mercy. Although, as with the abovementioned clause in the *Eisagoge*, the novel uses only word the εὐνούχος not σπάδων or καστράτος of the commentary of Theophilos; thus it is suggested that *Nov.Leo.* 26 abolished the old restriction on the adoption by *castrati* in *Inst.* 1.11.9 or that by καστράτος and θλιβίας in Theoph., *Inst.* 1.11.9. Moreover, it is highly possible that *Nov.Leo.* 26 and 27 were promulgated in order to amend not only stipulations in the law of Justinian I but also a stipulation of Basil I, *Eisag.* 33.24, which did not permit a woman or a eunuch to adopt children.

It is notable that the legislator reveals a sympathetic attitude towards eunuchs, considering them as victims of castration and as disabled people. Leo VI, considering that the refusal of adoption is the second damage done to eunuchs who suffered damage by other people, permits eunuchs to adopt children because adoption, the lawful acquisition of children, is the only way for eunuchs to become fathers and enjoy care from their adopted sons (νιῶν).⁶⁴⁰ The legislator uses the Greek word νιῶν only once in *Nov.Leo.* 26 and 27. It is difficult to answer the question of whether the legislator intended to order eunuchs to adopt only males from the fact that he uses the plural form of παῖς in the other part. If, however, he presupposed that eunuchs would have male adoptees, it might be possible to explain that such a presupposition originated from a negative view towards a eunuch who lived with females

Dain 1944, 102.

⁶³⁷ *Nov.Leo.* 26, ed. Troianos, 112.25-7.

⁶³⁸ *Nov.Leo.* 26, ed. Troianos, 112.27-8. For the close connection between the work of Theophilos and the *Novels of Leo VI*, see Fögen 1990, 83-97, esp. 91-2.

⁶³⁹ *Nov.Leo.* 60, ed. Troianos, 200.24-202.27, 202.41-5. See also n. 501 of this thesis.

⁶⁴⁰ *Nov.Leo.* 26, ed. Troianos, 112.29-36.

except for their mother, sister, aunt or anyone who stands above suspicion.⁶⁴¹ Moreover, he emphasises again that it is inhumane for eunuchs to be deprived of the right of adoption at the same time as deprivation of their genital organs.⁶⁴² At the end of the novel, the legislator expresses an interesting viewpoint that the childlessness of those who had lost their male genitals is a sort of disability; namely, it mentions that a man who has lost his voice could replace the function of his tongue with his hands and cites it as an example to justify that eunuchs who have no offspring due to the removal of their genitals remedy this deficiency in any other way.⁶⁴³ It is true that there are some stipulations which regards the loss of one's male genitals as a sort of disability in Roman and Byzantine law, but the view in *Nov.Leo.* 26 that the childlessness of eunuchs should be relieved seems to be without precedent in Roman and Byzantine legal history. Although such an interpretation of eunuchs will be considered in the later part of this chapter, one thing is certain that such a sympathetic and philanthropic attitude to eunuchs facilitated the reversal of stipulations concerning adoption by the castrated.

Nov.Leo. 27 is a continuous stipulation from *Nov.Leo.* 26, for it permits all women, whether they have become mothers or not, to adopt. This novel abolished a stipulation of Justinian's *Institutes* which originated from a rescript of Diocletian for a female named Syra that only women, whose nature has already known motherhood but have become childless due to the death of their children, were exceptionally permitted to adopt.⁶⁴⁴ The legislator mentions the previous stipulation that men whose genitals had been removed could not adopt, as women who had not been mothers.⁶⁴⁵ Then, he claims again how inhumane the refusal of adoption for eunuchs is, as he does in *Nov.Leo.* 26; namely, *Nov.Leo.* 27 mentions the fact that although eunuchs have lost the opportunity to be natural parents this does not mean that this disadvantage should be aggravated by law.⁶⁴⁶ Moreover, the last part of *Nov.Leo.* 26 that eunuchs should not be prevented from replacing their deficiency in any other way is cited,

⁶⁴¹ E.g. Canons of the Council in Trullo, canon 5. This attitude will be discussed in the next chapter. It is true that eunuchs could also be suspected of homosexuality, but this seems to be problematised only in the context of monastic life. Messis 2014, 111-8.

⁶⁴² *Nov.Leo.* 26, ed. Troianos, 112.36-8.

⁶⁴³ *Nov.Leo.* 26, ed. Troianos, 112.38-43.

⁶⁴⁴ *Inst.* 1.11.10; *CJ.* 8.47.2.

⁶⁴⁵ *Nov.Leo.* 27, ed. Troianos, 114.11-8.

⁶⁴⁶ *Nov.Leo.* 27, ed. Troianos, 114.18-22.

although *Nov.Leo.* 27 uses different examples of physical disabilities which could be mitigated in any other way like adoption by eunuchs (i.e. the loss of hands, feet, or any other members).⁶⁴⁷ The legislator adds that it is unreasonable to exclude women from adoption on the pretext that they have not been mothers.⁶⁴⁸

Nov.Leo. 27, like *Nov.Leo.* 26, emphasises that the primary benefit of having children is the children's care for their old parents, whether the parents are poor or rich. It mentions that the adoptive child will provide service and care to his adoptive mother and will take over the management of his parent's property.⁶⁴⁹ On the other hand, the legislator suggests that the adopted son receives the blessing of the mother and her property after her death.⁶⁵⁰ Interestingly, the emperor adds another reason for permitting adoption: the respect for virginity. He honours virgins and shows his benevolence to women who prefer virginity to marriage but are tormented by love for children.⁶⁵¹ It might be possible to consider that the legislator knew some virgins like this. At first glance it seems that the legislator disturbs their dedication to virginity, but he asserts that these virgins, who see that they can satisfy such desire outside the marital bonds through adoption, will not ignore the reverence to virginity.⁶⁵² Perhaps, this respect for virginity is related mutually to his attitude towards eunuchs.

In the last part of *Nov.Leo.* 27, the legislator changes the procedure for the authorisation of adoption; namely, it states that those who wish to adopt will receive the authorization not only from the emperor, as the old laws stipulated, but also from all local administrators (*παρὰ παντὸς τοῦ καθ' ἐκάστην χώραν τὸ ἄρχειν καὶ διέπειν λαχόντος*).⁶⁵³ The author seemed to

⁶⁴⁷ *Nov.Leo.* 27, ed. Troianos, 114.22-4.

⁶⁴⁸ *Nov.Leo.* 27, ed. Troianos, 114.24-6.

⁶⁴⁹ *Nov.Leo.* 27, ed. Troianos, 114.26-116.39.

⁶⁵⁰ *Nov.Leo.* 27, ed. Troianos, 116.61-118.65. Ἐπεὶ εἰ τοῦτο, πῶς πολλὰ τῶν μητέρων κεχηρωμένοι παῖδάς τε συμβιοῦντας ὑποταττομένους μέχρι τῆς ἐσχάτης ἔχουσιν ἡμέρας, καὶ ἐν χερσὶν αὐτῶν τὴν ζωὴν καταλύουσαι τῆς τε μητρικῆς εὐλογίας καὶ τῶν προσόντων καταλιμπάνουσι κληρονόμους;

⁶⁵¹ *Nov.Leo.* 27, ed. Troianos, 116.45-9.

⁶⁵² *Nov.Leo.* 27, ed. Troianos, 116.46-9. Αἱ γὰρ ὅσαι μᾶλλον γαμικῆς ὁμιλίας τιμῶσι μὲν τὴν παρθενίαν, προτιμῶσαι δὲ ὅμως παίδων ἔρωτι νύττονται, τοῦτο καὶ γαμικῆς ὁμιλίας ἐκτὸς προσγινόμενον αὐταῖς ὀρᾶσαι τὸ σεμνὸν τῆς παρθενίας οὐ περιόψονται.

⁶⁵³ *Nov.Leo.* 27, ed. Troianos, 118.66-9.

modify *Inst.* 1.11.1, which decided on the one hand that an imperial rescript was used for permitting a person to adopt those who were independent, and on the other the magistrate gave the power to adopt those who were in the power of others. It seems to be curious that there is no mention about church authority although *Nov.Leo.* 24 and *Nov.Leo.* 89 suggest that adoption was made by divine service. This adoption in the church seems to be new to Roman civil law, but there is a sign that ecclesiastical blessing for adoption had been already known in the *Euchologion*, the liturgical texts, in the ninth century.⁶⁵⁴ Therefore, there might be two possibilities about the measures for establishing adoption in *Nov.Leo.* 26 and 27; divine service was also needed to make adoption in addition to the authorisation of emperors or officials, or church authority might stand in for secular authority.

These two novels show an important change in the stipulations concerning adoption in Roman law, abolishing the old restriction on eunuchs and women. Therefore, these novels have been studied from various points of view. In order to examine the contexts of this change, it is necessary to inspect these arguments and harmonise them together.

Social and Legal Contexts of the Novels

Before getting down to the main subject, we have to grasp the fact that studying how the system of adoption worked in the middle Byzantine period is a difficult task. Unfortunately, sources which inform us about Byzantine attitudes to the family are concentrated in the later Byzantine period, especially after the eleventh century, while there are some known cases of adoption during the ninth and eleventh centuries (e.g. the adoption of Basil I by Michael III and the adoption of Michael V by Zoe).⁶⁵⁵ Thus it is necessary to depend largely on legal sources, but this approach is liable to overlook the flexibility of adoption. Macrides mentions that the institution of adoption was ‘flexible, and varied with regard to expectations, obligations, and arrangements’⁶⁵⁶ and there is a variation in the degrees of belongings to the

⁶⁵⁴ Macrides 1990, 110-1. Goar, *Euchologion*, 561-3. For *euchologia*, see Rapp 2016, 53-62.

⁶⁵⁵ Macrides 2008, 625. Theoph.Cont. ed. Bekker, 207.8-10, 239.13-240.4; Skylitzes, 5.13, ed. Thurn, 113.22-5; Psellos, *Chron.* 4.23, 5.4, ed. Reinsch, vol. 1, 63-4, 81.

⁶⁵⁶ Macrides 1990, 118.

family both from the adoptee and the adoptive parents' point of view.⁶⁵⁷ She also argues that a different type of adoption which had been prohibited by Roman law was probably carried out; namely, adoption established through private contract.⁶⁵⁸ These things suggest a difficulty in clarifying the interaction between the ninth-century novels of Leo VI concerning adoption and the social understanding of such kinship in that period. In any case, it is worth examining the legal sources in order to consider artificial kinship in the middle Byzantine period, taking into account these flexibilities in its system.

The approaches to explain the contexts of *Nov.Leo.* 26 and 27 in previous studies seem to be roughly divided into two types. The first one is found in studies which focus on the social contexts of the novels and emphasise the close relationship between the legislator and his eunuchs, or his personal sympathy for them. The second approach is to focus on the various changes in the overall system of adoption in later Roman and Byzantine law; in other words, the change in *Nov.Leo.* 26 and 27 can be explained as part of the bigger change in the law of adoption. The following part of this chapter will attempt to combine these different research traditions and reconsider why Leo VI had promulgated these novels.

The Situation surrounding Leo VI and his Eunuchs

An interesting explanation that *Nov.Leo.* 26 was a manifestation of Leo VI's generous attitude towards his court eunuchs is found in the study of eunuchs.⁶⁵⁹ For example, Messis mentions that *Nov.Leo.* 26 may be based on a practical problem about the inheritance of eunuchs, especially who were in the imperial palace⁶⁶⁰ and concludes that allowing eunuchs to adopt was a compensation to faithful eunuchs in the imperial court.⁶⁶¹ However, according to Signes Codoñer, *Nov.Leo.* 2-68 were likely promulgated between ca. 887 and 893 before the time when some of the most famous eunuchs in Byzantium, Samonas and Constantine the

⁶⁵⁷ Macrides 2008, 657.

⁶⁵⁸ Macrides 1990, 111-4; Miller 2003, 164-7.

⁶⁵⁹ Tougher 1997, 202; Messis 2014, 100-1, 105; Tougher 2017, 231-2.

⁶⁶⁰ Messis 2014, 101.

⁶⁶¹ Messis 2014, 105. For court eunuchs in the reign of Leo VI, see Tougher 1997, 194-218.

Paphlagonian began to serve Leo VI,⁶⁶² but eunuchs had probably occupied an important position in the early reign of Leo VI. Therefore, his argument seems to be partly reasonable.

On the other hand, it seems to be unlikely that such an attitude towards eunuchs is the sole reason why Leo VI had promulgated *Nov.Leo. 26*, because the question why women were also permitted to adopt in *Nov.Leo. 27* remains unsolved. As for the latter, Messis mentions that because the permission to adopt is conceded to solitary women at the same time as *Nov.Leo. 26*, eunuchs were assimilated to women rather than men.⁶⁶³ However, this seems to be a logical leap. *Nov.Leo. 26* and *27* were promulgated in order to abolish all traditional restrictions of the *Institutes* and the *Eisagoge* and give all subjects the benefit of adoption. Accordingly, castrated men in *Nov.Leo. 26* could be regarded as a counterpart of women who had never been pregnant *Nov.Leo. 27* in that both of them had been denied the right to adopt children in the preceding laws until they were permitted to do so by Leo VI.⁶⁶⁴ This fact does not mean that eunuchs were in the same position of women, for women who had given birth but lost their children were permitted to adopt another.⁶⁶⁵ In addition, contrary to the opinion of Messis, *Nov.Leo. 26* seems to suggest that the legislator regarded a eunuch as a disabled man and a man who would not have his blood child and not become a ‘father’. Therefore, it might be more suitable to explain that Leo VI primarily aimed to grant the capacity to adopt children to all subjects, including those who had not had children and would not have them in the future, without distinction of their career and of their sex. Although it is highly possible that, as Messis argues, the emperor’s own experience with his court eunuchs was an impetus for promulgating *Nov.Leo. 26* or court eunuchs actually benefitted from the novel, this is probably just one aspect of the novel.

Some scholars focus on the emperor’s own situation: the absence of a male heir. Riedel considers that the emperor who managed to get married four times in order to have his male heir possibly felt himself to be handicapped like eunuchs.⁶⁶⁶ In addition, Tougher thinks about the emperor’s sympathy for eunuchs and his own situation together; namely, he argues

⁶⁶² Signes Codoñer 2009, 18-23.

⁶⁶³ Messis 2014, 101.

⁶⁶⁴ *Inst.* 1.11.9-10.

⁶⁶⁵ *Inst.* 1.11.10.

⁶⁶⁶ Riedel 2018, 133. The emperor had a daughter named Anna with his second wife Zoe Zaouzaina. Riedel 2018, 136.

that Leo VI may have felt sympathy for the childlessness of eunuchs due to his own concern to have a child.⁶⁶⁷ It is, however, necessary to point out that the situation of Leo VI was similar but not the same with that of eunuchs. The subject of *Nov.Leo.* 26 is probably those had lost their genitals. Moreover, as for the adoption, the emperor himself cannot have been deprived of his ability to adopt even before the promulgation of the novel because adult men over eighteen years who had their own genitals intact were permitted to have adopted children even if they did not marry.⁶⁶⁸ As a result, the influence of Leo's own situation on the change in *Nov.Leo.* 26 and 27 should not be overestimated, but the preface of *Nov.Leo.* 26, in which the legislator emphasises the importance of marriage and childbearing, might suggest a possibility that his keen interest in the importance of children made him consider those who had no opportunity to have children such as eunuchs and women who had never been pregnant.⁶⁶⁹

These studies indicate that the actual situation surrounding Leo VI and his eunuchs possibly inspired Leo VI to reconsider the conventional restrictions on adoption. Next, studies of the Byzantine family will be inspected.

Changes in the System of Adoption

Studies of family relationships in the Byzantine period tend to consider *Nov.Leo.* 26 and 27 as one of various changes concerning adoption which are found between the legal project of Justinian I and the promulgation of Leo's novels.⁶⁷⁰ Firstly, the power of an adoptive father over his adopted son was limited, especially after the promulgation of *CJ* 8.47.10 in 530. Theophilos also specifies that 'when a man adopted a person under the power of the another, the power of natural father no longer passed over to the adoptive father'.⁶⁷¹ According to

⁶⁶⁷ Tougher 2017, 231-2.

⁶⁶⁸ *Inst.* 1.11.pr.-4.

⁶⁶⁹ Riedel 2018, 133.

⁶⁷⁰ Patlagean 1978, 627; Macrides 1990, 111.

⁶⁷¹ Theoph. *Inst.* 1.11.2, ed Lokin *et al.*, 86.3-8; tr. Murison, 87. κελεύουσα ἡνίκα τις ὑπεξούσιον εἰς θέσιν λαμβάνει μὴ διαλύεσθαι τὴν τοῦ φυσικοῦ πατρὸς ὑπεξουσίτητα, μηδὲ τι μετιέναι ἐπὶ τὸν θετὸν πατέρα, μηδὲ γίνεσθαι αὐτοῦ *in potestate* τὸν παῖδα, εἰ καὶ τὴν ἐξ ἀδιαθέτου κλησιν εἰς τὰ πράγματα τοῦ λαβόντος αὐτὸν εἰς υἰοθεσίαν ἢ εἰρημένη διάταξις

Zachariä von Lingenthal, this restriction on the power of the adoptive father had led adoption in Byzantine custom and practice *adoptio minus plena*.⁶⁷² namely, adoption of those who are under the paternal power, ‘by which the ties with the former family of the adopted person were not completely destroyed, particularly in the field of the rights of succession’.⁶⁷³ As for adoption by eunuchs, Theophilos referred to this restriction when he commented on the legal adoption made by a *spado*.⁶⁷⁴ Macrides and Pitsakis argue that this restriction which eventually caused a change in the character and the purpose of adoption seemed to be one of the reasons why Leo VI had abolished the restriction in his novels. Pitsakis argues that the Byzantine practice of adoption was intended to form a bond of legal paternity and kinship, in the interests of the adoptee, rather than to establish or increase *patria potestas*, which was losing its importance in the Byzantine period, in favour of the adopter.⁶⁷⁵ As a result, a new concept of adoption was emphasised: adoption as a means of giving offspring to citizens who had no children.⁶⁷⁶ Although the concept of *patria potestas* itself remained and is confirmed in *Nov.Leo*. 25, Pitsakis convincingly argues that such a new character of adoption allowed a significant extension to the right to adopt, especially to women and eunuchs.⁶⁷⁷ Accepting these arguments, the present thesis considers that, although adoption without *patria potestas* had already been stipulated during the reign of Justinian I, such a shift in the system of adoption might make it easier for the ninth-century legislator to permit all eunuchs and women to adopt children.

Nov.Leo 27 actually indicates the decrease in the importance of *patria potestas* in adoption as a significant factor for removing restrictions on adoption made by women. Leo VI denies an idea in the *Institutes* that women cannot adopt someone due to the fact that they are not allowed to have *patria potestas* and to subject their children.⁶⁷⁸ He points out a

αὐτῷ ἐφιλοτιμήσατο.

⁶⁷² Zachariä von Lingenthal 1892, 116-8.

⁶⁷³ Berger, 1953, 350, ‘*Adoptio minus plena*’.

⁶⁷⁴ Theoph. *Inst.* 1.11.9, ed. Lokin *et al.*, 92-4; tr. Murison, 93-5.

⁶⁷⁵ Macrides 1990, 111; Pitsakis 1998, 21-2.

⁶⁷⁶ Pitsakis 1998, 22.

⁶⁷⁷ Pitsakis 1998, 22. In her analysis of *Nov.Leo*. 25, 26 and 27, Fögen also mentions that ‘Der Begriff der *patria potestas* hat damit seine scharfen Konturen verloren’. Fögen 1990, 96.

⁶⁷⁸ *Nov.Leo*. 27, ed. Troianos, 116.49-51. Οὐ γὰρ δὴ ἄξιον, διότι θῆλυ πρόσωπον ὑπεξουσίους

contradiction in such an idea from the fact that old law had permitted women, who had had biological children but lost them, to adopt.⁶⁷⁹ Then, without considering the issue of the power of the adoptive mother, he concludes that there is no problem in the adoption by a female if the adopted child voluntarily accepts such subordination.⁶⁸⁰ As a result, it seems to be reasonable to consider that solving the problem of paternal power in adoption was important for permitting adoption by women, and perhaps by castrated men.

Another notable change concerning adoption is that ecclesiastical blessing was introduced as a new procedure for adoption between the sixth century and the ninth century. In *Nov.Leo.* 24, Leo VI prohibited a father from marrying an adopted child with his blood child because, according to him, adoption was no longer a mere matter for civil law as before but was established by the prayers of the church.⁶⁸¹ Moreover, *Nov.Leo.* 89, which makes ecclesiastical blessing essential for marriage, is built on the idea that adoption was created by ecclesiastical rite.⁶⁸² Although we have no existing canon concerning adoption, the ecclesiastical blessing for adoption had been already known in the *Euchologion*, the liturgical texts from the ninth century.⁶⁸³ Accordingly, this suggests that the legislator probably affirmed existing customs of the adoption ceremony in the church and privileged church rules over civil law in *Nov.Leo.* 24.⁶⁸⁴

Thus, a possibility that Leo's respect for Christian rites and authority was behind the change in *Nov.Leo.* 26 and 27 could be raised. Patlagean argues that the Christianisation of the way of adoption until the reign of Leo VI made 'le critère canonique de la volonté' at the time of making adoption prevail although the classical Roman law focused on whether the adoption imitated nature or not.⁶⁸⁵ Considering that Justinian I restricted adoption by eunuchs for the reason that such adoption was inapplicable to the concept of the imitation of nature, it

ἔχειν παῖδας οὐκ ἐφεῖται, διὰ τοῦτο μὴ ἐξεῖναι υἱοθετεῖσθαι.

⁶⁷⁹ *Nov.Leo.* 27, ed. Troianos, 116.51-4.

⁶⁸⁰ *Nov.Leo.* 27, ed. Troianos, 116.54-61.

⁶⁸¹ *Nov.Leo.* 24, ed. Troianos, 106.19-27, tr. Noailles and Dain, 94. Fögen 1990, 83-4; Macrides 1990, 110.

⁶⁸² *Nov.Leo.* 89, ed. Troianos, 254.3-11, tr. Noailles and Dain, 294-6.

⁶⁸³ Macrides 1990, 110-1. Goar, *Euchologion*, 561-3.

⁶⁸⁴ Riedel 2018, 130-1.

⁶⁸⁵ Patlagean 1978, 627.

is highly possible that Leo VI abolished the restriction on eunuchs' adoption as a result of these changes concerning the way and concept of adoption.⁶⁸⁶ Pitsakis is, however, sceptical about the importance of adoption by ecclesiastical blessing, for this form had probably remained marginal in Byzantine law, as later collections and legal manuals hardly repeat provisions such as *Nov.Leo.* 24 and 89.⁶⁸⁷ In addition, as mentioned above, Leo VI did not mention such ecclesiastical blessing for adoption when he modified a part of the procedure of adoption in *Nov.Leo.* 27. Nevertheless, whether the new form of adoption was adopted in other legal texts or not, *Nov.Leo.* 24 and 89 undeniably show that Leo VI himself considered the blessing requisite for adopting someone and that church authority could be expected to play a larger role in the arrangement of legal adoption in the ninth century than in the sixth-century laws.

The introduction of the new form of adoption into the civil law requires us to consider the system of baptismal sponsorship because the adoption ceremony in the church probably made them more similar to each other.⁶⁸⁸ Baptismal sponsorship is one of the forms of spiritual kinship. In the ritual of baptism of infants, or sometimes of adults, spiritual ties of kinship are created between godparents and godchildren, godparents and natural parents, and the offspring of both families.⁶⁸⁹ Godparents have a duty to instruct their godchildren in the faith in theory, but their more visible function is the substitution of natural parents; namely, they would provide their orphaned godchildren with 'an upbringing, education, dowry, and even entering into business transactions with them'.⁶⁹⁰ Although godchildren did not have the right of intestate succession of their godparents, the latter role of godparents is similar with that of an adoptive father. According to Macrides, the legislation of Leo VI, probably *Nov.Leo.* 24, assimilated adoption to baptism both in terminology and in marriage prohibitions.⁶⁹¹

This close identification of adoption and baptismal sponsorship reminds us of the fact that some eunuchs had already become godparents before *Nov.Leo.* 26. In the fifth century,

⁶⁸⁶ Patlagean 1978, 627.

⁶⁸⁷ Pitsakis 1998, 25-6.

⁶⁸⁸ Patlagean 1978, 625; Macrides 2000, 1-11.

⁶⁸⁹ Macrides 2008, 657.

⁶⁹⁰ Macrides 1987, 139-62; Macrides 2008, 658.

⁶⁹¹ Macrides 1987, 141; Macrides 2000, 2, 4.

John who was probably a eunuch, became a monk with his godson, Peter the Iberian.⁶⁹² In his letter dated to the first quarter of the sixth century, Paul Helladikos, the abbot of the Elusa monastery in Idumaea,⁶⁹³ refers to a story of the eunuch Eutropius (a monk in the sixth century) who became the godfather of a son of a local rich nobleman of Jericho.⁶⁹⁴ This seems to be an exceptional case because monks were forbade to act as godparents by monastic charters of all periods.⁶⁹⁵ Moreover, the eunuch Samonas, who was a renowned court eunuch of Leo VI, became a *patrikios*, one of the godparents of Leo's son Constantine in 906, and finally *parakoimomenos*.⁶⁹⁶ Although these scattered cases are probably insufficient to allow us to draw a specific conclusion concerning the spiritual fatherhood of eunuchs, it is possible to suppose that these precedents of eunuch godparents lowered the legislator's resistance to abolish the restrictions on eunuchs' adoption after the promulgation of *Nov.Leo.* 24.

In conclusion, it is clarified that there are multiple factors intertwined together behind the abolition of old restrictions concerning adoption in *Nov.Leo.* 26 and 27. Based on them, we will consider how the legislator understood eunuchs and their lives in *Nov.Leo.* 26, focusing on the concept of eunuchs as disabled people.

Concept of Eunuchs as Disabled

Nov.Leo. 26 and 27 demonstrate an interesting view about castrated men which is an almost unprecedented one, at least in the legal sources: castration as disability. *Nov.Leo.* 60 showed a negative view toward castration and its products as mentioned in the previous chapter. In

⁶⁹² *PLRE* 2, Ioannes 22, 599; Tougher 2008, 47.

⁶⁹³ Jordan 2006b, 948, n. 77; Tougher 2021, 114-6. His life is also mentioned in the *Life* of Sabas written by the sixth-century monk and hagiographer, Cyril of Scythopolis. Cyril, 69, ed. Shwartz, 171.

⁶⁹⁴ Helladikos, *Letter*, ed. Lundström, 20-3. This episode was incorporated in the *Typikon of Phoberou*, rules for the monastery of St. John the Forerunner of Phoberos written in the twelfth century. *Typikon of Phoberou* 58, ed. Papadopoulos-Kerameus, 80-2; tr. Jordan, 941-2.

⁶⁹⁵ Macrides 1987, 144.

⁶⁹⁶ GMC, ed. Bekker, 865; Symeon, 133.47, ed. Wahlgren, 288. Tougher 2008, 55.

Nov.Leo. 26, however, the legislator showed his great sympathy for eunuchs who had become victims of castration. In particular, he asserts that the childlessness of eunuchs should be compensated as other disabled people, like the dumb and those who had lost hands, feet, or any other members, replace the disabilities with other measures, regarding their loss of their male genitals as a sort of ‘disability’. Therefore, it is necessary to refer to studies of disabilities in the Roman and Byzantine period, and consider how this concept appeared in *Nov.Leo* 26 and what it means for eunuchs in Byzantium.

It seems to be doubtful that infertility and castration of men were considered as disabilities in the Roman and Byzantine period. Laes defines ancient disability as ‘an instrumental problem, with the potential to put a person at a disadvantage at certain moments, and in particular situations’, considering that ancient writers used ‘the shifting and fluid category of disability’.⁶⁹⁷ Although he proposes the main categories of disabilities as follows ‘(1) physical handicaps/mobility impairment, (2) sensory impairment (visual, auditory), (3) speech disorders, (4) learning disorders or intellectual disabilities, (5) mental conditions, (6) multiple impairments’, he includes deformation of the genitalia as an additional category of disability.⁶⁹⁸ Moreover, in the volume *Disability in Antiquity*, the legal status of male impotence and castration is dealt with in the study of marriage law in the early Islamic period, but there is no mention about it in other articles concerning disabilities in the Roman and Byzantine period.⁶⁹⁹ The article of Toohey about the *Digest*, which focuses on whether those who have an impairment were disabled people before the law or not, suspects that impotence and castration were not regarded as disabilities in Roman law, for impotent men and eunuchs could have oral communication which was the most necessary part for Roman legal procedures unlike other disabilities such as insanity, blindness, being deaf and dumb.⁷⁰⁰ The third-century jurist Paul states that vendors of slaves must declare that a slave had been castrated at the time of sale because the slave is considered to be diseased,⁷⁰¹ but, as Toohey suggests, Paul’s statement was that rendered a slave problematical, but not that announced

⁶⁹⁷ Laes 2017, 8.

⁶⁹⁸ Laes 2017, 6.

⁶⁹⁹ Benkheira 2017, 421-33.

⁷⁰⁰ Toohey 2017, 300.

⁷⁰¹ *Dig.* 21.1.7 (Paul, *Sabinus*, book 11).

castrated men as those who suffered from any legal disadvantage.⁷⁰² Therefore, the Roman legal tradition seemed to consider eunuchs much less disabled than other kinds of disabled people.

On the other hand, there is a possibility that the concept of eunuchs as disabled seems to appear inconsistently until the reign of Leo VI. Efthymiadis mentions that ‘it is generally accepted that eunuchs obviously shared characteristics that could result in their being labelled as “disabled”’,⁷⁰³ although he mentions that the physical disability of eunuchs was ‘not always seen as a defect but was taken as an additional qualification, especially for pursuing certain careers in the imperial administration’.⁷⁰⁴ As we know, the loss of male genitals had already been regarded as an impairment in a specific situation (e.g. marriage in the *Digest*).⁷⁰⁵ In addition, a clause of the *Nomokanon of 14 Titles* brought together canons of the Canons of Apostles which permit the appointment of priests who were eunuchs, physically handicapped people, the deaf, and those who had lost one eye or were blind.⁷⁰⁶ This possibly shows that the compiler considered eunuchs as being amongst the disabled. Finally, the *Epitome*, which was compiled soon after the death of Leo VI,⁷⁰⁷ puts questions about marriages of deaf people (ὁ κωφός), dumb people (ὁ ἄλαλος), and those who had difficulty in engendering offspring, in the same clause.⁷⁰⁸ As a result, these cases show that eunuchs were sometimes regarded as disabled before and after the reign of Leo VI, but there seems to be no stipulation which ordered eunuchs’ disability, i.e. their childlessness, to be relieved as *Nov.Leo*. 26 did.

Turning our eyes to adoption again, it is notable that the aforementioned change of the character of adoption might be concerned with such logic. The sixth-century jurist Theophilos explained adoption as ‘an act of the civil law imitating nature, and devised for the solace of childless men’.⁷⁰⁹ As mentioned above, however, the character of imitation of nature

⁷⁰² Toohey 2017, 306.

⁷⁰³ Efthymiadis 2017, 390.

⁷⁰⁴ Efthymiadis 2017, 389.

⁷⁰⁵ *Dig.* 23.3.39.1 (Ulpian, *Edict*, book 33), 28.2.6 (Ulpian, *Sabinus*, book 3).

⁷⁰⁶ *Nomokanon of 14 Titles*, 1.14; Canons of Apostles, canons 21, 22, 77, 78.

⁷⁰⁷ Chitwood 2017, 42.

⁷⁰⁸ *Epitome*, 23.37.

⁷⁰⁹ Theoph. *Inst.* 1.11.pr., ed. Lokin *et al.*, 84.4-5; tr. Murison, 85. νομίμη πράξις μιμουμένη τὴν φύσιν πρὸς <ἀ>παίδων παραμυθίαν ἐπινενοημλενη.

in adoption probably tended to lose its importance until the reign of Leo VI.⁷¹⁰ As a result, it seems likely that the latter part of its character, for the solace of childless men, became more important. This change of character of adoption made the legislator consider castrated men as ‘disabled’ people and deal with them more sympathetically and philanthropically. Moreover, Byzantine hagiographies indicate that the Byzantines considered the childlessness of couples and a woman’s inability to conceive as a disability, as the miraculous stories about the deliverance of women from barrenness reveals.⁷¹¹ In addition, as mentioned above, the emperor’s own experience with eunuchs or his desire for his own son might have led to such a sympathetic notion concerning castration and childlessness in his novels. Therefore, it seems reasonable to conclude that, although the concept of eunuchs as disabled people itself probably existed before its promulgation, the peculiarity of the institution of adoption inspired the emperor to emphasise castrated men as miserable victims who should be relieved from suffering in his legislation, *Nov.Leo.* 26 and 27.

Practices of Adoption: Eunuchs and Women

To end this chapter, we will attempt to consider whether eunuchs and women, the subjects of these novels, actually used the institution of adoption after the promulgation of *Nov.Leo.* 26 and 27. It is, however, difficult to clarify how *Nov.Leo.* 26 and 27 impacted on practices of adoption because, as mentioned above, there are limited numbers of sources which detail the background of adopters. As for *Nov.Leo.* 26, there seems to be no existing sources which report the completion of adoption by a eunuch. There are several cases of adoption made by women from the third century to around the fifteenth century,⁷¹² but we could not specify the

⁷¹⁰ Pitsakis 1998, 21-2.

⁷¹¹ Congourdeau 2009, 35-63; Efthymiadis 2017, 388-9.

⁷¹² Miller offers six cases of adoption made by women in his study of Byzantine orphans. (1) Adoption of Clement of Ancyra made by a childless widow named Sophia in the third century. *Life of Clement of Ancyra*, 9-10, PG 114, cols. 821-4. Miller 2003, 64-5, 275. (2) A woman who adopted the daughter of her sister in the *Lausiaca History*. Miller 2003, 65. (3) Succession of properties as dowry to Theodora who was an adopted daughter of Kale, a widow of Constantas, from her adoptive mother. *Actes de Lavra*, doc. 4, ed. Lemerle *et al.*, vol. 1, 101-2.

impact of *Nov.Leo.* 27 because it is uncertain whether each adoption was established by a woman who had conceived a child, as the *Institutes* had already permitted her to adopt children, or by a virgin or widow who had never experienced pregnancy whose adoption *Nov.Leo.* 27 permitted. Moreover, even if adoption is made by the latter, it admits of another interpretation, that the woman made the adoption informally without observing a legal procedure. An historiographical source and the legal texts completed after the novels of Leo VI, however, provide us with an important suggestion that adoption by castrated men could be performed in the later period.

There is only one eleventh-century event which shows the possibility of adoption by eunuchs. The *protovestiaros* John proposed to adopt George Palaiologos in gratitude for saving his life in battle, promising to ‘establish him as heir of his property and would value him as if he were his own child’.⁷¹³ Although this promise was probably broken because of

The editors of this act considered that the document about the succession of the property from Theodora to her son and Kale’s grandson David was written in 952, but Lefort, Oikonomidès, and Papachryssanthou dated it to the year 922 on the basis of the activity period of a judge, Samonas who presided over David’s case. *Actes d’Ivion*, doc. 1, ed. Lefort et al., vol. 1, 106-8. Cf. Miller 2003, 168. Therefore, the adoption of Theodora was probably made before or during the reign of Leo VI. *PMBZ Konstantas* (23730) Available at:

<https://www.degruyter.com/database/PMBZ/entry/PMBZ23426/html> [Accessed: 13 November 2021]. (4) A wealthy woman of Trebizond who took in Athanasios the Athonite and raised him with a number of other foster children in the eleventh century. Miller 2003, 275. (5) A wealthy widow named Eudokia who adopted a seven-year-old girl and planned to give her property to her, in the fourteenth century. Miller 2003, 169, 275. (6) Adoption of an orphan named Thomaïas by the mother of Nicholas Kabasilas. This story is mentioned in the fifteenth-century chronicle of George Sphrantzes. Miller 2003, 169.

⁷¹³ Bryennios, 4.38, ed. Gautier, 309.17-21; tr. in Macrides 2000, 5. ὁ δὲ μετρίως ἀνενεγκὼν ὡς τοῦ ὕδατος ἀπεγεύσατο, Θεόν τε αὐτὸν ἄλλον ἀπεκαλεῖτο καὶ υἱὸν τοῦ λοιποῦ, εἰ διασωθείη, ἐκ προαιρέσεως τοῦτον ποιήσασθαι ἐπηγγέλλετο, οὐ μέχρι δὲ λόγου τὰ τοῦ λόγου ἐβεβαίουν, ἀλλ’ ὡς κληρονόμον αὐτὸν καταστήσαι ἐπὶ πᾶσι τοῖς αὐτοῦ ὥσπερ οἰκείου παιδὸς σπουδάσειν. Macrides 2000, 5; Tougher 2008, 66.

the eunuch's ingratitude,⁷¹⁴ this seems to suggest that the author and his readers did not question that eunuchs could adopt.

In addition, legal texts show that *Nov.Leo.* 26 was transmitted to the later period, although together with the sixth-century prohibition on eunuchs' adoption. Pitsakis considers that eunuchs' adoption seems to be regularly practised in the empire, referring to more stipulations in unofficial collections of law after the reign of Leo VI.⁷¹⁵ Existing sources suggest that the provision of *Nov.Leo.* 26 tended to be accepted more frequently in the late Byzantine period. Soon after the death of Leo VI, *Epanagoge aucta* 44.29 and *Epitome* 5.29 adopt the opinion of Theophilos that eunuchs who have no possibility of becoming a father in the future cannot adopt children. Theophilos is also referred to by another tenth-century compilation, the *Synopsis Basilicorum Maior*, an abridgement of the *Basilika*.⁷¹⁶ The eleventh-century writer Michael Psellos also refers to Theophilos.⁷¹⁷ The twelfth-century canonist, Balsamon, however, comments that Leo VI withdrew such restrictions concerning eunuchs' adoption, in a commentary on canon 53 of the Council in Trullo which prohibits marriage between spiritual fathers of children and the widowed mother of these children.⁷¹⁸ One of the scholia of *Synopsis Minor* compiled at the end of the thirteenth century mentions *Nov.Leo.* 26 and 27.⁷¹⁹ In the fourteenth century, *Nov.Leo.* 26 was collected in various legal texts. Although *Prochiron auctum* 26.13 and 30.18 mentions that neither females nor eunuchs can adopt children, another stipulation follows *Nov.Leo.* 26.⁷²⁰ The canonist Blastares, probably following the explanation of Balsamon, states Leo's abolition of previous restrictions.⁷²¹ Finally, the *Hexabiblos* compiled by Constantine Harmenopoulos offers a summary of the stipulations concerning adoption by eunuchs and women, referring to both the

⁷¹⁴ Bryennios, 4.40, ed. Gautier, 311.

⁷¹⁵ Pitsakis 1998, 24.

⁷¹⁶ *Synopsis Basilicorum Maior*, E. 43.3, Y. 3.5 = *Bas.* 33.1.59 (*restitutus*).

⁷¹⁷ Psellos, *Synopsis Legum*, vv. 1301-3, ed. Weiss, 210.

⁷¹⁸ Balsamon, *Syntagma*, ed. Ralles and Potles, 430; Canons of the Council in Trullo, canon 53, ed. and tr. Nedungatt and Featherstone, 133-4.

⁷¹⁹ *Synopsis Minor*, E. 73. For the *Synopsis Minor*, see Fögen 1991, 1995.

⁷²⁰ *Prochiron auctum*, 26.29.

⁷²¹ Blastares, *Syntagma*, ed. Ralles and Potles, 136-7.

opinion of Theophilos and the two novels of Leo VI.⁷²² Therefore, it is probable that differences of legal opinion were maintained in Byzantium after the promulgation of *Nov.Leo.* 26, but these legal texts suggest that the novel was known for several centuries and possibly used in order to justify adoption by eunuchs.

Conclusion

Nov.Leo. 26 made a remarkable change to one of the legal stipulations concerning castration and eunuchs when all the restrictions on those who had been prevented from adopting was annulled. Although their paternal power was restricted, they were able formally to have offspring by arrangement, receive the help of an adopted son/daughter, and leave them their wealth.

This chapter has pointed out that the legislator declares a different image of eunuchs from that shown in the previous laws: eunuchs as miserable victims and disabled people. In *Nov.Leo.* 60, he asserts that a castrated man is a different creature that the Creator's wisdom had not foreseen, in order to condemn the vice of castration. These two attitudes of the novels might be the two sides of a coin, in other words, the legislator problematises the act of castration and hates its perpetrator as he shows sympathy to victims of castration. However, the last novel of *Nov.Leo.* 98 shows that the situation was not so simple. In the next chapter, we will examine the different and flexible treatment of castrated men between *Nov.Leo.* 26 about the permission to adopt and *Nov.Leo.* 98 which prohibits them from getting married.

⁷²² Harmenopoulos, *Hexabiblos*, 2.8, ed. Heimbach, 316-8.

Chapter 6

Prohibition of Eunuchs' Marriage in *Nov.Leo. 98*

Introduction

It goes without saying that marriage was important in the Byzantine world, especially for emperors and aristocratic families. Marriage could tie economically or/and politically two families and form new social groups through reproduction,⁷²³ although another option of single life had been accepted from late antiquity, not only for monks and clergy but also for laymen.⁷²⁴ On the other hand, a question about marriage of those who were prevented from fathering children had arisen as early as the third century. Answering this question, the Roman jurists traditionally considered that eunuchs, especially those who had been castrated, could not get married. As a result, castrated men were possibly distinguished from ordinary men in so as far as they seem to have had no choice concerning marriage.⁷²⁵

Leo VI issued a novel which prohibited eunuchs from getting married although he permitted them to adopt. If we accept the theory of Signes Codoñer, this novel, which addressed the emperor's leading minister Stylianos Zaoutzes, was probably written during 893-9.⁷²⁶ This novel is the longest stipulation concerning eunuchs' marriage and is full of information about how the legislator considered eunuchs and their marriage. Thus, this chapter will analyse it and clarify the transformation and continuity from the law compiled during the reign of Justinian I to that in the Macedonian era, solving the question of why Leo VI newly prohibited the marriage of eunuchs in spite of the conventional restrictions on such an act. This examination will reveal that the legislation concerning eunuchs reflects the larger trends of the *Novels* mentioned in chapter 3, especially the emphasis on Christianity.

Scholars who study eunuchs and impotent men examine what *Nov.Leo. 98* suggests,⁷²⁷ but the scope of their analysis is limited in the context of civil law. For example, Messis states that the novel marginalised eunuchs from men and fixed their concrete role in

⁷²³ Laiou 1992, 11-20.

⁷²⁴ Efthymiadis 2019, 309-19.

⁷²⁵ Tougher 2010, 88-9.

⁷²⁶ Signes Codoñer 2009, 1-33.

⁷²⁷ Dalla 1978, 302-11; Messis 2014, 103-4.

order to prevent eunuchs from endangering the social system of marriage and threatening men.⁷²⁸ Such an argument is reasonable, but there seem to be aspects yet to be studied. One obvious problem is that previous studies merely comment on a few stipulations in the civil law which mention eunuchs' marriage, putting aside their social context and relationship with other stipulations, including both civil and canonical ones. Such factors make it necessary to reconsider the novel in a wider context in order to clarify its significance and novelty.

The structure of this chapter is as follows. Firstly, we will analyse civil and canon laws and clarify how emperors/society problematised the marriage and cohabitation of eunuchs and females. In particular, the issue concerning a chaste union between a eunuch and a woman in the later Roman period is also considered. Then *Nov.Leo. 98* will be analysed, comparing it with previous laws of Justinian I and Macedonian emperors and canons. This comparison will show some significant differences between the prohibition of eunuchs' marriage in the Justinianic law and that of *Nov.Leo. 98* and enable us to clarify why the legislator issued a new stipulation concerning eunuchs' marriage. Moreover, this chapter will sum up all findings in these sources and attempt to explain how the situation surrounding eunuchs' marriage changed or remained unchanged. It will be concluded that, as with *Nov.Leo 26*, the contents of *Nov.Leo. 98* were strongly affected by the Christianisation of the system of marriage, which was accelerated after the death of Justinian I, while the outcome of these novels is totally different to one another. In the last part of the chapter, the ideal image of eunuchs, that is those who had lost desire for women and were trusted guardians of the bed, demonstrated by Leo VI in *Nov.Leo. 98* will be analysed in order to clarify the imperial view toward them. It will be revealed that eunuchs' celibacy was emphasised as an important factor for emperors to affirm the usefulness of eunuchs in the empire, not only from the close reading of *Nov.Leo. 98* but also from other sources which discuss the chastity of eunuchs or report court scandals about eunuchs and empresses.

⁷²⁸ Messis 2014, 103-4.

Eunuchs' Marriage before *Nov.Leo.* 98

Denial of Eunuchs' Marriage in the Justinianic Law and the *Basilika*

The principle that eunuchs could not get married was not new to Roman law, especially to the *Digest*.⁷²⁹ The early Macedonian legislators possibly knew that principle because these clauses were collected in the *Basilika*. *Dig.* 40.2.14.1 (Marcianus, *Rules*, book 4) states that a *spado* can free his female slave for the purpose of marriage with her, but a *castratus* could not. *Bas.* 48.2.14 repeats this clause, translating *castratus* as ἐκτομίας. In addition, *Dig.* 23.3.39.1 is about dowry and Ulpian presents a situation in which a woman marries a man who is not able to beget children (*spado*). He draws a distinction between a *spado* who has been castrated and one who has not. According to him, 'if he has been castrated, you may say that there cannot be a dowry; but where a man has not been castrated, there can be a dowry and an action for it, because a marriage can take place here'.⁷³⁰ The *Basilika* compiled the abbreviated version of this clause; namely, *Bas.* 29.1.35 states plainly that 'a non-castrated eunuch (εὐνοῦχος) can get married and receive dowry'⁷³¹ without mentioning a castrated eunuch. However, it still implies that castrated eunuchs could not get married. These two clauses probably suggest that the Roman and Byzantine legislators understood that it is difficult or almost impossible for eunuchs, especially those who has been castrated, to get married.

On the other hand, Justinian I established a new rule on divorce that a wife and her parents could dissolve her marriage on the grounds that her husband is unable to have intercourse with her for a certain period.⁷³² This is one of the bases for legal divorce which Justinian I had determined when he restricted free divorce by consent of both partners according to the Christianised view of marriage that marital union was indissoluble in

⁷²⁹ For eunuch's marriage in the Justinianic law, see Kontani 2018, 322-3.

⁷³⁰ *Dig.* 23.3.39.1 (Ulpian, *Sabinus*, book 3), ed. Mommsen, 338; tr. Watson, 23.3.39.1. Si spadoni mulier nubserit, distinguendum arbitror, castratus fuerit necne, ut in castrato dicas dotem non esse: in eo qui castratus non est, quia est matrimonium, et dos et dotis action est.

⁷³¹ *Bas.* 29.1.35, ed. Scheltema et al., ser. A, vol. 4, 1452.3-4. Ὁ μὴ ὦν ἐκτετμημένος εὐνοῦχος καὶ γαμεῖν δύναται καὶ προῖκα λαμβάνειν.

⁷³² Kontani 2018, 326-7.

principle. In *CJ.* 5.17.10, the emperor firstly stipulates the period should be two years from the date of matrimony, but he extended the period to three years in *Nov.Jus.* 22.6 because there was a possibility that the husband would recover his sexual potency even after two years have passed. The legal basis of divorce for three-year impotence of the husband was accepted with other bases in the *Ecloga* and the *Basilika*.⁷³³ Leo VI also refers to the justifiable divorce due to the husband's impotence in *Nov.Leo.* 112. This stipulation clearly shows a principle that people hoped generally to contract legal marriage in order to procreate biological offspring. According to this principle, it seems to be reasonable that castrated men who had no hope to have a biological child were not permitted to get married in the later Roman period as men who were not able to show their copulative power for procreation could justifiably be divorced following a claim by his spouse or her parents.

Negative View of Cohabitation of Eunuchs and Women

There seems to be no source which mentions marriage, or wives, of eunuchs. On the contrary, we have a joke in the *Philogelos* which is dated to the third century. Abderite asked someone whether a woman, who was chatting with a eunuch, was a wife of the eunuch. The man who was asked replied that eunuchs could not have a wife; then, Abderite said 'so, she is his daughter'.⁷³⁴ This story suggests that the author in the late Roman period probably would have never imagined that a eunuch could have a spouse in the real world. Another example is in the *Question on Genesis* written by the fifth-century theologian Theodoret of Cyrus, in which the theologian answered a question about how the eunuch Potiphar had a wife (γυναῖκα) in Gn. 39:1. According to the translation of Hill, his answer is as follows:

the terms “eunuch” and “castrated male” are frequently employed to mean more than one thing. But it was not unusual even for one who was truly a eunuch to have a wife (γυναῖκα) in his house to attend to domestic affairs.⁷³⁵

⁷³³ *Ecloga* 2.9.3; *Bas.* 28.7.4.

⁷³⁴ *Philogelos*, no. 115, ed. and German tr. Thierfelder, 70. Ἀβδηρίτης εὐνοῦχον ἰδὼν γυναῖκί ὁμιλοῦντα ἡρώτα ἄλλον, εἰ ἄρα γυνὴ αὐτοῦ ἐστὶ. τοῦ δὲ εἰπόντος εὐνοῦχον γυναῖκα ἔχειν μὴ δύνασθαι ἔφη· Οὐκοῦν θυγάτηρ αὐτοῦ ἐστίν. Cf. Rotman 2015, 147.

⁷³⁵ Theodoret, *Questions on Genesis*, 100, ed. and tr. Hill, 190-1. Πῶς, εὐνοῦχος ὢν, ὁ

Messis, however, interprets that the latter γυναῖκα means a female servant, not a wife and suggests that Theodoret altered the interpretation of the Bible.⁷³⁶ The question remains whether we could translate differently the same Greek word γυναῖκα in this brief text, a female servant and a wife, but it is safe to say that people in the later Roman period could have doubts about a eunuch who had a wife. In addition, Sidéris mentions a story of a monk in the *Life of St. John the Almsgiver* in the first half of seventh century. The monk was accused because he was accompanied by a young girl, who someone believed to his wife.⁷³⁷ However, he was found to be innocent when he turned out to be a eunuch. This story might reflect a way of thinking of the seventh-century readers that a eunuch is chaste and does not have a wife.

Other sources report some eunuchs who lived with females although it is difficult to consider them to be their wives. The fourth-century poet Claudian mentions a ‘sister’ of the eunuch Eutropius, who was the *praepositus sacri cubiculi* of the eastern emperor Arcadius (395-408).⁷³⁸ In his invective against the eunuch, Claudian describes her as Eutropius’ ‘sister and spouse (if such a prodigy can be conceived)’ and states that she, ‘like a chaste wife, sings the praises of her eunuch husband’.⁷³⁹ She may have been literally Eutropius’ sister, but Long argues that she may have been a *subintroducta*, ‘a woman brought into his household in a chaste union sometimes compared to sisterhood’.⁷⁴⁰ She states that Claudian mentioned the sister in his invective because such a union was severely criticised by church fathers, like John Chrysostom.⁷⁴¹ In any case, whether she was literally his sister or not, the poet seemed

ἀρχιμάγειρος γυναῖκα εἶχεν; Μάλιστα μὲν οὖν καὶ τοὺς εὐνούχους καὶ τοὺς ἐκτομίας ὁμώνυμῶς καλοῦσιν. οὐδὲν ἦν ἀπείκός, καὶ εὐνούχον ὄντα, γυναῖκα ἔχειν ἐν τῇ οἰκίᾳ, τῶν ἔνδον ἐπιμελουμένην πραγμάτων.

⁷³⁶ Mesis 2014, 38.

⁷³⁷ Sidéris 2017, 200-2. *Life of John the Almsgiver*, 23, ed. Festugière 373-5.

⁷³⁸ Claud. *In Eutr.* 1. 263, 2.84-94, ed. and tr. Platnauer, 158-9, 190-1.

⁷³⁹ Claud. *In Eutr.* 2. 88-90, ed. and tr. Platnauer, 190-1. at soror et, si quid portentis creditur, uxor mulcebat matres epulis et more pudicae coniugis eunuchi celebrabat vota mariti.

⁷⁴⁰ Long 1996, 133.

⁷⁴¹ Long 1996, 133. For the attitude of John Chrysostom against *subintroducta*, see De Wet 2017, 58-80. In *CT* 16.2.44, Honorius probably problematises *subintroducta*, for he mentions

to consider a eunuch who kept a woman like a spouse to be abnormal.

It is significant that castration was considered as a way to justify a chaste union between a male and a female. For example, Justin Martyr in the middle of the second century reports an unsuccessful petition made by a Christian man. The man asked the prefect Felix permission to be castrated by a physician in order to persuade opinion that unrestrained fornication did not exist in his relationship with a female.⁷⁴² In the fourth century, Athanasius of Alexandria mentioned the self-castration of the bishop of Antioch, Leontius. Leontius, when he was a presbyter in Antioch, was censured for his intimacy with Eustolia, and prohibited from living with her. He mutilated himself in order to associate with her freely. Subsequently he was deposed, but the emperor Constantius II (337-61) made him bishop of Antioch.⁷⁴³ According to Athanasius, the reason for Leontios' deposition was that he could not clear himself from suspicion. Theodoret of Cyrus, who cited this episode in his *Ecclesiastical History*, adds another reason, that canons prohibited those who castrated themselves from becoming clerics.⁷⁴⁴ Whether the episode of Leontius' self-castration is a false charge inserted in order to attack the Arian bishop and emperor or not, this episode seems to suggest that some people had an idea that eunuchs or castrated men could live with women in chaste union.

A seventh-century canon, canon 5 of the Council in Trullo, which prohibited eunuch laymen from living with women or handmaids, may have problematized the abovementioned union of eunuchs and females. This canon has hardly been mentioned in previous studies of eunuchs, especially in the context of the social life of eunuchs,⁷⁴⁵ but we find that it offers us valuable information about the cohabitation of eunuchs and females. The Council in Trullo was called by Justinian II in 691/2, and 102 canons of this council were constituted for

that the lives of the clergy should not be tarnished by 'the association of so-called "sister" (*consortio sororiaea appellationis*)'. *CT* 16.2.44, ed. Mommsen and Meyer, vol. 1, 851; tr. Pharr, 448.

⁷⁴² Just. *Apol.* 29.2, ed. and tr. Minns and Parvis, 160-1. Long 1996, 133.

⁷⁴³ Athanas. *Apolog.* 26, *PG* 25.1, col. 677. This episode is repeated in Athanas. *Hist.* 28, *PG* 25.1, cols. 724-5 and Socrates, *Ecclesiastical History*, 2.26.9-10, ed. Hansen, vol. 2, 124.

⁷⁴⁴ Theodoret, *Ecclesiastical History*, 2.24.2, ed. Parmentier and Hansen, vol.1, 446. Cf. Canons of the First Council of Nicaea, canon 1.

⁷⁴⁵ Cf. Sidéris 2017, 201-2.

reordering the spiritual and moral life of the church.⁷⁴⁶ The primary purpose of canon 5 is probably to supplement canon 3 of the First Council of Nicaea which stipulates that clergy who have a female companion, barring their mother, sister, aunt or anyone who stands above suspicion, are deposed.⁷⁴⁷ Hunter argues that this canon 3 was written in order to ‘prevent unmarried clergy from living with unrelated women because of the danger of immorality that such proximity posed’.⁷⁴⁸ This canon was partly accepted by emperors; Honorius (393-423) and Justinian I prohibited a part of the clergy from living with extraneous women.⁷⁴⁹ On the basis of canon 3 of the First Council of Nicaea, canon 5 of the Council in Trullo adds: ‘eunuchs shall also refrain from doing the same, taking thought for their irreproachability; in the case of transgression, if they are clerics, they shall be deposed, if laymen, excommunicated’.⁷⁵⁰ This suggests that being a eunuch, whether cleric or layman, had enabled men to live with women chastely without any suspicion of sexual immorality, but people were apprehensive that eunuchs might succumb to temptation.⁷⁵¹ Therefore, canon 5 admitted of no exception and prohibited eunuch’s cohabitation with females, wishing to

⁷⁴⁶ Ohne 2012, 79-80. For the imperial ideology behind the Council in Trullo, see Humphreys 2015, 37-80.

⁷⁴⁷ Canons of the First Council of Nicaea, canon 3, ed. Joannou, 25-6; tr. *NPNF* 14, 11. Περὶ τῶν παρὰ κληρικοῖς συνεισάκτων γυναικῶν. Ἀπηγόρευσε καθόλου ἡ μεγάλη σύνοδος μήτε πρεσβύτερον μήτε διάκονον μήτε ὅλως τῶν ἐν τῷ κλήρῳ τινὶ ἐξεῖναι συνείσακτον ἔχειν, πλὴν εἰ μὴ ἄρα μητέρα ἢ ἀδελφὴν ἢ θεῖαν ἢ ἃ μόνᾳ πρόσωπα ὑποψίαν διαπέφευγεν. Canons of the Council in Trullo, canon 5, ed. and tr. Nedungatt and Featherstone, 74-5. Περὶ τῶν μηδένα ἱερατικὸν ἐπεισάκτω θεραπαινίδι συνοικεῖν. Μηδεὶς τῶν ἐν ἱερατικῷ καταλεγόμενων τάγματι, τῶν ἐν τῷ κανόνι ἐμφερομένων ἀνυπόπτων προσώπων ἐκτὸς διάγων, γυναῖκα κεκτήσθω ἢ θεραπαινίδας, τὸ ἀνεπίληπτον ἑαυτῷ ἐντεύθεν τηρῶν· εἰ δὲ παραβαῖνοι τις τὰ παρ’ ἡμῶν ὀρισθέντα, καθαιρείσθω.

⁷⁴⁸ Hunter 2016, 122.

⁷⁴⁹ *CT* 16.2.44; *Nov.Jus.* 6.5.

⁷⁵⁰ Canons of the Council in Trullo, canon 5, ed. and tr. Nedungatt and Featherstone, 74-5. Τὸ αὐτὸ δὲ τοῦτο καὶ οἱ εὐνοῦχοι παραφυλαττέσθωσαν, τὸ ἄμεμπτον ἑαυτοῖς προνοούμενοι· παραβαίνοντες δέ, εἰ μὲν κληρικοὶ εἶεν, καθαιρείσθωσαν, εἰ δὲ λαϊκοί, ἀφορίζεσθωσαν.

⁷⁵¹ Sidéris 2017, 202.

preserve for eunuchs a blameless reputation, as it did for clerics.⁷⁵² This seventh-century canon is important because this is probably the only canon in the existing canons in which the church authority enacted canonical penalties on the suspicious association between eunuchs and females.

Prohibition on Marriage of Eunuchs: *Novel 98* of Leo VI

In the first part of the novel, the emperor announces the issue of the new law and questions whether eunuchs are allowed to get married.⁷⁵³ He justifies this promulgation, stating that the enactment of laws is designed to organize the state and, when nature is harmed, to offer assistance to it.⁷⁵⁴ He begins to consider the issue, asking whether it is possible to give the name of marriage to the union and whether the law allows for the union to enjoy what is generally done in marriage, that is, blessing or rite in all forms of human celebrations and joys.⁷⁵⁵ The answer is no. The novel explains that the priest unites male and female for reproduction and the bridal pairs and their parents themselves have a hope to see their offspring.⁷⁵⁶ For that reason, the union of eunuch and female is unlawful because it has no such hope.⁷⁵⁷ Then, the legislator emphasises the illicit character of the union, mentioning God and nature. The marital union is designed by God in consideration of the multiplication of the human race.⁷⁵⁸ Therefore, the union which makes it difficult to fulfil such divine will is unnatural and should be forbidden.⁷⁵⁹

However, he seems expect two objections to his prohibition. The first is that if the novel excludes eunuchs from marriage because of their infertility, it should also prevent many

⁷⁵² Sidéris 2017, 201-2.

⁷⁵³ *Nov.Leo.* 98, ed. Troianos, 272.5-7. For this novel, the present author referred to the French translation of Noailles and Dain. Noailles and Dain, 1944, 320-6.

⁷⁵⁴ *Nov.Leo.* 98, ed. Troianos, 272.3-5.

⁷⁵⁵ *Nov.Leo.* 98, ed. Troianos, 272.7-12.

⁷⁵⁶ *Nov.Leo.* 98, ed. Troianos, 272.12-274.19.

⁷⁵⁷ *Nov.Leo.* 98, ed. Troianos, 274.19-24.

⁷⁵⁸ *Nov.Leo.* 98, ed. Troianos, 272.12-4, 274.24-32.

⁷⁵⁹ *Nov.Leo.* 98, ed. Troianos, 274.32-7.

other people from getting married because not all married couples show their fertility.⁷⁶⁰ He answers that the union of eunuch and female is different from the childless couple; the latter has a desire to procreate at the time of their marriage, although the eunuch and his ‘spouse’ know that their union is absolutely sterile.⁷⁶¹ Then, the novel claims again that the union of a eunuch is a conspiracy against nature, criticising not only eunuchs but women who, even though they had reproductive potential, preferred sterile union with eunuchs.⁷⁶² Perhaps, the mention of the childless couple might reflect the situation of Leo VI during 893-9 when the emperor had no male offspring in his first marriage with Theophano until 893 or 897 and his second marriage with Zoe Zaoutzaina during 898-900.⁷⁶³ On the other hand, it is uncertain that the legislator intended to correspond the distinction between marriage of eunuchs who had no hope of begetting children due to their genital defect with that of other infertile men, to that between *castratus* and *spado* in Justinian I’s stipulations concerning marriage. Such an explanation of eunuchs in *Nov.Leo.* 98, however, seems to suggest at least that the word εὐνοῦχος in *Nov.Leo.* 98, like *Nov.Leo.* 26, can be identified with καστράτος and θλιβίαι in Theophilos’ commentary on the *Institutes*: those who had lost their male genitals and who had no hope to beget children.⁷⁶⁴

The legislator refutes the second objection made by those who rely on the words of Paul [I. Cor. 7:9] that ‘it is better to marry than to burn with passion’ in justification of eunuchs’ marriage.⁷⁶⁵ He repeats that the union of a eunuch and a female is not worthy to be blessed as a legitimate marriage.⁷⁶⁶ Moreover, the character of eunuchs is confirmed in order

⁷⁶⁰ *Nov.Leo.* 98, ed. Troianos, 274.37-40.

⁷⁶¹ *Nov.Leo.* 98, ed. Troianos, 274.41-5.

⁷⁶² *Nov.Leo.* 98, ed. Troianos, 274.45-276.50.

⁷⁶³ Tougher 1997, 133-63; Riedel 2018, 132-6.

⁷⁶⁴ The *Epitome*, which was compiled soon after the death of Leo VI, offers a strange opinion concerning eunuchs’ marriage. Using the terminology of Theophilos, it states that σπάδωνες can get married, but κανστράτοι (i.e. καστράτοι) cannot. However, the compiler adds that θλιβίαι can get married although no previous law had discussed the marriage of θλιβίαι. *Epitome*, 23.37. This strange opinion might come from a problem of manuscripts or the personal interpretation of the compiler.

⁷⁶⁵ *Nov.Leo.* 98, ed. Troianos, 276.58-60.

⁷⁶⁶ *Nov.Leo.* 98, ed. Troianos, 276.60-9.

to support the idea that their marriage is abnormal; namely, it is emphasised that eunuchs have lost sexual desire for females and become unsuspected guardians of the nuptial bed (τῆς εὐνῆς ἀνυπόπτους φύλακας).⁷⁶⁷ In the last part of the novel, it gives a sanction that eunuchs who dare to enter into marriage shall be subject to the punishment for fornication, and priests who commit the celebration of such a union shall be deprived of their dignity.⁷⁶⁸

It is unquestionable that *Nov.Leo.* 98 presented a comprehensive rule concerning the marriage of those who could not have their own offspring. There seems to be no change in the traditional principle that castrated men who have no ability to beget any child could not contract legal marriage, whereas *Nov.Leo.* 98 contains new rules about the union between a eunuch and a woman. It is, however, notable that no abovementioned preceding laws, which should have been transmitted to the reign of Leo VI through a compilation of the *Basilika*, were mentioned in *Nov.Leo.* 98. This is strange because the drafter of novels, including *Nov.Leo.* 26 and 60, tended to refer carefully to their precedents in both civil and canon law and to point out clearly what their problem was and how it would be corrected. Therefore, the absence of any mention of previous clauses in *Nov.Leo.* 98 possibly shows that the novel was independent of these previous laws at least for the drafter of the novel; in other words, it seems that the novel was promulgated with the intention not of modifying a certain old stipulation but of establishing totally new rules on the marriage of eunuchs.

Thus, a question arises: why did Leo VI issue the new law which prohibited eunuch's marriage? It is difficult to guess the specific situation behind the promulgation of *Nov.Leo.* 98 from the text itself, but one can speculate about some possibilities. For example, the legal principle that eunuchs could not get married might not be generally known in that period, or the emperor perhaps received a petition from eunuchs concerning their marriage, or was troubled by such illegal marriages.⁷⁶⁹ Actually, the text of *Nov.Leo.* 98 seems to suggest that the novel was derived from an actual case or petition, for the legislator mentions the question of whether eunuchs can get married as 'a subject now inquired (νῦν περὶ τῆς ζητουμένης ὑποθέσεως)'.⁷⁷⁰ In addition, the fact that the legislator carefully offers rebuttals to opinions

⁷⁶⁷ *Nov.Leo.* 98, ed. Troianos, 276.69-80.

⁷⁶⁸ *Nov.Leo.* 98, ed. Troianos, 278.81-4.

⁷⁶⁹ Tougher 2008, 66.

⁷⁷⁰ *Nov.Leo.* 98, ed. Troianos, 272.5.

that eunuchs' marriage could be justified for several reasons perhaps shows that he was actually confronted with these opinions.

In addition to the social context, the legal context of *Nov.Leo.* 98 should be considered. Although Dalla points out a change in the focusing on the Justinianic laws, his hypothesis seems to be problematic. He considers that *Nov.Leo.* 98 punished those who commit eunuchs' marriage but allowed the marriage to remain if it had already been celebrated, so the novel changed the Justinianic laws which judged that the marriage of castrated men, which had already been contracted, shall be nullified.⁷⁷¹ Certainly *Nov.Leo.* 98 does not mention the fate of eunuchs' marriage, but it is probably because the novel aimed at the act of eunuchs' marriage itself and took less account of its treatment after punishment.⁷⁷² Even if his hypothesis is correct, it is hardly probable that the 'change' concerning the treatment of eunuchs' marriage, which had already been contracted, was the main purpose of the novel because the legislator does not mention the old stipulation. Therefore, it is necessary to consider the text of *Nov.Leo.* 98 in more detail.

The novel concerning eunuchs' marriage might derive partly from *Nov.Leo.* 26 in which the emperor permitted eunuchs to adopt children, for such permission could raise a question about other rights of eunuchs. As a matter of fact, *Nov.Leo.* 26 and *Nov.Leo.* 98 stress the same concept that marriage is for procreation, the multiplication of the human race.⁷⁷³ Moreover, Leo VI linked adoption with marriage when he claimed that marriage should be celebrated by the Christian rites as adoption was.⁷⁷⁴ It is, however, noticeable that the final judgement of *Nov.Leo.* 98 is the opposite of that of *Nov.Leo.* 26 because of a different understanding of nature. On the one hand, *Nov.Leo.* 26 permits the adoption of eunuchs, abolishing a conventional principle that an act of adoption is an imitation of nature and that eunuchs are deprived of the opportunity to beget a child by nature. On the other hand, *Nov.Leo.* 98 asserts that marriage of eunuchs should not be allowed because it is an act

⁷⁷¹ Dalla 1987, 306-11.

⁷⁷² E.g. *Nov.Leo.* 90.

⁷⁷³ *Nov.Leo.* 26, ed. Troianos, 110.5-9. Μέγα καὶ τίμιον ἀνθρώποις παρὰ τοῦ πλάσαντος Θεοῦ δῶρον ὁ γάμος· οὐ γὰρ μόνον δαπανωμένη θανάτῳ βοηθεῖ τῇ φύσει καὶ τὴν διαμονὴν τῷ γένει χαρίζεται οὐκ ἔῶν ὑπ' ἐκείνου κατανεμόμενον παντελῶς διαρρυῆναι, ἀλλὰ καὶ ἄλλως διὰ τῆς παιδοποιίας μεγάλα τῷ ἀνθρωπίνῳ χαρίζόμενος βίῳ.

⁷⁷⁴ *Nov.Leo.* 24, 89.

contrary to nature. This suggests that the cause of this difference could be attributed to the difference between the system of adoption and that of marriage in the reign of Leo VI. Thus, this chapter will examine *Nov.Leo.* 98 in the context of marriage law in the Macedonian period. This examination will suggest that the purpose of *Nov.Leo.* 98 is to reconsider the marriage of eunuchs in the new framework of Christian marriage and prohibit it again, redrawing a line between men who are allowed to get married and eunuchs who are not.

***Nov.Leo.* 98 and Christian Marriage⁷⁷⁵**

Marriage Law of Leo VI: *Nov.Leo.* 89

There seems to be no doubt that Leo VI had an interest in marriage law, like the Isaurian emperors. There are 18 novels concerning marriage, in which the emperor conciliated the contradicting previous laws, adopted canon laws and customs into civil laws, and introduced entirely new laws which he considered necessary.⁷⁷⁶

One of the most remarkable changes in Byzantine marriage law is the promulgation of *Nov.Leo.* 89, which for the first time required ecclesiastical blessing for marriage. According to Zachariä von Lingenthal, there was a principle that ‘marriage was formed only by consent (*solius consensus facit nuptias*)’ in the Roman legal tradition; namely, legal marriage was formed only from a civil contract on the basis of consent of both partners and, if they were under paternal power, their parents.⁷⁷⁷ Accordingly, there is no specific ritual required for legal marriage in Roman law.⁷⁷⁸ Although Justinian I promulgated novels which commanded any forms of proof of marriage, such as dowry-contracts or oaths, he also accepted marriage formed by intention alone as valid unless the marriage was to be contracted by a man among the great ranks, down to *illustres*.⁷⁷⁹ In another novel, the emperor mentioned

⁷⁷⁵ For the relation between the church and the state concerning marriage, see Laiou 1992, 9-20.

⁷⁷⁶ Riedel 2018, 114-7, 132-6.

⁷⁷⁷ Zachariä von Lingenthal 1892, 71.

⁷⁷⁸ Zachariä von Lingenthal 1892, 71. Cf. Riedel 2018, 117.

⁷⁷⁹ *Nov.Jus.* 117.4. Zachariä von Lingenthal 1892, 71.

that men of illustrious rank should make out a certificate in church before three or four of the church's most reverend clergy if he did not wish to make marriage contracts,⁷⁸⁰ while ecclesiastical blessing still did not seem to be needed for establishing marriage ties. Thereafter, the *Ecloga* marks the earliest mention of a blessing in church for the formation of marriage in existing sources of civil laws when legislators require the formation of marriage to be made public. The *Ecloga* stipulates that there are two ways to contract marriage of Christians: written and unwritten.⁷⁸¹ As for the latter, *Ecloga* 2.6 sanctions that those who were unable to make a written marriage, an unwritten marriage should be made and 'it shall be made known either through a blessing in a church or before friend'.⁷⁸² It seems, however, that civil law did not consider a blessing in church as equivalent with the civil contract of marriage, for sanctions the church blessing only as one of the alternate forms of concluding legal marriage for those who were unable to make a written marriage due to their poverty or low standing. On the other hand, this clause is noticeable in that it adds an explanation of which relationship between a male and a female could be regarded as marriage; namely, it states that a man shall have contracted an unwritten marriage with a free woman if he should take her into his house, 'entrust her with the management of the household and have carnal intercourse with her'.⁷⁸³ Thereafter, in the ninth century one of the Macedonian legal texts, suggests a possibility that marriage was performed in church, probably through ecclesiastical blessing; namely, *Proch.* 4.27 commands a priest who performed a secret marriage to be subject to canonical punishment.⁷⁸⁴ In the end, Leo VI puts greater emphasis on the ecclesiastical blessing for marriage in *Nov.Leo.* 89 in the tenth century. Leo, who had made a premise that adoption of children should be blessed by the church in *Nov.Leo.* 24, considered that marriage also should be given the same honour as adoption.⁷⁸⁵ Thus, he made the blessing of the church a legal requirement and excluded any union which did not receive it after the promulgation from

⁷⁸⁰ *Nov.Jus.* 74.4, tr. Miller and Sarris, 73.

⁷⁸¹ *Ecloga* 2.1, 3. Zachariä von Lingenthal 1892, 71-2.

⁷⁸² *Ecloga* 2.6, ed. Burgmann, 178.224-5; tr. Humphreys, 49. εἴτε ἐν ἐκκλησίᾳ τοῦτο δι' εὐλογίας ἢ καὶ φίλων γνωρισθῇ.

⁷⁸³ *Ecloga* 2.6, tr. Humphreys, 49.

⁷⁸⁴ Zachariä von Lingenthal 1892, 72.

⁷⁸⁵ For adoption, see Macrides 1990, 110.

legal marriage.⁷⁸⁶ The novel finally suggests that the legislator attempted to make a clear distinction between those who are in married life and those who keep celibacy.⁷⁸⁷ Riedel argues that Leo VI hoped to ‘bring the Byzantine policy into closer conformity with explicitly Christian practice’.⁷⁸⁸

Nov.Leo. 98 could be understood in the context of such a significant change of marriage law in the late ninth and early tenth centuries.⁷⁸⁹ The author of *Nov.Leo.* 98 sometimes mentions the blessing and asks whether the marriage of eunuchs is worthy of being blessed as legitimate marriage.⁷⁹⁰ Moreover, the novel explains the reason for prohibiting eunuchs’ marriage in the Christianized way, which is in contrast to the stipulations in the *Digest* that just denied the marriage of castrated men without giving any reason. Although procreation is a cornerstone of the marital bond not only for Christian marriage but also for legitimate marriage in Roman law, the novel mentions that marital union is designed by God for multiplication of the human race.⁷⁹¹ Finally, according to Meyendorff, *Nov.Leo.* 89 is the first law which gives the church ‘an exclusive privilege to legalize marriages, placing church courts in charge of all legal problems connected with marriages, including divorce and its consequences’, and the obligatory blessing in the novel enables ecclesiastical canonical authority to be ‘extended very substantially over the life of society as a whole’.⁷⁹² As a result, it is probable that such emphasis on the strict Christian view of marriage in the *Novels of Leo VI* was in the background of *Nov.Leo.* 98; namely, the legislator was increasingly interested in reconsidering the marriage of eunuchs within the Christian framework and explaining why such marriage was illegal.

⁷⁸⁶ Riedel 2018, 133.

⁷⁸⁷ *Nov.Leo.* 89, ed. Troianos, 254.17-21, ed. Noailles and Dain, 296. Μεταξὺ γὰρ ἀγαμίας καὶ γάμου οὐκ ἔστιν εὐρεῖν ἀκατηγόρητον τὸ γινόμενον. Ἐστὶ σοι γαμικῆς πολιτείας ἔφεσις; Ἀνάγκη τὰ τοῦ γάμου τηρεῖν. Ἀλλ’ ἀπαρέσκει τοῦ γάμου τὰ πράγματα; Διοκεῖτω σε ἀγαμία· καὶ μήτε γάμον κιβδηλεύσης μήτε ψευδῶς τὴν ἀγαμίαν ὑποκορίζῃ.

⁷⁸⁸ Riedel 2018, 117.

⁷⁸⁹ Cf. Dalla 1987, 306.

⁷⁹⁰ *Nov.Leo.* 98, ed. Troianos 272.13, 274.21-3, 276.62-9.

⁷⁹¹ The same logic appears repeatedly in Leo’s novels, e.g. *Nov.Leo.* 26 and 112. For the importance of reproduction in Byzantine marriage law, see Laiou 1992, 10-2.

⁷⁹² Meyendorff 1990, 105; Laiou 1992, 12

Penalisation of the marriage of eunuchs probably resulted from this trend. Previous laws certainly mention that castrated men could not get married, but there seems to be no attempt to inflict any penalty on such a union. It is thus notable that *Nov.Leo.* 98 penalises those who had committed an illegal marriage; namely, not only eunuchs who had entered into marriage are punished by the penalty of fornication, but also priests who had celebrated the union are deposed, but the novel does not mention the female side of the union in spite of the blame for her consent. First and foremost, such penalisation of priests suggests that the legislator premised the celebration of marriage in church. Secondly, the penalty of fornication imposed on eunuchs shows the close connection between *Nov.Leo.* 98 and Christianity. The word πορνεύων has several meanings, but it probably means fornication.⁷⁹³ *Nov.Leo.* 98 may refer to *Ecloga* 17.20 collected in *Bas.* 60.37.82, ‘an unmarried man who fornicates shall be beaten with six blows’.⁷⁹⁴ It should be noted that the laws concerning illicit sexual relations in the *Ecloga* are probably promulgated in the situation that marriage became more important than in the laws of Augustus⁷⁹⁵ and are included as a part of the correction of sexual immorality of Christian subjects.⁷⁹⁶ We will back to the issue of the penalty of fornication against castrated men when the impact of canon laws on *Nov.Leo.* 98 will be discussed later.

It might be possible to conclude that the more the legislator emphasised the blessed marriage, the more those who had been considered inappropriate for it, i.e. castrated men, were excluded from marital life. The *Digest* mentions that castrated men cannot get married and Justinian I permits a female and her parents to divorce her husband if he could not have sex with his wife for several years after the day of marriage.⁷⁹⁷ However, these laws seem to have had no power to deter castrated men from getting married, because there was no penalty against such a union. This theoretically means that even castrated men could contract marriage by the consent of the female’s parents. Eventually Leo VI, who emphasised the necessity of church blessing for marriage, could not overlook the possibility that eunuchs would get married against nature because he hoped to divide his subjects clearly into two

⁷⁹³ For fornication in Byzantium, see Laiou 1993, 113-32.

⁷⁹⁴ *Ecloga* 17.20, ed. Burgmann, 230.825; tr. Humphreys, 72. Ὁ μὴ ἔχων γυναῖκα καὶ πορνεύων τυπτέσθω ἀλλακτὰ ἕξ.

⁷⁹⁵ Laiou 1993, 117-8.

⁷⁹⁶ Humphreys 2015, 118-25; Humphreys 2017, 71, n.151.

⁷⁹⁷ *CJ* 5.17.10; *Nov.Jus.* 22.6.

groups: those who got married legitimately and those who kept their celibacy. As a result, the celibacy of eunuchs was more emphasised in *Nov.Leo.* 98 than the laws of Justinian I.

The Impact of Canon Law on *Nov.Leo.* 98: The Penalty for Fornication

The influence of Christianity on the new prohibition on eunuchs' marriage could be suggested through comparisons not only with *Nov.Leo.* 89 but also with canon law. The connection between canon law and civil law has been revealed by some scholars.⁷⁹⁸ As for the *Novels of Leo VI*, Troianos argues that some of Leo VI's novels incorporated the canons of the Council in Trullo into civil law.⁷⁹⁹ Although he does not mention *Nov.Leo.* 98 due to the lack of direct citation of canons in the novel, canons seem to help us to understand some points in *Nov.Leo.* 98, such as the reason why eunuchs who violate the novel are punished by the penalty for fornicators.

Nov.Leo. 98 punishes the marriage of eunuchs by the penalty for fornicators. As mentioned above, this penalty probably means the six blows for unmarried fornicators, which *Ecloga* 17.19 inflicted. However, the *Ecloga* punishes those who contracted unlawful marriage by the penalty for adultery, namely cutting off noses, on both sides of the union.⁸⁰⁰ Moreover, Leo VI mentions the penalty for fornication only once in his novels, although he promulgated other laws which prohibited some forms of marriage.⁸⁰¹ Therefore, there is a question why *Nov.Leo.* 98 inflicted the penalty for fornication on eunuchs who had dared to get married.

The text of *Nov.Leo.* 98 itself might partly enable us to conjecture the answer to this question. In *Nov.Leo.* 98, the legislator discusses the problem of eunuch's marriage from two points of view: procreation and satisfaction of sexual desire. According to Laiou, the church in the middle Byzantine period recognised procreation and satisfaction of sexual desire as a double end of marriage.⁸⁰² Firstly, Leo VI prohibits the marriage of eunuchs because they

⁷⁹⁸ E.g. Laiou 2000, 71-86

⁷⁹⁹ Troianos 2007b, 469-83.

⁸⁰⁰ *Ecloga* 17.25, 17.26, tr. Humphreys, 73.

⁸⁰¹ *Nov.Leo.* 23. In this novel, Leo VI does not mention the penalty against those who violate the law.

⁸⁰² Laiou 1992, 69, 85.

could not accomplish the former purpose. Then, he supposes that eunuchs might attempt to justify their marriage from the second point of view by saying that marriage should not be prevented in order to avoid the burning of the flesh. He, however, does not accept this excuse, for their union is not worthy to receive the blessing and is not considered a marriage because of its infertility. Considering this argument, the legislator might consider that the marriage of eunuchs was designed not to procreate but to satisfy their sexual desire. It might be reasonable for the emperor to punish such an act as fornication.

It is also noticeable that the legal project of Basil I, the father and predecessor of Leo VI, adopted the same punishment as *Nov.Leo.* 98. *Proch.* 4.25, which prohibits fourth marriages, orders that even those who contract the second or third marriage shall be subjected to canon law.⁸⁰³ Although there is a hypothesis that this clause originated from the fourth marriage of Leo VI and was issued in 907, van Bochove convincingly rejects it and adopts the traditional dating between 870 and 879.⁸⁰⁴ This stipulation declares that those who dare to contract a fourth marriage shall not be regarded as those who get married legally and be punished as fornicators.⁸⁰⁵ *Proch.* 4.25 probably shares a common idea with *Nov.Leo.* 98, for the author suggests that a fourth marriage was required not only by those who had suddenly lost their spouse but also for those who indulged themselves in carnal pleasures.⁸⁰⁶ In addition, *Proch.* 4.27 stipulates that any priest who had been involved in a secret marriage shall be punished in accordance with canon law.⁸⁰⁷ This sanction reminds us of that in *Nov.Leo.* 98, the

⁸⁰³ *Proch.* 4.25.

⁸⁰⁴ Van Bochove 1996, 83-98.

⁸⁰⁵ *Proch.* 4.25, ed. Zepos, 128, tr. Freshfield, 62. ἔστω νῦν πᾶσι κατάδηλον, ὥς εἴ τις τολμήσειε πρὸς τέταρτον γάμον τὸν οὐ γάμον ἐλθεῖν, οὐ μόνον ἀντ' οὐδενὸς ὁ τοιοῦτος νομιζόμενος γάμος λογισθήσεται, οὔτε οἱ ἐξ αὐτοῦ τεχθέντες παῖδες παῖδες γνήσιοι γνωρισθήσονται, ἀλλὰ καὶ ταῖς ποιναῖς τῶν μεμολυσμένων τοῖς τῆς πορνείας ῥυπάσμασι καθυποβληθήσεται, ἀπ' ἀλλήλων δηλονότι τῶν τοιούτων προσώπων διῆσταμένων. Freshfield translates the word πορνεία into adulterers.

⁸⁰⁶ *Proch.* 4.25, ed. Zepos, 127, tr. Freshfield, 62. ἴσως καταστοχαζομένου [...] τὸ ταχέως τὸ συνοικοῦν πρόσωπον αὐτοῖς ἀποβάλλεσθαι, ἥ καὶ νέοις ἐτι τοῦτο παθεῖν, καὶ οὐδὲν ἀνθίστασθαι πρὸς τὰς τῆς φύσεως ὁρμὰς, ὥστε τοῦτοις συμβαίνειν τῶν σωφρόνων μὲν γάμων ἀποτρέπεσθαι, φοιτᾶν δὲ εἰς τινὰς μίξεις ἀπηγορευμένας.

⁸⁰⁷ *Proch.* 4.25, ed. Zepos, 128, tr. Freshfield, 63.

deposition of priests who had celebrated the marriage of eunuchs. In conclusion, these two clauses about illegal marriage in the *Prochiron* probably became precedents for the punishment for eunuchs' marriage.

The punishment for fornicators against those who had contracted illegal and unnatural marriage could be dated back to the works of church fathers and canon law, rather than the Roman legal tradition. A letter of Athanasius of Alexandria which was established as a canon of the Fathers in the Council in Trullo, suggests that sexual intercourse for licentious or lascivious behaviour, namely not for procreation, shall be punished as fornication and adultery.⁸⁰⁸ Moreover, it is notable that several canons of the Council in Trullo subject those who had contracted a marriage deemed unsuitable by canon law to the penalties of fornicators.⁸⁰⁹ The canonical penalty for fornication is not fixed in the works of church fathers. Basil of Caesarea states that fornicators shall be subjected to the penance of a four-year or seven-year exclusion from communion,⁸¹⁰ but according to Gregory of Nyssa, fornication is punishable with penance for five years.⁸¹¹ Perhaps, the seven-year penance for incestuous marriages which canon 54 of the Council in Trullo inflicted could be linked up with the penalty for fornication.⁸¹² Moreover, canon 44 stipulates that 'a monk found guilty of fornication, or of taking a woman to wife and living with her shall in accordance with the canons be subject to the penalties of those who commit fornication'.⁸¹³ This canon could make us aware of an interesting resemblance between monks and eunuchs, for both of them were not allowed to get married due to their profession of celibacy or their physical defect. In any case, it seems to be probable that the punishment of *Nov.Leo.* 98 derives from these seventh-century canons concerning illicit marriage directly or via the *Prochiron*, although

⁸⁰⁸ Canons of Athanasius, canon 1, tr. *Rudder*, 760.

⁸⁰⁹ Canons of the Council in Trullo, canons 44, 53.

⁸¹⁰ Canons of Basil, canons 22, 59. For the discussions of later commentators about the different terms of penance, see the note of canon 59 by Deferrari.

⁸¹¹ Laiou 1993, 131.

⁸¹² Canons of the Council in Trullo, canon 54, tr. Nedungatt and Featherstone, 134-6.

⁸¹³ Canons of the Council in Trullo, canon 44, ed. and tr. Nedungatt and Featherstone, 126. Μοναχὸς ἐπὶ πορνείᾳ ἀλόους, ἢ πρὸς γάμου κοινωνίαν καὶ συμβίωσιν γυναῖκα ἀγόμενος, τοῖς τῶν πορνευόντων ἐπιτιμίῳις κατὰ τοὺς κανόνας ὑποβληθήσεται. Cf. Canons of Basil, canon 19.

there is no mention of these canons in the text of the novel.

We have pointed out a possibility that the legislator issued *Nov.Leo.* 98 in order to prohibit eunuchs' marriage in a Christian and canonical framework. In the background of this novel, there seems to be a trend which emphasises the role of church authority in marriage. Finally, we will clarify how the legislator understood eunuchs and how his view of them affected his decision on eunuchs' marriage, analysing the latter part of *Nov.Leo.* 98.

Leo VI's View of Eunuchs: Idealisation of Eunuchs' Celibacy

In the last part of *Nov.Leo.* 98, Leo VI adds a detailed explanation concerning features of eunuchs and attempts to make eunuchs aware that celibacy is the ideal and normal status for them. This is a valuable statement concerning eunuchs, for there are few mentions of how eunuchs should be in the Roman and Byzantine legal sources. The legislator states:

Otherwise, castration is a precarious and impious act. After their castration, those who cut off their male genitals no longer accomplish what men can do but rather they have abandoned a desire for women and become unsuspected guardians of the nuptial bed as the name gives guarantee of. If such people wish to do this (i.e. marriage) despite that, why will not they feel a righteous anger against their own idea, not only because they have made a plan against nature, but also because they have contradicted themselves who, even though castration is culpable, had equally endeavoured to meet their expectations that they would be viewed as those who had something useful, and because they, who do not have the nature which they originally had nor which the malpractice (i.e. castration) had remodelled, belong to an alien species (γένος)?⁸¹⁴

⁸¹⁴ *Nov.Leo.* 98, ed. Troianos, 276.69-80. Ἄλλως τε δὲ καὶ τοῖς ἀποτέμνουσι τούτων τὴν ἀρρενοποιίαν εἰ τοῦτο ἢ ἐπίνοια βούλεται, εἰ καὶ σφαλερῶς καὶ Θεῷ ἀντιπράττοντες ἤκουσιν ἐπὶ τὴν πρᾶξιν, ὥστε μηκέτι δρᾶν αὐτοὺς ἄπερ ἄνδρες, ἀλλ' ὅσα γε τὴν πρὸς τὸ θῆλυ γένος ἐπιθυμίαν ἀπομαρᾶναι καὶ τῆς εὐνῆς ἀνυπόπτους φύλακας εἶναι — τοῦτο γὰρ ἢ κλῆσις ἐγγυᾶται — πῶς κατὰ τοῦτο δικαίαν οὐ χαλκεύσουσιν καθ' ἑαυτῶν ἀγανάκτησιν, δι' ὧν οὐ

The mention of the removal of what makes them men (τὴν ἀρρενοποιΐαν) and the risk of such an act undoubtedly shows that the emperor was concerned about castrated men in this sentence. This idea is also supported by the use of the word of κακοτεχνία used in the novel because, according to an index in Troianos' edition of the *Novels of Leo VI*, the words κακοτεχνία and κακοτέχνως were used exclusively in *Nov.Leo*. 60 for expressing castration. The central aim of this apostrophe is probably to emphasise how unnatural eunuchs' marriage is from the aspects of both their sexual desire and social role, following the preceding sentence in which the legislator refutes an opinion that a eunuch's marriage could be justified on the grounds of curbing his passion. Therefore, it might be reasonable to suppose that the features of eunuchs in this sentence were used as a rhetorical device,⁸¹⁵ but it should not be dismissed that the legislator and recipients of this novel probably shared such an idea of eunuchs.

The legislator distinguishes eunuchs from other men, offering two traditional features of eunuchs: loss of desire for women and being trustworthy guardians of the bed. The former is a well-known feature of eunuchs which is derived from Hippocrates, Aristotle, and Galen.⁸¹⁶ On the other hand, some Christian writers after the fourth century doubt the chastity and sexual abstinence of eunuchs, especially if their castration was made after the reached puberty.⁸¹⁷ Canon 5 of the Council in Trullo, as we mentioned above, also mentions the chastity of eunuchs as well as doubt about it. Accordingly, it is significant that *Nov.Leo*. 98 makes chastity of eunuchs a fundamental assumption in spite of such ambivalent views about the sexual desire of eunuchs in sources.⁸¹⁸

μόνον τῇ φύσει ἐχθρὰν προαίρεσιν κέκτηνται, ἀλλὰ καὶ αὐτοῖς ἐκείνοις οἱ, εἰ καὶ κακοτέχνως, ὁμῶς σπουδὴν ἔθεντο πρὸς τὸ δόξαν αὐτοῖς χρησίμους ὀφθῆναι ἐναντιούμενοι ἀπεδείχθησαν, καὶ ξένον τι γένος ὑπάρχουσιν μήτε τῇ ἐξ ἀρχῆς προβαλούσῃ φύσει, μήτε τῇ μετὰ ταῦτα μεταπλασασμένη κακοτεχνία συνουκιοῦμενοι; I referred to the translations of Noallis and Dain, and Troianos. Noailles and Dain 1944, 324-6; Troianos 2007, 277.

⁸¹⁵ Messis 2014, 103, n.30.

⁸¹⁶ Sidéris 2017, 146-70.

⁸¹⁷ Sidéris 2017, 145-205; Messis 2014, 71-5.

⁸¹⁸ According to Laiou, the Byzantine Church generally regarded sexual desire as the natural character of man. Laiou 1992, 69-70. Leo VI might suppose that eunuchs have a different

The second feature of eunuchs, unsuspected guardians of the bed, is partly linked up with the first one, for eunuchs could be guardians of females or beds due to their sexual abstinence. From late antiquity, eunuchs were mentioned as guardians of females or chamberlains such as in the Bible, histories, and saints' lives.⁸¹⁹ However, we must remember that not all eunuchs or castrated men in later Roman and Byzantine history played a role as guardians and that Leo VI would have known that eunuchs worked outside the bedroom. Therefore, this sentence probably does not mean that the subject of this novel was only eunuch servants, but that the legislator needed to emphasise such a character of eunuchs in order to discuss the issue of their marriage whatever the actual roles of eunuchs were. Such a definition of eunuchs in *Nov.Leo.* 98, however, presents the significant fact that the legislator expected every eunuch to have such a character of chastity since they had been castrated.

The supposition that eunuchs could not be suspected of any sexual immorality seemed to be controversial, as canon 5 of the Council in Trullo did not completely accept the irreproachability of eunuchs. In the legal sources, *Nov.Jus.* 133.5 permits eunuchs and elderly men to enter convents as *apocrisiaries*, but states that they must be known for their chastity. Moreover, it is notable that historiographical sources report some accusations concerning associations between empresses and court servants in the reigns of Basil I and Leo VI, although whether their associations deviated from their sexual morality or not is uncertain. Firstly, Niketas Xylinites who was the master of the emperor's table (ὁ ἐπὶ τῆς τραπέζης), was accused because he was loved by the empress Eudokia Ingerina. Thus, he was made a monk by her husband, the emperor Basil I. However, he became an *oikonomos* of Hagia Sophia in the reign of Leo VI.⁸²⁰ There is no mention that he was a eunuch. Although Philotheos' *Kletorologion* in 899 lists his office as one for eunuchs, it is difficult to judge whether he was a eunuch because non-eunuchs sometimes filled positions which Philotheos reserved for eunuchs, such as Basil I being the *parakoimomenos* of Michael III. The second is the eunuch Constantine the Paphlagonian. The *parakoimomenos* Samonas accused Constantine regarding his association with the empress Zoe, the fourth wife of Leo VI, probably after the promulgation of *Nov.Leo.* 98. Leo VI, who believed the accusation of his *parakoimomenos*,

nature from men.

⁸¹⁹ Sidéris 2017, 145-205; Messis 2014, 71-5.

⁸²⁰ Symeon, 132.13, ed. Wahlgren, 264; GMC, ed. Bekker, 843.10-2. Tougher 1997, 49, n.33, 62, 200, n.47.

tonsured Constantine and sent him to the monastery of St Tarasios.⁸²¹ The emperor, however, later restored him to his previous post, and finally appointed him as *parakoimomenos*. The sources do not explain what kind of associations were at issue, so it might be impossible to conclude that these servants were suspected of sexual liaisons with empresses. At least, however, it could be suggested that the chroniclers considered that emperors worried about the relationship between their empresses and servants whether the servants were castrated or not. On the other hand, if these episodes are true, it is suggested that emperors could have a distrust of the fidelity of some court servants, including eunuchs, sometimes when an accusation was made. Accordingly, there might be a possibility that the emperor who had such suspicions about chamberlains in mind inserted this sentence in *Nov.Leo*. 98 concerning the morality of eunuch chamberlains in order to control them for his own benefit.

Thus, Leo VI emphasises the gap not only between eunuchs and non-eunuchs but also between celibate eunuchs and eunuchs who dare to get married. According to him, eunuchs should not attempt to get married not only because they become hostile to nature, but also because they oppose themselves to those who have endeavoured to be useful. It is difficult to confirm what was the usefulness of eunuchs, but the absence of desire for females must be included. This seems to suggest that the legislator and perhaps eunuchs themselves recognised the value of eunuchs' chastity in spite of the prohibition of castration. Moreover, at the end of this sentence, the legislator judges that eunuchs who hope to get married are no longer men nor eunuchs probably because of their sexual desire for women. The ambiguous phrase of 'καὶ ξένον τι γένος ὑπάρχουσιν μήτε τῇ ἐξ ἀρχῆς προβαλλούσῃ φύσει, μήτε, τῇ μετὰ ταῦτα μεταπλασάμενῃ κακοτεχνίᾳ συνοικειούμενοι' could be interpreted to mean that the legislator considered eunuchs as an extraordinary sex neither male nor female.⁸²² However, as *Nov.Leo*. 60 describes castrated men as a different creature that the Creator's wisdom had not foreseen, the idea that castration transforms men into women is unfamiliar to Roman and Byzantine law, so it seems to be reasonable to interpret 'τῇ μετὰ ταῦτα μεταπλασάμενῃ κακοτεχνίᾳ συνοικειούμενοι' as general eunuchs, not females. Accordingly, it seems that the legislator attempted to frame eunuchs in an idealised image; namely, eunuchs were accepted as a different category from men as far as they remained single, but they could be considered as abnormal if they had deviated from the fixed features or morality of eunuchs.

⁸²¹ Theoph.Cont., ed. Bekker, 375.10-8; GMC, ed. Bekker, 898-9. Tougher 1997, 200.

⁸²² Sideris 2017, 198-9.

Nov.Leo. 98 seems to make the position of eunuchs in law clearer than that in Justinianic law, resolving the ambivalence of eunuchs' character. This is partly because the legislator needed to bring forward reasons why eunuchs had to be excluded from marriage. Moreover, the legislator redrew a line between eunuchs and men and, using traditional images of eunuchs, declared that celibacy and chastity were the essential features of eunuchs. It should not be ignored that such an ideal image of eunuchs might be a *topos*, but this does not seem to diverge too much from the legislator's, or perhaps society's, understanding of eunuchs. It is highly possible that Leo VI expected his eunuchs to attain such an ideal.

Conclusion

This chapter examined the novel of Leo VI concerning the marriage of eunuchs. We saw both continuity and transformation in the text of *Nov.Leo.* 98. As for the former, the negative view toward eunuchs' marriage or their cohabitation with females had been a long-standing idea no later than the fifth century, which was sometimes accompanied with the controversy about the sexual abstinence of eunuchs. On the other hand, we found some significant differences between Leo VI's novel and the Roman legal tradition. Perhaps the most significant difference is that the legislator reconsiders eunuchs' marriage in the framework of Christian marriage. The issue of eunuchs' marriage itself had been mentioned in the Justinianic law, but Leo prohibited it in a different, Christianised, way. This can be situated in the discussion of the underlying context behind the *Novels of Leo VI*. As mentioned in chapter 3, recent studies indicate two characters of the *Novels of Leo VI*; namely, Chitwood emphasises the Romanness in the Macedonian legal project on the one hand, and Riedel points out Leo's awareness as a Christian ruler in his novels on the other. This chapter clarified that *Nov.Leo.* 98 is more likely to be a product of the latter rather than the former, for this novel unlike the other two novels of Leo concerning eunuchs which modified the Justinianic stipulations in more Christianised way, does not refer to the Roman legal stipulations preserved in the law of Justinian I. In other words, it might be possible to consider that the novel is also a product of what Magdalino calls an orthodox imperial culture.⁸²³ As a result, the prohibition of eunuchs' marriage in *Nov.Leo.* 98 is rooted not only in the intention not to reduce opportunities for childbirth, but

⁸²³ Magdalino 2011, 147.

also in the sexual morality of Christianity, that sexual intercourse for a purpose other than procreation could be regarded as a vice.

Nov.Leo. 98 provides us with some important insights concerning eunuchs in the ninth and the tenth centuries. One of the most important points in the novel is that the emperor emphasised the celibacy and sexual abstinence of eunuchs as indicating the usefulness or significance of eunuchs, for there seems to be no other existing source in which the imperial authority explains eunuchs in such detail. As a result, this novel could explain one of the reasons why the Byzantine emperors used eunuchs; namely, although the act of castration should not be allowed, Leo VI probably regards chastity and celibacy of eunuchs as their main value and attempts to control them to attain their ideal state. Moreover, there is a possibility that the abovementioned norms in *Nov.Leo.* 98 were not only idealised by the emperor or other officials but also partly internalized by court eunuchs themselves. For example, the *Life of St. Basil the Younger*, probably written in the middle of the tenth century,⁸²⁴ tells a story of the *primikerios* Constantine called Barbaros, who ‘had no wife, remaining unmarried and thus striving to please the Lord’.⁸²⁵ If we guess from his title of *primikerios* that he was a eunuch, it is suggested that the court eunuch kept his celibacy.

We finally turn our eyes on eunuchs themselves. It seems that *Nov.Leo.* 98 and its previous stipulations were on the whole observed, for, as far as we can tell, there is no case of a eunuch’s marriage mentioned in Byzantine sources. However, it should be noted that marriage is not the only way to build social ties with others even when eunuchs had been prevented from getting married. For example, the marriage of a sister of Constantine the Paphlagonian with Leo Phokas is a remarkable case of a eunuch connected with others through marriage.⁸²⁶ It is interesting that such a social tie was made after the prohibition of eunuchs’ marriage was renewed. In addition, as we mentioned in chapter 4, eunuchs, especially from within the imperial territory, could have a close relationship with their own family, such as their uncles, nephews and brothers.⁸²⁷ *Nov.Leo.* 26 permitted them to have

⁸²⁴ For the dating of the *Life*, see Sullivan *et al.* 2014, 7-8.

⁸²⁵ *Life of Basil the Younger*, 1.26, ed. Sullivan *et al.*, 118.24-5; tr. Sullivan *et al.*, 119. Οὐκ εἶχε γὰρ σύμβιον ὁ κύριος αὐτῆς, ἄζυγα τηρῶν ἑαυτὸν καὶ τῷ Κυρίῳ ἀρέσαι σπουδάζων.

⁸²⁶ Theoph.Cont., ed. Bekker, 390-1.

⁸²⁷ The relationship between Samonas the Arab and his father seems to be exceptional. Tougher 1997, 212-5.

adopted children. Therefore, eunuchs possibly built a relationship with others not through their own marriage, and thus keeping their idealised image.

In the last three chapters, new stipulations of Leo VI concerning eunuchs have been examined. These analyses conclusively show the following two points. Firstly, it is suggested that the individual novels concerning eunuchs were not isolated from wider legal and social contexts. As chapter 6 clarified, there is a possibility that the promulgation of *Nov.Leo.* 98 was linked with the events described in historiographical works (e.g. the doubts of emperors about the relationship between their empresses and court servants). Moreover, it is undoubtable that the Macedonian legal project was an important factor in the promulgation of these novels. In the course of ‘Cleansing of the Ancient Laws’, Basil I and Leo VI led the large codification projects including the issuing of Leo’s novels. As a matter of fact, this legal project was probably a trigger for Leo’s promulgations concerning eunuchs, for *Nov.Leo.* 26 and 60 were issued in order to correct old stipulations of Justinian I according to a plan mentioned in the proem of the *Novels*.⁸²⁸ In addition, it is evident that Leo’s interest in Orthodox faith seemed to bring about significant changes in all three novels about eunuchs. It was clarified that canonical stipulations issued after the death of Justinian I and Christian thought partly became the basis of these novels, such as the mitigation of severe penalty, the ecclesiastical blessing for adoption and marriage, and the Christian notion of sexual immorality. In this sense, these novels were clearly products of the Macedonian legal projects, namely, the considerable interest in reviewing the Roman law seems to have inspired Leo VI to reconsider the legal standing of eunuchs.

Secondly, *Nov.Leo.* 26, 60, and 98 show flexible views of the legislator toward eunuchs. It is probably true that these novels were issued from a keen interest in eunuchs of people in the ninth century who possibly knew the patriarchate of the eunuch Ignatios, the institutionalization of eunuchs as imperial officials, the increase in the number of eunuchs from within the imperial territory, and the close relationship between emperors and eunuchs. It is, however, striking that these novels present mutually different views about eunuchs. *Nov.Leo.* 60 offered a negative view of castration and eunuchs: an act of deformation of God’s creation. *Nov.Leo.* 26 suggested that the removal of male genitals should be sympathetically compensated as a kind of physical defect, whereas the legislator asserted that eunuchs were

⁸²⁸ Chitwood 2017, 37; Riedel 2018, 98.

guardians of the bed who had no desire for women in *Nov.Leo.* 98. These differences probably show that the legislator flexibly picked up and rearranged traditional images of eunuchs depending on the acts about which he promulgated his novels. On the other hand, these images seem to show compatibly an outline of ideal eunuchs for the legislator: disabled people who had lost both their male genitals and sexual desire for women as a result of the misdeed of castration. It should be noted that these novels did not necessarily replace their preceding stipulations. However, it is highly possible that these novels were expected to give one answer to questions concerning the legal and social standings of eunuchs, and to control eunuchs not to deviate from the framework.

Chapter 7

Two Decisions of Basil II concerning Property of Native Eunuchs

Introduction

After the death of Leo VI, there are only a few legal stipulations concerning eunuchs left: an imperial novel of Basil II (976-1025) against large landholders and his decision against inheritance to eunuchs which was mentioned in the mid-eleventh-century law book *Peira*. It is notable that both stipulations deal with the property of eunuchs who were probably from within the imperial territory. Although, unlike the three novels of Leo VI, these stipulations have drawn little attention in studies of eunuchs, the examination of these decisions on eunuchs needs to be carried out in this chapter as the final step to complete the present study of eunuchs in Byzantine law.

The reign of Basil II, more than half a century after that of his great-grandfather Leo VI, tends to be considered as the apogee of the period of territorial expansion in the Macedonian period. Basil II, who was a grandson of Constantine VII and a son of Romanos II, was named as co-emperor with his younger brother Constantine VIII in the reign of his father and those of two subsequent emperors, Nikephoros II Phokas and John I Tzimiskes. Even after he became a senior emperor with his brother in 976 at the age of eighteen, government was in the hands of the *parakoimomenos* Basil Lekapenos, who was a eunuch and the emperor's great-uncle, until his deposition in 985 and death shortly afterwards. In addition, the early reign of Basil II was a period of both political and military instability caused by the two revolts between 976 and 989 led by Bardas Skleros and Bardas Phokas the Younger, in addition to the defeat against the Bulgarians in 986.⁸²⁹ After bringing an end to the civil wars, however, he succeeded in concentrating power in his hands and accomplished the conquest of Bulgaria in 1018 after his repeated campaigns for thirty years, in addition to the annexation of parts of Armenia and Georgia.⁸³⁰ In the end, he reigned the empire for a half-century, which was one of the longest reigns of an emperor since Justinian I himself.⁸³¹

⁸²⁹ Holmes 2005, 3-4. For the early reign of Basil II, see Holmes 2005, 240-98; Kaldellis 2017, 81-102.

⁸³⁰ Holmes 2005, 4, 240-98; Kaldellis 2017, 103-141.

⁸³¹ Kaldellis 2017, 139.

In several pieces of legislation of Basil II which have been handed down up till the present,⁸³² two stipulations mention eunuchs. The most famous law of Basil II is probably a novel promulgated in 996 against amassment of lands made by the ‘powerful (*dynatoi*)’, including eunuchs. This novel was one of the series of Macedonian land legislation from 934, which dealt vigorously with amassment of lands by the ‘powerful’ in order to defend the ‘poor’ and the village communities.⁸³³ In addition, this novel of Basil II problematised the influence of the emperor’s great-uncle, the eunuch Basil Lekapenos, who had already been deposed from the imperial court. This will show that some court eunuchs who had fallen into disgrace with Basil II became a target of the emperor’s attack in the course of strengthening his imperial authority. Secondly, a court decision of Basil II, which prevents testators from leaving their *oikos* to their castrated kinsmen, should be examined. This decision was adopted in the *Peira*, a mid-eleventh-century collection of excerpts from the practice of Eustathios Rhomaïos, a judge in the High Court of Constantinople.⁸³⁴ This is a remarkable stipulation for the present thesis because there are few stipulations concerning inheritance to eunuchs in existing laws.

The context of these imperial decisions is an issue. In comparison with the *Novels of Leo VI* promulgated in the course of the large-scale legal projects, the laws of Basil II seem to be more isolated from the contemporaneous legal context, for there is no clue of a legal project during his reign. This lack of the wider framework of Basil II’s promulgation makes it hard to conduct, as earlier chapters did, a comparative analysis of these novels and other contemporaneous laws in order to clarify reasons for the promulgation of these new laws. In such circumstances, this chapter will focus on the social context through examining narrative sources instead of the analysis of contemporaneous laws. Moreover, the close reading of the text of such decisions and the comparative analysis with the preceding stipulations in Justinian I’s laws will continue to be adopted as was followed in the previous chapters.

This chapter examines the context of these two decisions of Basil II. It will begin with the analysis of the novel of Basil II against the ‘powerful’. The issue of the ‘powerful’ in the Macedonian era has been a controversial one for the Byzantinists, so we will review their arguments and consider the political and social context behind it such as the relationship

⁸³² Holmes 2005, 89; Troianos 2017, 185-90.

⁸³³ For the Macedonian land legislation, see McGeer, 2000.

⁸³⁴ Oikonomides 1986, 169-76; Stolte 2015, 363.

between Basil II and his *ex-parakoimomenos* Basil Lekapenos. In addition, the case of Philokales in this novel shows that eunuchs who were born in the empire could be assimilated to the ‘powerful’. In the latter half of this chapter, we will analyse Basil II’s decision in the *Peira* and the issue of inheritance of eunuchs. This chapter will attempt to clarify why Basil II made such a decision in the law court and how this court decision affected eunuchs themselves through the comparison with previous laws concerning succession and cases of eunuchs’ succession in non-legal sources. Then, this chapter will emphasise that the new restriction on the inheritance to eunuchs in *Peira* 31.1 had originated from the close family relationship between eunuchs and their native families emerging from the increase in the number of native eunuchs during the middle Byzantine period. At the end of this chapter, we will offer a possibility that these two decisions of Basil II emerged from the emperor’s wariness about the strong presence of native eunuchs, which finally reached a zenith at the time of John the *orphanotrophos* in the middle of the eleventh century.

Eunuchs in the Land Legislation of the Macedonian Emperors

In the novel issued in January 996, Basil II dealt vigorously with amassment of lands by the ‘powerful (*dynatoi*)’ in order to defend the ‘poor’ and the village communities. The powerful means those holding the rank of *patrikios* and *magistros* and the members of the military and bureaucratic and ecclesiastical hierarchies.⁸³⁵ The Macedonian emperors from Romanos I Lekapenos to Basil II promulgated laws which restricted the powerful from acquiring properties of the ‘poor’ in order to protect the village communes and military property on which the fiscal system was based,⁸³⁶ although Kaldellis points out that there is no data about the extent of the encroachment.⁸³⁷ Morris states that each law was promulgated in response to different kinds of crises for provinces, such as natural disasters (famine and long winter), military defeats, and revolts.⁸³⁸ Among these laws, the novel of Basil II is ‘the reassertion of

⁸³⁵ Morris 1976, 14-7; McGeer 2000, 3-8.

⁸³⁶ Morris 1976, 3-27; McGeer 2000, 3-8; Holmes 2005, 20-5.

⁸³⁷ Kaldellis 2017, 149.

⁸³⁸ Morris 1976, 8-11.

the full force of the law against the *dynatoi*',⁸³⁹ while it mainly relied on the arguments of the novel of Romanos I Lekapenos promulgated in 934.⁸⁴⁰

Basil II permitted the 'poor' to reclaim their lands alienated after the promulgation of the novel of Romanos I in 934 without reimbursing the powerful for the prices or improvements.⁸⁴¹ He also abolished an old principle that those who possessed the property of others for more than forty years would acquire immunity from judicial inquiry by prescriptive right.⁸⁴² In another part of the novel, the legislator dealt with various topics: the validity of boundary descriptions (*Nov.* 2), the appropriation of villages by metropolitans or bishops (*Nov.* 3), the penalties for crimes committed by *protospatharioi* and men superior to them (*Nov.* 5), the invalidation of chrysobulls issued by Basil Lekapenos (*Nov.* 6), and the conflict over the places of local fairs (*Nov.* 7).⁸⁴³

This novel is preserved in two forms. Svoronos argues that version 1 seems to be recognised as an authentic text of the novel.⁸⁴⁴ On the other hand, version 2 not only constitutes a paraphrase of version 1, but also contains some clarifications and modifications, such as the supplement of individual names or deletion of names of certain offices.⁸⁴⁵ Svoronos convincingly suggests that version 2 was the reworking of the novel because it adopts changes in the administrative hierarchy occurring from the middle or the end of the eleventh century to the tenth-century novel, such as the deletion of a *magistros* and *domestikos ton scholon*.⁸⁴⁶ He concludes that version 2 was possibly composed during the second part of the eleventh century, but it does not mean that the credibility of the information added in version 2 should be doubted; namely, he argues that the author of this later version was aware of the circumstances behind the promulgation of the novel.⁸⁴⁷ His hypothesis that

⁸³⁹ Morris 1976, 27. Holmes also mentions the novel is a 'draconian version of the anti-Powerful legislation'. Holmes 2005, 21.

⁸⁴⁰ McGeer 2000, 111.

⁸⁴¹ Basil II, *Nov.* 1, tr. McGeer, 118-21.

⁸⁴² Basil II, *Nov.* 4, tr. McGeer, 126-9.

⁸⁴³ McGeer 2000, 122-31.

⁸⁴⁴ Svoronos 1994, 194.

⁸⁴⁵ Svoronos 1994, 195-7.

⁸⁴⁶ Svoronos 1994, 195-6. Basil II, *Nov.* pr.3.

⁸⁴⁷ Svoronos 1994, 197.

the additional information of version 2 came from the authorised interpretations in the imperial rescripts emanating from Basil II might be true.⁸⁴⁸

There is discussion of why Basil II issued this novel. Morris argues from ambiguous descriptions of the situation of the ‘poor’ that what the Macedonian land laws were primarily concerned with was not the welfare of the ‘poor’ and the village communities as a whole but opposition to the great landowners of the provinces.⁸⁴⁹ In particular, according to her, the novel of 996, which had the severest stipulations in the Macedonian land legislation, was a result of the threat of the great aristocratic families, the Phokades and the Skleroi, during the early reign of Basil II.⁸⁵⁰ Holmes, however, denies that the revolts of Bardas Skleros and Bardas Phokas the Younger could be explained as a struggle between the emperor and the landed aristocracy, reconsidering the relationship between them before and after their revolts.⁸⁵¹ She also considers it unlikely that Basil II primarily targeted the powerful families in his novel, for the names of the specific families of Phokades and Maleinoi are mentioned only in the later version of the novel.⁸⁵² In addition, it is suggested that the novel against appropriations performed by the powerful landowners was not directly connected with the civil wars. Holmes argues that it is the conflict over foreign policy and control of the army, not the competition for private resources, that mainly caused the opposition between Basil II and the rebels, whose power was vested in their command over the imperial army accompanied with their public offices not in their own private property and manpower.⁸⁵³ On the contrary, she points out that Basil’s novel was issued for the purpose of establishing imperial authority over the court and administration, ‘which had for so long been dominated by the influence and reputation of his great-uncle, Basil the *parakoimomenos*’.⁸⁵⁴ Kaldellis supports Holmes’ argument although he emphasises that there is little evidence for Basil II’s

⁸⁴⁸ Svoronos 1994, 197.

⁸⁴⁹ Morris 1976, 19-27.

⁸⁵⁰ Morris 1976, 27.

⁸⁵¹ Holmes 2005, 461-75. She also shows conflicting views in the scholarly discussion before her. Holmes 2005, 21-4.

⁸⁵² Holmes 2005, 468. Basil II, *Nov.* pr.3.

⁸⁵³ Holmes 2005, 462-3, 466-7.

⁸⁵⁴ Holmes 2005, 469.

effort to enforce his new law in order to stop the alienations of country lands.⁸⁵⁵ He also argues that the law was one of the measures of Basil II who aimed to ‘rhetorically strengthen the emperor’s otherwise vulnerable position vis-à-vis the powerful and influential men that he needed to run the empire, especially the army’,⁸⁵⁶ reaffirming ‘the supreme power of the emperor as ultimate judge’ and to give ‘him a weapon that he could use if it became necessary’.⁸⁵⁷ However, he does not agree with Holmes’ idea that Basil Lekapenos was central to the novel because the decree looked to the future.⁸⁵⁸ His opinion seems to be supported by the fact that the author of the decree dealt with the matter of the *parakoimomenos* only as a part of his bigger challenges against his potential enemies.

The most significant point of this novel for the present thesis is that the legislator mentions a presumed eunuch of the powerful with whom Basil II actually dealt, the *protovestiarios* Philokales. Separating him from the cases of the powerful who belonged to the great families (e.g. the Phokades and Maleinoi), the author explained his case in detail. This is because he took a special interest in the exceptional case that one of the powerful who was originally one of the poor but had joined the powerful as a consequence of being honoured with a title. The name of Philokales was recorded in the late eleventh-century reworking of the novel,⁸⁵⁹ while the *protovestiarios* is left anonymous in the first one. Philokales was a *koitonites* and thereafter *protovestiarios*, so he was probably a eunuch.⁸⁶⁰ According to the novel, Philokales was a poor villager before he became one of the illustrious and wealthy. Then ‘he took possession of the entire village commune and made it into his own estate; he even changed the name of this village’.⁸⁶¹ Basil II, who travelled through the area, was complained to by the poor about the *protovestiarios*, so he demolished Philokales’ houses,

⁸⁵⁵ Kaldellis 2017, 118.

⁸⁵⁶ Kaldellis 2017, 116.

⁸⁵⁷ Kaldellis 2017, 118, 149-50.

⁸⁵⁸ Kaldellis 2017, 326, n. 65.

⁸⁵⁹ Svoronos 1994, 190-8; McGeer 2000, 111; Holmes 2005, 468.

⁸⁶⁰ Tougher 2008, 56.

⁸⁶¹ Basil II, *Nov. pr.4* (ver. 2), ed. Svoronos, 203.56-8; tr. McGeer, 119. τὸ ὅλον ἐκ τοῦ κατ’ ὀλόγον ἐκράτησε χωρίον καὶ προάστειον ἴδιον ἐποίησεν ἐναλλάξας καὶ τὴν ἐπωνυμίαν τοῦ τοιοῦτου χωρίου. There is no mention that Philokales had changed the name of his village in version 1.

restored the property of the poor, and returned Philokales to his original status as one of the villagers.⁸⁶² The location of Philokales' village is uncertain. Kaldellis seems to doubt the credibility of the emperor's travels mentioned in his novel,⁸⁶³ pointing out that 'he had travelled through Asia Minor only once as an adult' in 995.⁸⁶⁴ However, it may not be necessary to think like Kaldellis, because as the author of *PMBZ* argues,⁸⁶⁵ the village might have been located in the Balkan Peninsula which Basil II passed through when he operated against the Bulgarians in the first half of the 990s, if we believe the eastern sources.⁸⁶⁶ In addition, the legislator does not mention whether Philokales had lost his court title or not. We, however, interpret that he was literally made 'one of the villagers once more',⁸⁶⁷ as the author of the novel contrasts his past state as a poor villager with his present one as one of the powerful who had been honoured with a title. Kaldellis considers that this is an anecdote inserted for illustrating the fate of one of those who had violated the law.⁸⁶⁸ Even if his supposition is right, however, it does not seem to mean that the story of Philokales was a fiction, for Philokales was not the only eunuch who had been born in the empire and achieved social ascension after his castration. As mentioned above, the *parakoimomenos* Constantine the Paphlagonian, who held political power during the first decades of the tenth century, was a son of a poor farmer. In addition, the eunuch John the *orphanotrophos* belonged to a family of money-changers in Paphlagonia. John the *orphanotrophos* was one of the most famous and

⁸⁶² Basil II, *Nov.* pr.4, tr. McGeer, 118-9. Tougher 2008, 56.

⁸⁶³ Basil II, *Nov.* pr.2, 4.

⁸⁶⁴ Kaldellis 2017, 118.

⁸⁶⁵ *PMBZ* Philokales (26626) Available at:

<https://www.degruyter.com/database/PMBZ/entry/PMBZ28780/html> [Accessed: 23 October 2021].

⁸⁶⁶ Yahya, French tr. Kratchkovsky and Vasiliev, 430-42; Stephen of Taron, German tr. Gelzer and Burckhardt, 198. For the expedition of Basil II, see Holmes 2005, 193-4; Kaldellis 2017, 112-3.

⁸⁶⁷ Basil II, *Nov.* pr.4 (ver. 1), ed. Svoronos, 202.56-7; tr. McGeer, 118. ἐκεῖνῳ δὲ κατέλιπεν ὅπερ εἶχε δημόσιον καὶ τῶν χωριτῶν ἓνα ἐποίησε. Basil II, *Nov.* pr.4 (ver. 2), ed. Svoronos, 203.63-4; tr. McGeer, 119. ἐκεῖνῳ δὲ κατέλιπεν ὅπερ ἐξ ἀρχῆς εἶχε δημόσιον καὶ τῶν χωριτῶν ἓνα πάλιν αὐτὸν ἐποίησεν.

⁸⁶⁸ Kaldellis 2017, 118.

powerful eunuchs in Byzantine history.⁸⁶⁹ He was *praipositos* and then *orphanotrophos* under Romanos III (1028-34) and succeeded in making his brother Michael emperor through arranging the marriage between him and the empress Zoe. Thereafter, he engineered for his nephew Michael to become the emperor after making him the adopted son of Zoe, and he ruled the empire until the emperor banished him to a monastery. There may be a possibility that Philokales became a target of Basil II's policy due to his humble origins and his status as a eunuch. It should, however, be noted that even if Philokales was a eunuch his eunuchism seems to be considered irrelevant to the reason why Basil II dealt rigorously with him, for the social context of the novel seems to show that the legislator refers to the case of the *provestiarios* in order to threaten the rich, whether eunuchs or not, with radical measures. On the contrary, the novel probably suggests that court eunuchs, who were native eunuchs, were mostly assimilated into the powerful in spite of their castration and their poor origin, unless they had violated the law or lost the emperor's favour.

Basil II countered what his great-uncle Basil Lekapenos had achieved in both versions of the novel. Basil Lekapenos was a bastard son of the emperor Romanos I Lekapenos. He had been probably castrated in his early infancy in order not to usurp the throne.⁸⁷⁰ Even though his half-brothers were removed in 945, he became *parakoimomenos* under Constantine VII Porphyrogenitos and had influence on the emperors until the reign of Basil II, except for during the reign of Romanos II who favoured the Paphlagonian eunuch Joseph Bringas.⁸⁷¹ In the early part of Basil II's reign, the eunuch Basil 'reached the apogee of

⁸⁶⁹ For John the *orphanotrophos*, see Janin 1931; Magdalino 1998, 145; Tougher 2008, 56, 151.

⁸⁷⁰ Psellos, *Chron.* 1.3, ed. Reinsch, vol. 1, 3. Brokkaar 1972, 200-3; Angelidi 2013, 12. Cf. Wander 2012, 106-11. PMBZ, Basileios Lekapenos (20925) Available at: <https://www.degruyter.com/database/PMBZ/entry/PMBZ23078/html> [Accessed: 14 November 2021].

⁸⁷¹ Joseph Bringas was appointed to important positions (*patrikios*, *praikopositos*, *sakellarios*, and *droungarios* of the fleet) by Constantine VII in the middle of the tenth century. He became a prominent figure in the empire when he was appointed as the *parakoimomenos* in place of Basil Lekapenos in 959. Thereafter, he was banished after the death of Romanos II and the enthronement of Nikephoros II Phokas in 963. Magdalino 1998, 144-5. PMBZ, Ioseph Bringas (23529) Available at:

power, due to the inexperience of the young emperor'.⁸⁷² Basil II, however, exiled the eunuch and confiscated most of his property in 985 when the emperor could no longer accept his subordination to the *parakoimomenos*.⁸⁷³ Thereafter, the emperor issued a πρόσταξις which was probably the original version of the novel of 996.⁸⁷⁴ More than ten years later, however, Basil II repeated it in his novel of 996 and still attempted to nullify the chrysobulls issued by Basil Lekapenos during his reign unless they had been provided with the emperor's confirmation.⁸⁷⁵ Regarding this, Kaldellis' argument that the issue of Basil Lekapenos was not the focus of this novel is probably right, but it does not seem to contradict Holmes's argument that the novel suggests the emperor's persistent attempt to 'annul the grants and privileges issued by his great-uncle' and 'to browbeat his officials into recognizing his own omniscient and omnipotent position at the heart of Byzantine government'.⁸⁷⁶ As a result, the repetition of such invalidation enabled the emperor to claim his predominance over his potential enemies. Unlike the case of Philokales, Basil II's reaction against his great uncle was not limited to his property; this stipulation is exceptionally a result of the political conflict between Basil II and the older eunuch who was a great-uncle of the emperor.

The novel of Basil II shows the emperor's wariness about his officials, including eunuchs. The emperor probably promulgated this novel as a device for strengthening his authority over the imperial administration as a whole. As a result, there seems to be no special feeling of Basil II towards eunuchs manifested in the text because the purpose of this novel had no need to mention eunuchs in distinction from bearded officials. Conversely, this perhaps means that eunuchs just like Philokales could behave just like the powerful in spite of their eunuchism. This does not, however, mean that eunuchs became insignificant for Basil II, for as described later, it seems to be true that Basil II continued to use eunuchs even after the

<https://www.degruyter.com/database/PMBZ/entry/PMBZ25683/html> [Accessed: 14 November 2021].

⁸⁷² Tougher 2008, 56.

⁸⁷³ Skylitzes, 16.16, ed. Thurn, 335.58-67; tr. Wortley, 317-8.

⁸⁷⁴ Dögler 2003, 176 (Nr. 768f), 194-6 (Nr. 783). Brokkaar 1972, 234.

⁸⁷⁵ *Novel of Basil II* (996), 6.1, tr. McGeer, 128-31.

⁸⁷⁶ Holmes 2005, 470.

downfall of the eunuchs Basil Lekapenos, such as Orestes and Sergios.⁸⁷⁷ Next, another decision of Basil II which focuses on the status of eunuchs will be examined.

Prohibition on Inheritance to a Castrated Family Member: *Peira* 31.1

Peira 31.1 and its Interpretation

The *Peira* is a mid-eleventh-century collection of excerpts from the practice of Eustathios Rhomaios, a judge in the High Court of Constantinople.⁸⁷⁸ According to Oikonomides, who studied the *Peira* in general, Eustathios was a judge from the reign of Basil II and was appointed as the *droungarios* of the Vigla, i.e. chief judge of the empire and ranked by the title of *magistros* and in the reign of Romanos III Angyros.⁸⁷⁹ An anonymous pupil or assistant of Eustathios wrote the *Peira*, probably in the middle of the eleventh century after 1034 and during Eustathios' lifetime.⁸⁸⁰ It consists of seventy five chapters divided according to various topics. Oikonomides argues that the author attempted to make a legal handbook 'where one would be able to find easily what should – or could – be done in given situations' by putting together the written decisions of Eustathios,⁸⁸¹ a part of which were contained in his work represented by the *hypomnemata*, a collection of legal opinions, and the oral sources from Eustathios.⁸⁸² The *Peira* is a significant source in Byzantine legal history because this informs us how the tribunal in the capital worked between the end of the tenth century and the

⁸⁷⁷ Tougher 2008, 104. *PMBZ*, Orestes Aichmalotos (26199) Available at: <https://www.degruyter.com/database/PMBZ/entry/PMBZ28353/html>; Sergios (27045) Available at: <https://www.degruyter.com/database/PMBZ/entry/PMBZ29199/html>. [Accessed: 14 November 2021]. There is a hypothesis that John the *orphanotrophos* had already served in the imperial court in the reign of Basil II. This will be inspected in the later part of this chapter.

⁸⁷⁸ Oikonomides 1986, 169-76; Stolte 2015, 363.

⁸⁷⁹ Oikonomides 1986, 170-74.

⁸⁸⁰ Oikonomides 1986, 175.

⁸⁸¹ Oikonomides 1986, 191.

⁸⁸² Oikonomides 1986, 176-82.

early eleventh century. It also demonstrates how judges at times flexibly applied the written laws to real cases through re-interpretating or modifying them according to social reality.⁸⁸³

In the first paragraph of chapter 31 of the *Peira*, titled ‘about choices (περὶ αἰρέσεων)’, its author makes a short but interesting reference to Basil II’s decision concerning the choice of inheritors, in which eunuchs are included; ‘even if anyone wrote (in his/her will) that “I leave my house/household (τὸν οἶκόν) to my castrated kinsmen”, this will not be heard, for the choice is unlawful. The emperor Basil had decided this’.⁸⁸⁴ Although it seems to be uncertain which sources the author of the *Peira* used when he wrote this paragraph, Zachariä von Lingenthal mentions *Peira* 31.1 as an example of court cases over which the emperor presided.⁸⁸⁵ Oikonomides also reasonably considers it as one of the cases in which ‘the emperor’s opinion, if expressed, made law and ended all discussion about the matter’.⁸⁸⁶ Therefore, it is likely that *Peira* 31.1 is based on an actual case in a law court probably after Basil II had dismissed his great-uncle and began to directly govern his empire in 985, in which someone of an interested party like other potential heirs had disputed the validity of the abovementioned inheritance. Considering the fact that Eustathios had started his career as judge at the end of the tenth century,⁸⁸⁷ it is likely that this report was based on his own experience, and the text of ‘I leave my house/household to my castrated kinsmen’ was a quotation from the disputed will itself. This decision concerning the inheritance rights of eunuchs is remarkable because this probably has no precedence in existing laws promulgated during the later Roman and Byzantine period.

There are two questions concerning *Peira* 31.1. How was the inheritance of eunuchs understood before the reign of Basil II? And why did Basil II make such a decision? The following section will attempt to analyse this short text and answer these questions.

⁸⁸³ For concrete examples of Eustathios’ judgements, see Oikonomides 1986, 183-92.

⁸⁸⁴ *Peira* 31.1, ed. Zepos, 137. Ἐὰν γράψῃ τις καταλιμπάνω τὸν οἶκόν μου τοῖς συγγενέσι μου τοῖς εὐνουχιζομένοις, οὐκ ἀκούεται παράνομος γὰρ ἡ αἵρεσις. καὶ τοῦτο ἔκρινεν ὁ βασιλεὺς κύρις βασιλῆις. For the definition of byzantine kinship (συγγένεια), see Leidholm 2019, 13-5.

⁸⁸⁵ Zachariä von Lingenthal 1892, 357, n. 257.

⁸⁸⁶ Oikonomides 1986, 187.

⁸⁸⁷ Oikonomides 1986, 171.

Inheritance of Eunuchs before the *Peira* 31.1

What makes this analysis difficult is not only the shortness of *Peira* 31.1 but also the limited numbers of precedents concerning inheritance to eunuchs. There are few studies in the past which considered the inheritance laws concerning Byzantine eunuchs because of the lack of sources.⁸⁸⁸ Cheynet, who examines of the inheritance of Byzantine aristocracy, assumes from *Peira* 31.1 that there was a principle that eunuchs could not inherit from their parents before the decision ‘undoubtedly because they themselves could not have any direct offspring inheriting their property’.⁸⁸⁹ It is, however, necessary to assess his opinion by considering previous laws concerning inheritance.

In legal sources, only the law about eunuchs’ rights of making a will could be found. The *Digest* and the *Codex Justinianus* contain an opinion of classical jurists and some decrees of later Roman emperors. The argument of Dalla that eunuchs could make their testaments seems to be reasonable.⁸⁹⁰ It is true that *Dig.* 28.2.6 points out that castrated men (*castrati*) could not have posthumous heirs while other kinds of impotent men could, but there is no mention about their right of making a will.⁸⁹¹ The third-century jurist Paul mentions that *spadones* (i.e. those who could not have children) could make their wills after the age of eighteen, but it remains uncertain whether the *spadones* in this stipulation has a meaning of castrated men or not.⁸⁹² After the fourth century, however, the emperors tend to show clearly that eunuchs could make their testament. Constantius II permits eunuchs (*eunuchi*) to make a will and ‘compose their last wishes like everyone else’.⁸⁹³ *CT* 16.5.17 promulgated under the names of Valentinian, Theodosius, and Arcadius in 389 is against Eunomians, asserting that the Eunomian *spadones* ‘shall not have the liberty either to make a testament or to take under

⁸⁸⁸ For the inheritance of impotent men, including eunuchs, in Roman law, see Dalla 1987, 201-28; Kontani 2018, 324-5. For general accounts of transmission of property in the Byzantine empire, see Laiou 2009, 51-75.

⁸⁸⁹ Cheynet 1998, 5.

⁸⁹⁰ Dalla 1987, 201-28; Kontani 2018, 324-5.

⁸⁹¹ *Dig.* 28.2.6 (Ulpian, *Sabinus* book 3).

⁸⁹² Paul, *Sentences.* 3.4A.2.

⁸⁹³ *CJ* 6.22.5, ed. and tr. Frier, Kehoe, and McGinn, 1496-7. *componere postremas exemplo omnium voluntates*,...

testament'.⁸⁹⁴ Eunomians were the supporters of Eunomius of Cyzicus, who took an extreme position against the Nicene creed.⁸⁹⁵ Stachura, who studies a series of anti-Eunomian decrees, convincingly argues that the expression of Eunomian *spadones* means eunuch *cubicularii* in the imperial court, who were Eunomian followers.⁸⁹⁶ Considering the fact that the same emperors impose the same sanctions on Manichaean people,⁸⁹⁷ this law probably suggests that the inheritance and the succession of 'Orthodox' eunuchs' property were permitted at that time; in other words, the emperor problematised succession and inheritance of the Eunomian eunuchs not because they were *spadones* but because they were heretics. Leo I also seems to take it for granted that chamberlains (*cubicularii*), including eunuchs, could make a testament when he decided that slaves gifted to the emperor as chamberlains would be immediately freed from their former masters.⁸⁹⁸ In conclusion, it is probably undoubtable that eunuchs including castrated men were permitted to make their will by the later Roman emperors.

On the other hand, there was an exceptional stipulation which had restricted the right of inheritance to those who had no child about one thousand years before the *Peira*: the marriage legislation of Augustus (27BC-14AD). In *lex Iulia de maritandis ordinibus* (18 BC) and *lex Papia Poppaea* (AD 9), Augustus restricts partly the ability of those who were unmarried and who were married but childless adults to receive their inheritances and legacies in order to promote marriage and the procreation of children in the Roman wealthy upper classes.⁸⁹⁹ This fact could tempt us to connect this Augustan decree with *Peira* 31.1 and to consider that those who have no or poor chance of having offspring, such as eunuchs or singles, could be subject to restriction on their inheritance rights. In addition, it is interesting that Theophylact of Ohrid in the early twelfth century mentions an old law which deprived those who did not get married of privileges in order to increase the population of the city of Rome.⁹⁰⁰ Although he did not explain who issued such a law, it might be possible to identify

⁸⁹⁴ *CT* 16.5.17, ed. Mommsen and Meyer, vol. 1, 861.2-3; tr. Pharr, 453. Eunomiani spadones nec faciendi nec adipiscendi habeant licentiam testamenti.

⁸⁹⁵ Stachura 2006, 45.

⁸⁹⁶ Stachura 2006, 50-52.

⁸⁹⁷ *CT* 16.5.18.

⁸⁹⁸ *CJ* 12.5.4.

⁸⁹⁹ Grubbs 1995, 103-4; Johnston 2015, 206-7.

⁹⁰⁰ Theophylact of Ohrid, ed. Gautier, 315. 4-12; tr. Gautier, 314.

this law with that of Augustus, as Simon points out.⁹⁰¹ It should, however, not be, overlooked that Constantine I had eliminated the distinctions made by Augustus in his law of 320 and freed both celibates and childless people from ‘the threatening terrors of the law (*immentibus legum terroribus*)’.⁹⁰² As a matter of fact, the purpose of the Augustan legislation is different from that of Basil’s decision, for the inheritance restriction of the former is for urging singles to get married and beget their offspring while it seems that Basil simply hoped to restrict his subjects from transferring their wealth to eunuchs by their wills. Therefore, it is improbable that the eleventh-century emperor applied the Augustan legislation for the law about the inheritance of eunuchs.

The individual cases of eunuchs mainly from the historiographical sources seem to show a possibility that eunuchs could make a testament or inherit property from others before *Peira* 31.1. In the sixth century, Prokopios recorded a failed succession of a eunuch in his *Secret History*.⁹⁰³ An Abasgian eunuch and *cubicularius* of Justinian I named Euphratas fell a victim of the emperor’s avarice and could not make his nephew inherit his property; then, the emperor confiscated all of his wealth. This story conversely suggests that eunuchs originally could make their testament in the sixth century.⁹⁰⁴ Moreover, the case of Symeon the New Theologian in the tenth to eleventh centuries might be evidence that eunuchs could have inherited wealth from their relatives if Symeon was actually a eunuch.⁹⁰⁵ According to his *Life*, Symeon who was from a rich family, ‘signed a document by which he renounced his inheritance’ before he became a monk.⁹⁰⁶ This suggests that Symeon had a right to inherit his father’s wealth in the latter half of the tenth century. In addition, we might be able to consider the abovementioned Philokales, who had bought the entire village from which he came;

⁹⁰¹ Simon 1994, 24.

⁹⁰² *CT* 8.16.1; *CJ* 8.57.1, ed. and tr. Frier, 2253. For the general accounts of the marriage law of Augustus in and after the reign of Constantine I, see Grubbs 1995, 118-39.

⁹⁰³ Prokopios, *SH*, 29.13, ed. Dewing, 196.

⁹⁰⁴ *PLRE* 3, Euphratas 2, 465.

⁹⁰⁵ For Symeon the New Theologian, see also page 136, esp. n. 600.

⁹⁰⁶ Cheynet 1998, 5, n.17. *Life of Symeon the New Theologian*, 9, ed. and tr. Greenfield, 24-5. Ταῦτα ἔφη, καὶ ἅμα πάσῃ τῇ ἐπιβαλλούσῃ αὐτῷ ἐκ γονέων περιουσία ἐγγράφως εὐθὺς ἀπετάξατο. ‘Symeon said this and at the same time renounced in writing with immediate effect all the property that would come to him from his parents’.

perhaps he started his accumulation of property by inheriting the property of his family members. Therefore, it seems possible to think that eunuchs were not prevented from inheriting property.

It is probably reasonable to revise the view that eunuchs could not inherit from their parents before *Peira* 31.1. *Peira* 31.1 certainly mentions that the testator's choice of eunuch heirs is unlawful, but it is clarified that there is no existing law which prohibits such inheritance except for a decree of Augustus which had been abolished in the fourth century.⁹⁰⁷ The fact that Eustathios and the editor of the *Peira* introduced the stipulation as a mere emperor's decision without referring to any specific law could suggest that the Basil II's decision is nearly new to the Byzantine legal tradition.

Grounds for the Decision in *Peira* 31.1: Illegality of Castration

There remains one question; why had Basil II made a decision that the testament in which a testator would leave his/her *oikos* to a eunuch kinsmen should be dismissed? Based on the above examination of previous stipulations, it is probable that the legal case in *Peira* 31.1 concerning the validity of a will had directly caused the new restriction on the rights of eunuchs. The most probable reason is that eunuchs could not have any direct offspring, as Cheynet mentions.⁹⁰⁸ He himself, however, doubts this explanation not only because Symeon the New Theologian had an opportunity to inherit his father's wealth but also because, even if eunuchs had no direct offspring, they could have a chance to bequeath their wealth to nephews, nieces, or, after the promulgation of *Nov.Leo.* 26, adopted children. Finally, Cheynet concludes that 'the emperor's opinions therefore did vary on the matter'.⁹⁰⁹ In such an ambiguous situation, the text of *Peira* 31.1 is too short to examine the specific view of Basil II about eunuchs, but it is valuable to consider possible contexts of the emperor's decision.

In the first place, Basil II's decision which attempted to restrict the testator's choice of his/her heirs seems to be unusual compared with the legal principle of inheritance. The purpose of inheritance is to transmit one's wealth to one's offspring. There seemed to be legal principles in the Roman inheritance law that partitive inheritance between children of the

⁹⁰⁷ Johnston 2015, 206-7. *CT* 8.16.1 = *CJ* 8.57.1.

⁹⁰⁸ Cheynet 1998, 5.

⁹⁰⁹ Cheynet 1998, 5.

deceased was required and that testators should not disinherit one of their offspring without good reason, such as physical and mental abuse against testators.⁹¹⁰ Leo VI and Eustathios Romaïos also aspire to this principle of equality between siblings.⁹¹¹ On the other hand, Leo VI promulgated novels concerning inheritance, but they are concerned with testators and procedures of making wills, like the aforementioned stipulations in the Roman law,⁹¹² not with inheritors.⁹¹³ Furthermore, he tended to permit various categories of people to make their testament, not to restrict their rights like Basil II.

The new legislation against the powerful promulgated by Romanos I Lekapenos, which was promulgated in 928 according to the dating of Svoronos, expresses concern about one's inheritance.⁹¹⁴ The legislator rules to prevent the powerful from accumulating a portion of the estate of a poor person through gifts or testaments.⁹¹⁵ This novel, however, conversely means that the legislator attempted to hinder the 'poor' landholders bequeathing their estate to outsiders for both themselves and their village commune. Accordingly, as *Peira* 14.22 problematises such bequeath,⁹¹⁶ it might be possible to speculate that Basil II knew this legislation and applied it to an actual case. It seems, however, unlikely that the decision in *Peira* 31.1 was derived directly from the novel because the latter does not refer to the contrast between the powerful and the poor. As we interpret the text of *Peira* 31.1 literally, eunuchs had been rejected from inheritance as eunuchs, not because they were the powerful. However, it should be noted that there had already been some imperial attempts to intervene in some kinds of inheritance before Basil II's restriction on one's choice of eunuchs as heirs.

There is no doubt that the peculiarity of the decision in *Peira* 31.1 was partly derived from its background as a decision probably based on an actual lawsuit; namely, it seems that

⁹¹⁰ *Nov.Jus.* 113.5. Cheynet 1998, 13-8; Howard-Johnston 2014, 259-71.

⁹¹¹ *Nov.Leo.* 19; *Peira* 48.10.

⁹¹² *Nov.Leo.* 5, 37-38, 40-44, 69, 82

⁹¹³ *Nov.Leo.* 5 (monks), 37 (freedmen), 38 (imperial slaves), 40 (captives), 69 (the blind, the illiterate, and women).

⁹¹⁴ For the general accounts of this novel, see McGeer 2000, 37-9.

⁹¹⁵ Romanos I, *Novel* (928), 2.1, ed. Svoronos 1994, 68.77-82, 69.76-81; tr. McGeer, 46-7. Howard-Johnston mentions similar legislation during the Macedonian era although he does not explain whose land legislation dealt with the issue. Howard-Johnston 2014, 262.

⁹¹⁶ Howard-Johnston 2014, 267.

the emperor made the decision in ruling on the individual case, not as a general novel to invalidate bequests to eunuchs. Thus, this interpretation shows the possibility that the target of Basil II's restriction on inheritance rights of eunuchs was quite limited to the inheritance of the *oikos* to a eunuch kinsman. The word *oikos*, probably means 'house' or 'household'. Kazhdan mentions that the word was used 'in a broader sense to the aristocratic mansion in urban and rural areas'.⁹¹⁷ In the legal sources, the *Synopsis Basilicorum Major* mentions that anyone should not be dragged from their *oikos* because one's *oikos* is one's castle.⁹¹⁸ The bequeathing of an *oikos* to the offspring of the deceased was often recorded in existing wills in the later Byzantine period.⁹¹⁹ As for the *oikos* in the sense of 'household', Leidholm defines the *oikos* as 'a social unit whose cohesion was based upon common ties to a single, physical structure, i.e. house or estate, and upon the dependance of its members on a singular head of household'.⁹²⁰ In any case, we cannot clarify what Basil II considered about the inheritance to eunuchs from such short text, but this might suggest a possibility that *Peira* 31.1 did not intend to restrict all bequests to eunuchs, but just the bequests of the *oikos* to eunuch kinsmen. As a matter of fact, a will of Kale, a widow of Symbatios Pakourianos in 1098 seems to prove that eunuchs could receive an inheritance from others. The widow wished her slaves, including two eunuchs, Basil and Nikolaos, to be manumitted after her death and bequeathed the former a silver bowl, a mare and a pound of gold,⁹²¹ and left the latter with the horse called Daimonitzes and a pound of gold.⁹²² This testament raises the question of whether she knew Basil II's decision or not. Assuming she knew, it might be possible to guess that she and witnesses considered this inheritance valid because she bequeathed movable goods, not her *oikos*, to eunuchs who were not her kinsmen. Perhaps, according to this idea, it might be theoretically possible for eunuchs to inherit *oikoi* from non-kinsmen, though such an

⁹¹⁷ Kazhdan 1991, 1517-8

⁹¹⁸ *Synopsis Basilicorum Maior*, K.2.45 (commentary of *Bas.* 2.3.103=*Dig.* 50.17.103). Magdalino 1984, 92.

⁹¹⁹ Macrides 1992, 91-7.

⁹²⁰ Leidholm 2019, 14.

⁹²¹ *Actes d'Ivion*, doc. 47, ed. Lefort *et al.*, vol.2, 180.22-34. *PBW*, Basileios 138 Available at: <http://pbw2016.kdl.kcl.ac.uk/person/Basileios/138/> [Accessed: 14 November 2021].

⁹²² *Actes d'Ivion*, doc. 47, ed. Lefort *et al.*, vol.2, 180.34-35. *PBW*, Nikolaos 125. Available at: <http://pbw2016.kdl.kcl.ac.uk/person/Nikolaos/125/> [Accessed: 14 November 2021].

inheritance might be less common than the inheritance from their own relatives. However, even if Basil II's decision is intended to be applied for a limited aspect, it is an undeniable fact that the emperor decided to partly restrict the right of eunuchs to inherit property from their kinsmen when he had to hand down his ruling on the disputation of a pro-eunuch testament.

Some scholars explain the context of this decision through associating it with the emperor's experiences of his great-uncle, the eunuch Basil Lekapenos.⁹²³ In particular, Tougher raises the possibility that such experiences of Basil II led to the curtailing of the inheritance rights of eunuchs.⁹²⁴ He probably means the conflict between the emperor and Basil, who held the supreme power as a bastard son of Romanos I Lekapenos. Schminck states that such a 'court decision (Gerichtssentscheid)' was issued in relation to the will of a famous eunuch, such as Basil Lekapenos, but his argument is unreasonable because Basil II problematised bequests to eunuchs not their own wills.⁹²⁵ On the other hand, it might be suggested that the emperor problematised Basil Lekapenos inheriting property from imperial family members when he was in power, although there is no hint of how much wealth the eunuch, the bastard-son of Romanos I Lekapenos, could acquire through inheritance from his kinsmen. This hypothesis, however, could be open to question on the grounds that the particular case of Basil Lekapenos could have inspired Basil II to bring disadvantages to all other eunuchs.

Although the possibility might remain that the emperor's personal view against eunuchs, represented by his attitude towards Basil Lekapenos, was the motivation to restrict eunuchs' rights, it should be noted that Basil II did continue to use some eunuchs. For instance, Sergios, whom Skylitzes describes as 'a eunuch and one of his (=Basil II's) most intimate chamberlains', played an important role as a negotiator with the Bulgars.⁹²⁶ In addition, the *protospatharios* Orestes, who was sent to campaign in Sicily by the emperor,

⁹²³ Kazhdan and McCormick 1997, 179; Tougher 2008, 56.

⁹²⁴ Tougher 2008, 56.

⁹²⁵ Schminck 2005, 310.

⁹²⁶ Skylitzes, 16.36, ed. Thurn, 351,81-94; tr. Wortley, 333. πρὸς οὗς ὁ βασιλεὺς Σέργιόν τινα ἐκτομίαν, ἕνα τῶν οἰκειοτάτων αὐτοῦ θαλαμηπόλων ἐκτέμπει, ... Tougher 2008, 104, 165.

PMBZ, Sergios (27045) Available at:

<https://www.degruyter.com/database/PMBZ/entry/PMBZ29199/html> [Accessed: 14 November 2021].

was regarded as ‘one of the most trusted eunuchs’ of Basil II.⁹²⁷ On the other hand, Kaldellis mentions that Basil II had no eunuch handlers after the downfall of his great-uncle,⁹²⁸ but Masterson points out a possibility that Nikephoros Ouranos, who was an important political figure from the early reign of Basil II (c. 980s), was a eunuch based on the fact that a lead seal shows he received the dignity of *vestarches*, which tended to be given to eunuchs, and that he seemed to have no wife or children.⁹²⁹ As a result, it seems questionable how much the conflict between the emperor and his castrated great-uncle had affected his decision concerning eunuchs as a whole. At least, however, there seems to be no doubt that the legal dispute concerning the bequest to a castrated kinsman in *Peira* 31.1 was a result of the strong presence of native eunuchs during the middle Byzantine period, for such eunuchs could be assimilated into society and maintain their ties of kinship more easily than foreign eunuchs.

It is necessary to reconsider the reasons why Basil II judged eunuchs to suffer from the restrictions on their inheritance rights. It is highly imaginable that Basil II restricted eunuchs’ right of taking property under testament due to their eunuchism. As Cheynet mentions, it seems to be difficult to explain that the emperor decided this on the grounds that eunuchs could not have any direct offspring, for eunuchs could have a kind of offspring through adoption or an uncle-nephew relationship.⁹³⁰ In addition, this explanation is probably unreasonable from the fact that other kinds of childless people, including unmarried men and monks, seem to be permitted to take property under testament, although, as mentioned above, there is the case of Symeon the New Theologian who gave up the inheritance right to property

⁹²⁷ Skylitzes, 16.47, ed. Thurn, 368,82-84; tr. Wortley, 348. ἓνα ὄντα τῶν πιστοτάτων εὐνούχων, ... Tougher 2008, 104,161. *PMBZ*, Orestes Aichmalotos (26199) Available at: <https://www.degruyter.com/database/PMBZ/entry/PMBZ28353/html> [Accessed: 14 November 2021].

⁹²⁸ Kaldellis 2017, 139.

⁹²⁹ Masterson 2019, 405-11. For detailed information on Nikephoros’ life, see *PMBZ*, Nikephoros Uranos (25617) Available at: <https://www.degruyter.com/database/PMBZ/entry/PMBZ27771/html> [Accessed: 14 November 2021].

⁹³⁰ Cheynet 1998, 5.

of his father before he became a monk.⁹³¹ Therefore, other aspects of eunuchs should be considered.

Another version of Basil's decision is helpful for this examination since *Peira* 31.1 just stated that the choice of heir was unlawful. This is included in the *Tipoukeitos*, which is an index of the *Basilika* written by a judge named Patzes at the end of the eleventh century, about a half-century after the *Peira*.⁹³² It is noticeable that the author of the *Tipoukeitos*, who refers to the same decision of Basil II in *Peira* 31.1, presents another basis for the imperial decision:⁹³³ 'because the law hinders the act of castration, punishing those who perform it'.⁹³⁴ Although it is uncertain whether this sentence was Patzes' own comment or the original words of Basil II, it shows a possibility that the emperor decided on the case based on the fact that castration was prohibited in the empire. Such reasoning seems unusual compared to the other stipulations in the civil laws examined above, which had restricted the rights of eunuchs due to their castration and their lack of reproductive function.⁹³⁵ As a result, *Tipoukeitos* 44.1.158, and perhaps *Peira* 31.1, might show a negative attitude not only to a specific type of nomination of heirs but also the act of castration. In other words, there is a possibility that eunuchs were considered different from other categories of the childless in terms of the illegal character of castration. This explanation in the *Tipoukeitos*, however, also seems to suggest that there was no other way to justify this decision. Thus it suggests a possibility that the legislator himself did not consider eunuchs' incapacity for having their offspring as reasonable grounds for justifying his decision that the inheritance to eunuchs should be restricted.

As a result of this examination, it seems to be safe to understand that the decision in *Peira* 31.1 originated from Basil II's opinion about eunuchs' right of inheritance. The existing sources do not prove that eunuchs suffered such a disadvantage before this decision. This decision, however, suggests that people, including the emperor, could have doubts about the

⁹³¹ Cheynet 1998, 15, 18-22.

⁹³² Burgmann 1991, 2088.

⁹³³ Dölger 2003, 227 (Nr. 819); Schminck 2005, 310.

⁹³⁴ Patzes, *Tipoukeitos* 44.1.158, ed. Ferrini *et al.*, vol. 3, 124.27-31. Ἰστέον δέ ὅτι, ἐὰν γρά(ψη) τις, ὅτι· «Καταλιμπάνω τὸν οἶκόν μου τοῖς συγγενέσι μου τοῖς εὐνουχιζομένοις», οὐκ ἀκούεται παράνομος γάρ ἐστιν αἵρε(σις). ὁ γὰρ νόμος τὴν εὐνουχότητα κωλύει τιμωρῶν καὶ τοὺς τοῦτο ποιοῦντας. ἔκρι(νε) δὲ τοῦτο καὶ κύρ(ιος) Βα(σίλειος) ὁ βασιλεὺς.

⁹³⁵ Cf. *Inst.* 1.11.9; *Nov.Leo.* 98.

validity of a testament which was eager to leave a house/household to a castrated kinsman. It might be possible that these doubts about the right of inheritance were relatively new ones which arose from the presence of eunuchs from within imperial territory, for such eunuchs could have close relationships with their kinsmen much more easily than foreign eunuchs.⁹³⁶ In this situation, Basil II had settled the dispute by rejecting flatly the validity of the will. Finally, the compilation of this decision in the *Peira* and the *Tipoukeitos* probably enabled this decision to be known as a judicial precedent and could force eunuchs into a more disadvantageous position than before when someone instituted a lawsuit concerning a testament with similar content to which *Peira* 31.1 invalidated. As a result, Basil II showed a different attitude towards eunuchs than Leo VI, for he had not only declared a new restriction on testators and their eunuch relatives and used a new reasoning in such a decision that it was natural that some rights of eunuchs should be limited due to the illegality of castration.

Based on the above examination, we will finally consider another possible context of *Peira* 31.1 in more detail: the increasing presence of eunuchs from within imperial territory and their relationship with native families. Kazhdan and McCormick indicate that *Peira* 31.1 was a reaction against the assimilation of native eunuchs into imperial society, but they do not examine this decision further.⁹³⁷ The examination of court eunuchs in the latter part of the Macedonian dynasty will reveal that the ties of eunuchs with their family members tended to be much stronger than at the time of Leo VI, although there is little evidence that restrictions on inheritance to eunuchs from their kinsmen in *Peira* 31.1 impacted on the current situation of eunuchs' property. As a result, it will show the possibility that the decision of Basil II in *Peira* 31.1, with his abovementioned novel against the powerful, might be derived from the emperor's general wariness of such changes in the circumstances of eunuchs.

Family Ties of Eunuchs from the End of the Tenth Century

The presence of native eunuchs in the empire seemed to gradually increase in the course of the Macedonian era. As mentioned in chapter 3 and chapter 4, the presence of eunuchs who

⁹³⁶ Kazhdan and McCormick 1997, 179.

⁹³⁷ Kazhdan and McCormick 1997, 179.

were from within the imperial territory represented by the example of Paphlagonia was a remarkable aspect of the situation of eunuchs in the middle Byzantine period. Basil II, even after the deposition of Basil Lekapenos, still used eunuchs, like Orestes and Sergios, although his decision concerning the restriction on eunuchs' inheritance might have been derived from the illegality of castration. Unfortunately, their origins are uncertain. On the other hand, Masterson raises the possibility that Nikephoros Ouranos was a eunuch.⁹³⁸ If his argument is correct, it is highly possible that Nikephoros had a close relationship with other members of the Ouranos family.⁹³⁹ Moreover, it is sometimes mentioned that John the *orphanotrophos*, who exercised great power during the reigns of Romanos III and Michael IV, had already been prominent during the reign of Basil II as *protonotarios* in 1022.⁹⁴⁰ However, sources mention that John the *orphanotrophos* served Romanos III before his accession to the throne.⁹⁴¹ Although scholars tend to identify John the *protonotarios* with John the *orphanotrophos*,⁹⁴² in my opinion, there seems to be weak evidence to support it, for both Psellos and Skylitzes, who mention both John the *protonotarios* and John the *orphanotrophos*, do not assert that John the *orphanotrophos* had held the office of *protonotarios*.⁹⁴³ It might, however, be possible to consider that whether John the *orphanotrophos* was appointed as *protonotarios* or not, he played a certain role for Basil II, as Psellos says: 'without promoting him to any exalted positions of responsibility, he (i.e. Basil II) used him with genuine

⁹³⁸ Masterson 2019, 405-11.

⁹³⁹ Masterson 2019, 405-18.

⁹⁴⁰ Skylitzes, 16.45, ed. Thurn, 367.52-4; tr. Wortley 346. Psellos also mentions that John had served Basil II. Psellos, *Chron.* 3.18.2-8, ed. Reinsch, vol. 1, 43; tr. Sewter, 75-6.

⁹⁴¹ Skylitzes, 18.17, ed. Thurn, 389.67-79; Psellos, *Chron.* 3.18.2-8, ed. Reinsch, vol. 1, 43; tr. Sewter, 75-6.

⁹⁴² *PMBZ*, Ioannes Orphanotrophos (23371) Available at:

<https://www.degruyter.com/database/PMBZ/entry/PMBZ25525/html> [Accessed: 15

November 2021]. Janin 1931, 431; Brand, Kazhdan and Cutler 1991, 1070; Tougher 2008, 56.

⁹⁴³ For example, *the Prosopography of the Byzantine World* itemises John the *protonotarios* and John the *orphanotrophos* separately. *PBW*, Ioannes 68 Available at:

<http://pbw2016.kdl.kcl.ac.uk/person/Ioannes/68/>; Ioannes 104 Available at:

<http://pbw2016.kdl.kcl.ac.uk/person/Ioannes/104/> [Accessed: 15 November 2021].

respect'.⁹⁴⁴ In any case, there is no doubt that even after the reign of Basil II, there were some native eunuchs who had enormous power in the empire, such as John the *orphanotrophos* and Nikephoritzes.⁹⁴⁵

John the *orphanotrophos* is one of the most remarkable eunuchs who showed strong family ties. He had great power and wealth, and succeeded in promoting his brother and his nephew to the throne as Michael IV and Michael V respectively. He also had eunuchs brothers named George and Constantine who held imperial offices.⁹⁴⁶ It is notable that Psellos describes John as a kind of 'a father to the whole family (πατὴρ λόγον πρὸς τὸ συγγενὲς ἐπέχοντα)' and 'a pillar of his family (τὸν τοῦ γένους στύλον)'.⁹⁴⁷ Michael Attaleiates also describes John as 'a leader of his relatives (τὸν μὲν ἐξάρχοντα τούτων)'.⁹⁴⁸ John was removed from his powerful position in the reign of his nephew and eventually exiled and blinded in the reign of Constantine IX Monomachos (1042-55),⁹⁴⁹ but it does not mean that emperors had given up using eunuchs. Michael V ordered the castration of all of his relatives, most of whom had already become adults and even fathers, after he had removed John the *orphanotrophos*, but he may just have replaced John with another eunuch, the abovementioned Constantine who was a brother of John and an uncle of the emperor.⁹⁵⁰

⁹⁴⁴ Psellos, *Chron.* 3.18.5-8, ed. Reinsch, vol. 1, 43; tr. Sewter, 76. εἰς ὑπερηφάνους μὲν οὐκ ἀναβιβάσας ἀρχὰς· γνησιώτατα δὲ πρὸς αὐτὸν διακείμενος.

⁹⁴⁵ *PBW*, Nikephoros 63 Available at: <http://pbw2016.kdl.kcl.ac.uk/person/Nikephoros/63/> [Accessed: 15 November 2021].

⁹⁴⁶ Tougher 2008, 62. Michael IV had another eunuch relative named Antony Paches, who became the bishop of Nicomedia. Tougher 2008, 71.

⁹⁴⁷ Psellos, *Chron.* 5.9.28-9, 5.42.3-9, ed. Reinsch, vol.1, 84, vol. 1, 102; tr. Sewter 126, 146-7.

⁹⁴⁸ Attaleiates, 4.3, ed. and tr. Kaldellis and Krallis, 17.

⁹⁴⁹ It should be noted that Isaac I Komnenos (1057-9) seemed to remain grateful to John after his death and donated twenty-four *nomismata* annually to the monastery Theotokos Dekapolitissa for candles lit at tomb of John. Tougher 2008, 66; Messis 2014, 51.

⁹⁵⁰ Tougher 2008, 62. Psellos, *Chron.* 5.42.3-9, ed. Reinsch, vol. 1, 102; tr. Sewter, 146-7; Attaleiates, 4.3, ed. and tr. Kaldellis and Krallis, 17-9. Skylitzes, however, mentions that Constantine was also exiled to his estate. Skylitzes, 20.1, ed. Thurn, 416-7; tr. Wortley 391-2.

As for the inheritance of these court eunuchs, descriptions of these court eunuchs seem not to provide an answer to the question of whether Basil's decision in a lawcourt collected in *Peira* 31.1 did affect the lives of eunuchs. It should, however, be noted that, even if eunuchs were not permitted to inherit their kinsmen's house/household, it seems questionable that they suffered serious financial disadvantages after Basil II's decision because they probably had other means of accumulating wealth (e.g. stipends from their offices, bribes, and gifts). For example, it is reasonable to speculate that John the *orphanotrophos* could have acquired wealth by taking advantage of his influential position. There seems to be, however, no hint about what happened to the property and wealth of John after his fall; namely, there is a question whether his fortune had been inherited by his relatives, including eunuchs such as his brother Constantine. In my opinion, the answer is in the negative because his deposition and death was exceptional. It might be presumed that his property and wealth had been confiscated, or inherited, by Michael V at the time of his deposition, or had been confiscated by Constantine IX at the time of his death. Skylitzes also reports that John's brothers, eunuchs George and Constantine had estates in Paphlagonia and Opsikion respectively.⁹⁵¹ Additionally, he told a story that Constantine, who was banished by the empress Zoe, hid fifty-three *kentenaria* of gold in a cistern at his house.⁹⁵² Moreover, Attaleiates reports that the *logothetes tou dromou* Nikephoritzes had received the monastery of the Hebdomon as a gift and procured numerous estates and revenues from the emperor Michael VII Doukas (1071-78).⁹⁵³ He also enjoyed considerable revenues from his granary (*phoundax*) at Raideustos which he had established with the emperor's permission.⁹⁵⁴ Accordingly, it seems unlikely that eunuchs suffered serious financial disadvantages even after Basil II's decision in *Peira* 31.1.

Whether this decision became a general rule afterwards or not, the fact that the emperor had restricted more or less the inheritance rights of eunuchs, in addition to Leo VI's novel which prohibited eunuchs from contracting legal marriage, might have significant

⁹⁵¹ Skylitzes, 20.1, ed. Thurn, 416-7; tr. Wortley 391-2. *PBW*, Georgios 106 Available at: <http://pbw2016.kdl.kcl.ac.uk/person/Georgios/106/>; Konstantios 64. Available at: <http://pbw2016.kdl.kcl.ac.uk/person/Konstantinos/64/> [Accessed: 15 November 2021].

⁹⁵² Skylitzes, 21.1, ed. Thurn, 422; tr. Wortley, 397.

⁹⁵³ Attaleiates, 25.3, ed. and tr. Kaldellis and Krallis, 365-7.

⁹⁵⁴ Attaleitates, 25.4-6, ed. and tr. Kaldellis and Krallis, 365-73.

meaning. In particular, it is notable that the issues on which Basil II attempted to make a novel and court decision, amassing of neighbouring properties by court eunuchs and succession to eunuchs from their kinsmen, probably have their roots in a common situation that eunuchs kept a close relationship with their native places and/or their family members in the empire. Considering the abovementioned cases of native eunuchs who had close relationships with family members, it is not hard to suppose that such a situation was caused by the increasing numbers of native eunuchs during the middle Byzantine period, which could make eunuchs, who had tended to be marginalised in the empire, more integrated into society. Therefore, it seems to be probable that Basil II was wary of such an expansion of the power of native eunuchs and considered it better to keep eunuchs away from their family through rejecting the will in which testator desired to bequeath his/her property to a castrated kinsman on the grounds of the illegality of castration. On the other hand, if this is the case, the prosperity of powerful native eunuchs, represented by the Paphlagonian family of John the *orphanotrophos*, is an interesting phenomenon which might prove on the one hand that the trend of the assimilation of eunuchs actually existed, and on the other that Basil II's decision was insufficient to control this trend. Although the political castration of male relatives by Michael V seems to prove that the act of castration was still effective in marginalising potential enemies without using the extreme measure of death,⁹⁵⁵ the social position of castrated men had changed significantly from the reign of Justinian I and even from that of Leo VI.

Conclusion

This chapter has examined two imperial decisions concerning eunuchs after the *Novels of Leo VI*. It should be noted that these stipulations seem to be new as compared with Leo's novels in terms of both subjects and contents. Basil II's novel in 996 problematised the illegal landholdings of a certain eunuch and the remaining influence of Basil Lekapenos, whereas their eunuchism were ignored. On the other hand, the same emperor decided that people could not bequeath their house/household to eunuch kinsmen by their will, possibly on the grounds

⁹⁵⁵ Psellos, *Chron.*, 5.42.2-10, ed. Reinsch, vol. 1, 102; tr. Sewter, 146-7; Attaleiates, 4.3, tr. Kaldellis and Krallis, 16-9.

that castration had been prohibited in the empire. Although the lack of sources made it hard to clarify the wider context of these new stipulations, it is suggested at least that these stipulations were made because of contemporary concerns of people including the emperor, e.g. reinforcement of imperial authority and doubts about the validity of a specific clause concerning eunuchs in a testament.

This study of Basil II's decisions showed the possibility that the emperor was wary of the growing family networks of native eunuchs. Of course, it is unlikely that the emperor intended to stop completely the trend of assimilation of eunuchs in the empire because he continued to use such eunuchs in his government. However, *Peira* 31.1 might suggest that the emperor's unwillingness to welcome these circumstances was in the background of his restrictions on eunuchs' acquiring of property through bequests from their kinsmen. If this hypothesis is correct, such wariness of the increasing assimilation of eunuchs suggested by the decisions of Basil II, in addition with the case of John the *orphanotrophos*, could perhaps explain why the politically significant eunuchs, like John, did not appear after the twelfth century. This point will be considered in the conclusion of this thesis.

Conclusion

Rejection and Acceptance: Eunuchs in Roman and Byzantine Law

In human society, the lack of reproductivity of both a male and a female could be a serious problem for themselves, their spouse, their family, and perhaps their community as a whole. The existence of eunuchs in later Roman and Byzantine society made this a more familiar problem to people. In particular, most emperors from the fourth century onwards were inseparable from eunuchs, who were their court servants and military commanders. Therefore, it seems to be a natural outcome that they, as legislators, attempted to deal with legal issues concerning eunuchs even when the character of imperial legislation gradually changed in the course of the period. The civil authority, however, was not the only source of law, especially in the Byzantine period. The canons from the fourth century onwards also showed an interest in eunuchs, reflecting the situation that eunuchs could become priests, or even patriarchs of Constantinople. The comprehensive analysis of these decisions of emperors and the Church in this thesis clarified how infertile men represented by eunuchs were treated by imperial authorities which reflected the Christian norms, including canon laws and the contemporaneous circumstances of Byzantine society.

The later Roman and Byzantine rulers dealt with male infertility in various ways, but we found a degree of continuity in their laws. To begin with, the act of castration, which intentionally makes men infertile, had never been permitted, while punishments against it were modified from the fourth century through to the tenth century. On the other hand, emperors like the Isaurian emperors used mutilation of male genitals for punishing criminals. As for infertile men themselves, however, the legislators tended to deal with them leniently. Their infertility became a significant problem in the laws, or probably in everyday life, only when they attempted to get married and to adopt. Then, male infertility was divided into two categories, between the castrated and the non-castrated, on the ground that the reproductive ability of the latter might be recovered. Infertile men whose genitals were intact were generally permitted to both marry and adopt, while impotence for three years could lead to the dissolution of their marriage. Those who had been castrated and perhaps who had had their genitals damaged, however, were not allowed to get married, nor to adopt, until Leo VI abolished the restriction on eunuchs adopting. As a result, this means that later Roman and Byzantine emperors shared an almost consistent understanding of the legal status of infertile men during the period from the sixth century to the eleventh century.

On the other hand, the imperial attitude towards castration and eunuchs is flexible in some respects. Firstly, the emperors could change the old stipulations promulgated by their predecessors, as Leo VI ruled that castrated men should be allowed to adopt, abolishing a decision of Justinian I. The reverse is also true: Basil II decided that bequests to eunuchs were to be restricted. Secondly, the permanent infertility of eunuchs was the most significant feature for legislators when they promulgated laws about eunuchs, but this was not necessarily the only reason why legislators problematised them; it seems likely that Basil II decided to partly restrict bequests to eunuchs on the ground that the act of castration was prohibited in the empire. Finally, various images of eunuchs emerged in the laws. The present thesis clarified especially that the *Novels of Leo VI* used different images of eunuchs for different purposes in his novels: namely, victims of castration, the disabled, abnormal creatures, and chaste guardians of women and the nuptial bed. It could be concluded that these images are probably rhetorical *topoi* as well as actual images of eunuchs that the legislator could have shared with his officials, including eunuchs themselves. As a result of these flexibilities, the legislator presents his normative image of eunuchs who lived in the empire depending on the situation at that time, e.g. his personal feelings toward them, actual cases brought to him from eunuchs or others, and the wider trends of law and society. One of the best examples is *Nov.Leo. 98* which emphasised that eunuchs must be those who had lost their desire for women although there was a possibility that some eunuchs experienced sexual desire in spite of the defects of their genitals. In conclusion, these laws could be mirrors that reflected a sort of ‘ideal eunuch’ for rulers and their empire. Such imperial views about different aspects of eunuchs revealed in the present thesis provide significant new food for thought in considering emperor-eunuch relationships in Byzantium.

Transformations of the Byzantine Empire, Law, and Eunuchs

The Byzantine legal sources inform us not only of the consistency and continuity in the legal status of eunuchs, but also of various changes that occurred from the sixth century to the eleventh century. It should be noted that these changes did not necessarily repeal the preceding provisions and that old laws sometimes remained in private lawbooks even after the promulgation of new ones, but these changes in laws provide significant clues to clarify the contemporaneous views of legislators towards specific subjects. Preceding studies, which

dealt with reasons for some of these changes, tended to focus on the relation between the changed clauses and eunuchs at that time. The present study, however, clarified that these changes in laws about eunuchs could be reinterpreted in the wider context, such as the transformations in Byzantine law and society. As a conclusion of the current study, the rest of the thesis will provide a picture of the history of eunuchs that emerged from Byzantine law.

The major background of the Isaurian law is the seventh-century crisis as a result of the rise of Islam and the loss of eastern provinces. When the empire stabilised, the emperors under the Isaurian dynasty published the *Ecloga* in order to reimpose central control over provincial magistrates.⁹⁵⁶ At the same time, the *Ecloga* emphasised its Christian character rather than the Roman one in the law of Justinian I, using the word ‘Christian’, not the word ‘Roman’, for describing imperial citizens.⁹⁵⁷ Although the lawbook inherited numerous laws from the law of Justinian I, the legislator reshaped the concept of law and emperor in accordance with the model of the Old Testament.

In such a context, mutilation of the penis was chosen as an official punishment for those who had committed bestiality when penal mutilation was introduced systematically in book 17 of the *Ecloga*. This introduction of penal mutilation, including that of the penis, was on the one hand probably based on actual cases of bodily mutilation performed in the later Roman period, and on the other hand was derived from the biblical idea that mutilation of one’s polluted limb would purify his/her sin. In that context, genital mutilation was accepted as one of the basic tools for putting an end to immoral sexual acts which had been problematised in the canonical context.

The characteristics of the legal texts in the Isaurian period seem to explain why these texts contain few references to eunuchs. It seems to be strange that the Isaurian legislators did not collect Justinian I’s provisions concerning eunuchs and castration. The present thesis concluded that the reason for this was probably not because the situation surrounding eunuchs had significantly changed after the reign of Justinian I but rather because the difference between the nature of these two legal projects caused the omission of laws concerning eunuchs. The *Ecloga*, which was probably made with the intention that it was to be used as a practical handbook of law by magistrates, was promulgated after the large-scale omission and simplification of the laws of Justinian I. In the course of this compilation, old provisions

⁹⁵⁶ Humphreys 2015, 264-5.

⁹⁵⁷ Humphreys 2015, 255.

concerning castration and male infertility were hardly recorded, probably because the eunuch status of people, including infertility, was relatively insignificant in terms of numbers of eunuchs and their characters in comparison with men and women. On the contrary, it is remarkable that an issue concerning the life of eunuchs was discussed in canon law: canon 5 of the Council in Trullo held at the end of the seventh century. This suggests that authorities still had an interest in eunuchs after the reign of Justinian I, while eunuchs became restricted more severely to living only with certain women as a result of the canon.

The laws of the Macedonian period reflected the political, social, and religious situation in the ninth century. In 843, the conflict over Iconoclasm from the eighth century ended in the triumph of the iconophiles. The Macedonian emperors Basil I and his son Leo VI needed to cleanse the traditional laws through reworking the *Ecloga* of Leo III and Constantine V, both of whom had been condemned as iconoclastic emperors in 843. The project of ‘Cleansing of the Ancient Laws’ was carried out in response to both the end of the iconoclastic controversy and the rivalry with western rulers over imperial legitimacy with regard to ‘Roman’ identity. Accordingly, the emperors carried out the compilations of the law of Justinian I, with some provisions of the Isaurian emperors, in a larger scale than the Isaurians while they also translated Roman traditional law written in Latin into Greek.⁹⁵⁸ As a result of the Macedonian legal project, the legal compilations represented by the *Sixty Books/Basilika*, which were more voluminous than the *Ecloga*, were promulgated, including the laws about eunuchs and castration collected or promulgated during the reign of Justinian I.

In the course of such reanimation of traditional law, the emperor Leo VI promulgated numerous novels in which he refined the old provisions of Justinian I in the middle Byzantine context and incorporated them into the context of Orthodox Christianity. The chapters in this thesis clarified that individual novels concerning eunuchs and castration were not isolated from legal and social contexts at the time of their promulgation. Three novels (renewed prohibition on castration, permission for eunuchs to adopt, prohibition on the marriage of eunuchs) were promulgated on the basis of a variety of factors, such as the impact of canon laws, changes in the legal system concerning penalties, marriage, and adoption, and the emperor’s own experience with eunuchs. In particular, it is evident that the imperial virtue of *philanthropia* and the Christianisation of the Roman legal tradition since Justinian I’s reign were the main factors behind the changes in Leo’s novels.

⁹⁵⁸ Chitwood 2017, 184-90.

On the other hand, it seems also true that the contemporaneous situation surrounding eunuchs had an influence on these novels. At that time, the position of eunuchs in the imperial government and society had been established, while the presence of eunuchs who had been born in the empire increased in central government. Therefore, the keen interest of Leo VI in eunuchs was derived from such changes regarding imperial eunuchs, in addition to the emperor's close relationship with his eunuchs at the imperial court. The three novels concerning eunuchs and castration were probably promulgated in order to offer an updated framework for eunuchs in the empire for the first time since the sixth century, reflecting on the actual situation of eunuchs during Leo's reign.

The novel and decision of Basil II could also be explained in this context, but his interest is slightly different from that of Leo VI. It is notable that the period from Leo VI to Basil II witnessed the appearance of several eunuchs who were from within imperial territory, used their family relationships with their native families, and seized political power in the empire, such as Basil Lekapenos. In this situation, Basil II took a different attitude towards this situation from Leo VI, who was partly favourable to eunuchs and abolished old restrictions on their adoption; namely, Basil II decided that some kinds of inheritance to castrated men from their kinsmen were to be restricted. In addition, he problematised the accumulation of land made by the powerful, including court eunuchs, who were from within the imperial territory. This decision might suggest that the political power of native eunuchs and their assimilation into the imperial society made the emperor take precautions against them, although these laws of Basil II do not seem to have been promulgated for the purpose of addressing the issue directly.

The examination of law and eunuchs after the Macedonian period is beyond the scope of the current thesis, but it is worth making some comments on how the abovementioned situation shifted. Regarding the law, Chitwood mentions that Byzantine secular law based on the Roman legal tradition disappeared after the end of the Macedonian period.⁹⁵⁹ According to him, the emperors from the twelfth century onwards, such as the Komnenoi and the Palaiologoi did not show great interest in the Roman legal tradition, nor lead the codification projects as well as their Macedonian predecessors had done.⁹⁶⁰ Indeed, as far as is known, there is no novel concerning eunuchs after the reign of Basil II, while some

⁹⁵⁹ Chitwood 2017, 187.

⁹⁶⁰ Chitwood 2017, 187.

clauses concerning eunuchs and castration promulgated between Justinian I to the Macedonian period were compiled in collections of both canons and secular laws made by individual canonists.

The changes in the situation of eunuchs after the end of eleventh century might be derived from the situation of which Basil II was wary: the increasing presence of native eunuchs. The situation of eunuchs, especially in central government, seemed to experience gradual changes after the rise of the Komnenian dynasty, from the accession of Alexios I Komnenos (1081-1118) in 1081 onwards. Tougher points out that the peak of the political power of court eunuchs had passed, although court eunuchs did not completely disappear during that period.⁹⁶¹ In particular, the period seemed to see no eunuch who wielded significant political power in the empire, except for the period between the reign of Andronikos I Komnenos (1180-83) and that of the Angeloi (1185-1204).⁹⁶² When he inspected theories concerning the background of such change, Tougher argued that emperors like Alexios I Komnenos chosen to govern the empire not with his eunuchs but with his family members and foreigners partly because ‘the self-interest of eunuchs was perhaps more pronounced due to the evident rise of the home grown eunuch in the middle Byzantine period’.⁹⁶³ Therefore, it might be possible to consider that Basil II’s wariness behind *Peira* 31.1, which chapter 7 in this thesis pointed out, support his argument; namely, the twelfth-century situation that some Komnenian emperors relied on their family as a substitute for eunuchs might be one consequence of the negative view of the eleventh-century emperor towards the assimilation of eunuchs in the empire.

The current thesis is important because it provides what conventional studies of eunuchs have not shed light on the legal status of eunuchs and its transition process in legal sources. It established how Byzantine emperors who gave important position to eunuchs themselves understood eunuchs and sometimes attempted to intervene in their lives. Moreover, the present thesis has updated the traditional images of Byzantine legal stipulations concerning eunuchs. It can be argued that these laws were not the mere static and obsolete legacy of the

⁹⁶¹ Tougher 2008, 119. Cf. Guiland 1943, 234. For a general account of Byzantine eunuchs between the middle of the thirteenth century and the year 1400, see Gaul 2002.

⁹⁶² Kazhdan and Epstein 1985, 70; Tougher 2008, 120-3.

⁹⁶³ Tougher 2008, 124-5. See also Tougher 2002, 151; Gaul 2002, 209.

Roman empire nor independent testaments from current circumstances in Byzantium; rather, the close examination of these laws enriched our understanding of eunuchs in imperial society, supplemented with the testaments of other kinds of sources. As a result, the abovementioned picture of eunuchs in this thesis is significant not only because it eliminates inconsistencies in the interpretation of the laws about eunuchs in conventional studies, but because it significantly informs the history of Byzantine eunuchs, especially the transition process of their social position and their political power in the central government, from the new point of view of Byzantine law. In that respect, the present author believes that the results obtained by the present thesis will contribute to the future research on Byzantine eunuchs.

In addition, the current thesis demonstrated the significance of taking legal sources into greater consideration when studying Byzantine eunuchs. Although the nature and function of law in the empire after the seventh century might have changed from the later Roman empire, the importance of imperial laws as sources for grasping the intentions of imperial government towards contemporaneous issues more or less remained. Furthermore, close examination of individual law concerning eunuchs shows the necessity that each stipulation must not be isolated from its wider legal and social contexts. In this regard, the methodology of the current thesis — comparison of certain legal clauses with older or contemporaneous ones, clarification of their transformation or continuity, and consideration of their context — is significantly helpful. As a result, this also suggests the possibility that this methodology could contribute to the study of different topics to eunuchs in the Byzantine empire, considering transformation and continuity of not only Byzantine society but also law in the Byzantine empire.

Appendix 1

First Case of the Castration of a Member of the Imperial Family in the Seventh Century

It is well known that the amputation of a body part of a member of the imperial family or of an emperor himself appeared frequently in historiographical sources from the seventh century onwards. They were variously made blind, had their hands, nose, or tongue mutilated as a result of a revolt or usurpation. Castration of son(s) of a dethroned emperor was also used for removing a threat to a new emperor, although it seems to be less familiar in the seventh century than in the later period.⁹⁶⁴ Thus, there is a necessity to examine earlier cases of political castration.

The castration of a son of Martina and the emperor Herakleios seems to be the first case of such a castration in the existing sources, while there is a doubt about the credibility of this event. In the second half of the seventh century, John, a bishop of Nikiu wrote in his chronicle that the youngest son of Martina had been castrated as a result of the downfall of his brother Heraklonas (641) in 641. However, there is a question mark over how his description faithfully reflected an actual event, for his chronicle, which may have been written in Greek, is transmitted to the present day only as the Ethiopic version translated from Arabic.⁹⁶⁵ Moreover, even if this version of John's chronicle is almost the same as his original, an inconsistency in the text makes it difficult to grasp the situation of this castration, including its credibility. Therefore, this appendix will analyse this case and show his description can be reasonably considered as one of the earliest cases of political castration.

The complicated description of John of Nikiu brings about different interpretations of which son had been castrated in previous studies. John describes the end of the emperor Heraklonas, a son of Herakleios and his mother Martina with his brothers as follows:

he (i.e. Theodore, a son of Constantine III (641)) had Martina and her three sons, Heraclius (= Heraklonas), David, and Marinus, escorted forth with insolence, and he

⁹⁶⁴ Krsmanović 2017, 41-64.

⁹⁶⁵ Brand 1991, 1066. This thesis uses English translations of Charles in addition to the French translation of Zotenberg.

stripped them of the imperial crown, and he had their noses cut off, and he sent them in exile to Rhodes.⁹⁶⁶

Following the deposition of the patriarch Pyrrhus, John mentions the sons of Martina again in 120.54:

‘and the youngest son of Martina was castrated, through fear, as they said, of his becoming emperor when he grew up. But the child could not endure the great wound, and straightway died. And the second of her sons was a deaf-mute, and so was unfit for the throne. For this reason they did him no injury’.⁹⁶⁷

Although the other chronicler Theophanes mentions the mutilation of Heraklonas’ nose and Martina’s tongue only, Maleon and Krsmanović follow the lead of John of Nikiu and assume that David was the second son of Martina and deaf-mute, and Merinos was the youngest son and castrated.⁹⁶⁸ Maleon states Martina’s tongue and the noses of her three sons, Heraklonas, David and Marinus were cut off and the youngest was also castrated.⁹⁶⁹ Krsmanović agrees with him concerning Heraklonas and Martina, but suggests that David and Marinus did not have their noses cut off, that David was spared because of his birth defect although Marinus was castrated.⁹⁷⁰ Laes adds another possibility that the castrated son whom John mentions was Martina’s other son whose name remains unknown, although he does not exclude the possibility that Marinos was castrated.⁹⁷¹ On the other hand, the *PMBZ* explains mistakenly that both David and Marinos were castrated and sent into exile.⁹⁷² Martindale, an editor of the

⁹⁶⁶ John of Nikiu, 120.52. Translation by Charles, 197 with some supplements in brackets.

⁹⁶⁷ John of Nikiu, 120.54. Translation by Charles, 197-8. Cf. *PLRE* 3, Heraclius 4, 586-7; Martina 1, 837-8.

⁹⁶⁸ Maleon 2011, 34; Krsmanović 2017, 45-6.

⁹⁶⁹ Maleon 2011, 34.

⁹⁷⁰ Krsmanović 2017, 45-6.

⁹⁷¹ Laes 2019, 221.

⁹⁷² *PMBZ* David (1241) Available at:

<https://www.degruyter.com/database/PMBZ/entry/PMBZ12334/html>; Marinos (4774)

Available at: <https://www.degruyter.com/database/PMBZ/entry/PMBZ15943/html> [Accessed:

third volume of *PLRE*, however, safely states that David and Marinus were ‘mutilated’, referring to only John of Nikiu, 120.52.⁹⁷³ Kaegi and Haldon also mention that the three sons of Martina and Martina herself were mutilated without giving details of their mutilation,⁹⁷⁴ but their explanations do not present solutions to the question of how the description of John of Nikiu should be interpreted.

The interpretation of Maleon and Krsmanović that the two sons whom John mention in the latter citation were identified with David and Marinos seems to have two problems. Firstly, this interpretation is inconsistent with the part John already mentioned that Heraklonas, Martina, David, and Marinos had their noses cut off and were exiled, for it means that John described later that David was not harmed even though he should have had his nose cut off. Secondly, David was appointed Caesar in 638 and a papyrological study suggests his title was also known in Egypt where John seemed to have written his chronicle.⁹⁷⁵ Moreover, according to the *Short History* composed by Nikephoros at the end of the eighth century,⁹⁷⁶ David was appointed as a co-emperor and renamed Tiberius in 641.⁹⁷⁷ This fact is inconsistent with John’s description that he ‘was unfit for the throne’.⁹⁷⁸ Therefore, it seems unreasonable to interpret John’s description as that Marinos was the youngest son of Martina and castrated after having his nose cut off.

The question now arises: should John’s description about the castration of the youngest son of Martina be considered unreliable? The answer is probably no. The key for resolving the abovementioned inconsistency in John’s description seems to be the presence of a deaf-mute son of Martina, Theodosius, whose name John did not mention in his chronicle.

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⁹⁷³ *PLRE* 3, David 8, 390; Marinos 12, 833.

⁹⁷⁴ Haldon 1997, 52; Kaegi 2003, 327.

⁹⁷⁵ Nikephoros, 27, ed. and tr. Mango, 76-7. Cf. Constantine VII, *The Book of Ceremonies*, book 2, chapter 29, ed. Reiske, vol. 1, 629-30; Moffatt and Tall vol. 2, 629-30. Gonis 2008, 199-202.

⁹⁷⁶ The editor of its modern edition, Mango, concludes that it was Nikephoros’ youthful work, possibly in the 780s. Mango 1990, 8-12. Nikephoros is identified with Nikephoros, the patriarch of Constantinople (806-15).

⁹⁷⁷ Nikephoros, 32, ed. and tr. Mango, 84-5.

⁹⁷⁸ Cf. Krsmanović 2017, 46.

Nikephoros, criticising the incestuous marriage of Herakleios with his niece Martina, mentions that the emperor begot two sons by her, Fabius and Theodosios, but the unlawfulness of the marriage caused the elder to have a paralyzed neck and the younger to be deaf.⁹⁷⁹ Both of them were not proclaimed in any office such as consul or Caesar. According to the prosopographical information, Fabius seems to have died by the 630s,⁹⁸⁰ while Nikephoros mentions that Theodosios was married to Nika, daughter of the Persian Sarbaros around 629/30.⁹⁸¹ Laes, who doubts that the deaf-mute Theodosios can be identified with the Theodosios married to Nika, argues that the former was one of two deceased sons of Herakleios, whose names Nikephoros did not mention, during the time when the emperor was away in Persia between 627 and 630.⁹⁸² However, whether Theodosios had died or not, there might be a possibility that John took into consideration that Martina had sons other than the three who had their noses amputated in 641. Then, this possibility seems to enable us to answer a question who was ‘the youngest son’ of Martina. The possibility that Marinos was the castrated youngest son still remains, but it might be more reasonable to consider that John added a description about sons other than Heraklonas, David and Marinus to that of the main members of the Heraklonas’ court.⁹⁸³ In the other words, John may consider that Martina and her sons who held the titles of emperor or Caesar, Heraklonas, David, and Marinus, had their noses cut off, and the other sons who could not occupy or had not occupied such a title due to their physical disability or immaturity were treated differently; the former was not injured but the latter was castrated. Although there is no source which proves the existence of the younger brother of Marinus, this interpretation could also explain why each part mentioning Martina’s sons is separated by descriptions of the deposition of the patriarch. As a result, it can be argued that John intended to show consistently that the youngest son of Martina whose name remains unknown was castrated.

The analysis in this appendix has argued that there seems to be no contradiction in the description of John of Nikiu concerning the castration of a son of Martina in 641. This means that this examination could enhance the likelihood that the castration in 641 was one of

⁹⁷⁹ Nikephoros, 11, ed. and tr. Mango, 52-3.

⁹⁸⁰ *PLRE* 3, Fabius, 477; Theodosius 44, 1299.

⁹⁸¹ Nikephoros, 17, ed. and tr. Mango, 64.

⁹⁸² Nikephoros, 18, ed. and tr. Mango, 64-7. Laes 2019, 220.

⁹⁸³ Cf. Laes 2019, 221.

the earliest cases of political castration in the existing sources. Unfortunately, it seems to be true that the question about the credibility of John's chronicle still remains, because the lack of sources during this period makes it difficult to grasp what actually happened to family members of Heraklonas in the confused situation. As far as we believe that the text was written by John himself, however, the text will show a significant fact that John of Nikiu and his audience probably thought that castration had been used for disqualification of a member of the imperial family.

Appendix 2

Excerpts of Greek Texts of the Key Legal Sources on Eunuchs discussed in the Thesis

Ecloga 17.39 (ed. Burgmann, 238.896)

Οἱ ἀλογευόμενοι ἤγουν κτηνοβάται καυλοκοπείσθωσαν.

Canon 8 of the Council of Constantinople (861) (ed. Joannou, 460-2)

Περὶ τῶν μὴ διὰ νόσημα εὐνουχίζόντων.

Ὁ θεὸς καὶ ἱερὸς τῶν ἁγίων ἀποστόλων κανὼν τοὺς ἐκτέμνοντας ἑαυτοὺς αὐτοφονευτὰς κρίνει· καὶ ἱερεῖς μὲν ὄντας, καθαιρεῖ, μέλλοντας δέ, καὶ τῆς ἐπὶ τὴν ἱερωσύνην προκοπῆς ἀπείργει· δηλὸν ἐντεῦθεν καθιστῶν, ὥς εἴπερ ὁ ἑαυτὸν ἐκτέμνων αὐτοφονευτὴς ἐστίν, ὁ ἕτερον ἐκτέμνων πάντως φονευτὴς ἐστὶ· θεὸς δ' ἂν τις τὸν τοιοῦτον δικαίως καὶ τῆς δημιουργίας αὐτῆς ὑβριστὴν.

Διόπερ ὥρισεν ἡ ἁγία σύνοδος, ὥς εἴ τις ἐπίσκοπος ἢ πρεσβύτερος ἢ διάκονος, εὐνουχίζων τινὰ ἐλεγχθεῖν ἢ αὐτοχειρίᾳ ἢ ἐξ ἐπιτάγματος τοῦτον καθαιρέσει καθυποβάλλεσθαι· εἰ δὲ λαϊκὸς εἴη, ἀφορίζεσθαι. Πλὴν εἰ μήπω νόσημά τινι προσπεσόν, πρὸς ἐκτομὴν τοῦ πεπονθότος ἐκβιάζοιτο· ὥσπερ γὰρ ὁ τῆς ἐν Νικαίᾳ συνόδου πρῶτος κανὼν τοὺς ἐν νόσῳ χειρουργηθέντας οὐ κολάζει, διὰ τὸ νόσημα, οὕτω καὶ ἡμεῖς, οὔτε τοὺς ἱερεῖς, ἐπιτάσσοντας εὐνουχίζεσθαι τοὺς νοσοῦντας, κατακρίνομεν, οὔτε μὴν τοὺς λαϊκοὺς αὐτοχειρίᾳ πρὸς τὴν ἐκτομὴν χρωμένους τιθέμεθα· τοῦτο γὰρ ἰατρείαν τοῦ νοσήματος, ἀλλ' οὐκ ἐπιβουλὴν τοῦ πλάσματος ἢ τῆς πλάσεως ὑβριν λογιζόμεθα.

Nov.Leo. 60 (ed. Troianos, 200-2)

Ὁ αὐτὸς βασιλεὺς Στυλιανῷ τῷ αὐτῷ.

Πρᾶγμα τολμώμενον μὲν ἀφειδῶς ὥς μηδεμιᾶς παρὰ Θεοῦ δοκοῦν ἔνοχον δίκης, μάλιστα δὲ ὃν ἄξιον δίκης, ἡ ἐκτομὴ τῆς ἐντεθιμείμενης ὑπὸ Θεοῦ τῇ φύσει δυνάμεως πρὸς διαδοχὴν τοῦ γένους, πάλαι μὲν τιμωροῦντι νόμῳ διὰ προνοίας ἐγεγόνει τοῖς νομοθέταις λαβεῖν ἐκκοπὴν ὥστε τῆς τοιαύτης ἐπινοίας καθαίρειν τὴν ἡμετέραν πολιτείαν. Οὐκ οἶδα δὲ ὅπως δέον εἴπερ τινὶ ἄλλῳ τούτῳ πείθεσθαι τῷ παραγγέλματι καὶ φείδεσθαι λωβᾶν τῇ φύσει, οὐχ οὕτω ποιοῦσιν, ἀλλ' ὥσπερ τι τῶν ὠφελίμων τὴν κατὰ τοῦ γένους τοιαύτην ἐπιβουλὴν λογιζόμενοι, τὰ δι' ὧν γένεσις ἀνθρώπου πρὸς φῶς ἔρχεται ἀποκείροντες ἀνθρώπους, ἕτερον αὐτοὶ πλάσμα καὶ οὐχ οἷον οἶδεν ἢ τοῦ Πλάστου σοφία τῷ κόσμῳ παρεισάγειν φιλονεικοῦσι.

Τοῦτο οὖν ἡμεῖς οὐκ ἀνεκτὸν ἡγούμεθα παριδεῖν, ἀλλὰ νόμῳ τὴν περὶ αὐτοῦ ποινὴν ὀρίζοντες πειρώμεθα σὺν Θεῷ τῆς τόλμης ἐπισχεῖν τοὺς οὕτω μὴ διευλαβουμένους τῷ θεῷ λυμαίνεσθαι πλάσματι. Ἡ μὲν οὖν τῶν προλαβόντων νομοθετῶν ψῆφος τοὺς τοῦτο τολμῶντας εἰς τὴν αὐτὴν ἀντιπερίστησι λώβην τοῖς παθοῦσι τοὺς λωβησαμένους, καὶ ὅπερ αὐτοῖς ἐπιθυμητὸν ἔδοξεν ἐν ἄλλοις ἰδεῖν, τοῦτο καὶ ἐν ἑαυτοῖς ὁρᾶν κατεπράττετο, οὐ λίαν ἔμοιγε ἀδίκως, εἰ καὶ μὴ λίαν πρεπόντως ὀρίζουσα. Οὐδὲ γὰρ ὅτι ἐκεῖνος ἐτόλμα οἶον ἀντιπλαστουργεῖν τῷ Θεῷ, διὰ τοῦτο καὶ τὸν ἐκδικοῦντα μιμεῖσθαι καὶ ἀντιπλαστουργεῖν ἔχει καλῶς, πλὴν ἀλλὰ πρὸς γε τὴν ἀπόνοιαν οὐ λίαν, ὥσπερ ἔφην, ἄτοπον. Ἐπὶ τούτῳ δὲ καὶ ἄλλως ἐτιμωρεῖτο τοὺς ἀνόσιον ἔργον τολμῶντας· τὰ τε γὰρ προσόντα ἐδημοσίου καὶ αἰδίου φυγῇ κατεδίκασε, καὶ τὸν ὑποστάντα τὴν ἀδικίαν δοῦλον ὄντα ἐλευθερίᾳ ἐτίμα. Ἡ μὲν οὖν τῶν προλαβόντων νομοθεσία τοιαύτη, ἡμεῖς δὲ περὶ τοῦ πράγματος ψῆφον ἐξάγοντες τὸ μὲν ἀντιλωβᾶσθαι τοὺς ἐπιβούλους τῆς φύσεως παραπλησίῳ λώβῃ ἀπαγορεύομεν, τοῖς δ' ἄλλοις ἐπ' αὐτῷ ὠρισμένοις, εἰ καὶ κἀνταῦθα πρὸς τὸ φιланθρωπότερον ἢ δίκη ὁρᾷ, ἀλλ' οὖν ὑποκεῖσθαι αὐτοὺς οὐκ ἀπαρέσκει.

Θεσπίζομεν οὖν πρῶτον μὲν τὸν προσκαλεσάμενον τὸν ἐνεργοῦντα τὴν κακοτεχνίαν ἐφ' ᾧ ἐνεργῆσαι, εἰ μὲν τῷ καταλόγῳ τῶν βασιλείων ἀνθρώπων τελεῖ, ἐκκόπτεσθαι τοῦ καταλόγου, ἔπειτα δὲ καὶ δέκα λιτρῶν χρυσίου εἰς τὸ δημόσιον ἀναφερομένων ζημίαν ὑπέχειν καὶ μέχρι δέκα ἐτῶν ὑπερόριον τῆς πατρίδος γίνεσθαι, τὸν δὲ τῆς κακοτεχνίας ἐργάτην καὶ αὐτὸν πρῶτον μὲν μᾶστιξι ταῖς εἰς τὸ σῶμα καὶ ἐν χρῷ κουρεῖα ἀτιμάζεσθαι, ἔπειτα δὲ καὶ τῶν ὄντων ἀποστερεῖσθαι καὶ ἴσῳ καιροῦ μέτρῳ τῆς ἐνεγκούσης φεύγειν. Ὁ δὲ τὴν ἀδικίαν ὑποστάς, εἰ μὲν τῶν ὑπὸ δουλείαν τελούντων εἴη, τὸν ὑπόλοιπον χρόνον τῆς αὐτοῦ ζωῆς δουλικῆς τύχης ἀμείνων ἔσται, εἰ δὲ τῶν ἐλευθέρων προσώπων, ὥς αὐτὸς ἑαυτῷ δι' ὧν κατεδέξατο οὐκ ὦν τῆς ἀδικίας ἀναίτιος, <ἀπὸ> τῆς οἰκείας γνώμης ὅπερ ἔπαθε τοῦτο κερδήσει. Εἰ μέντοιγε, οἷα πολλὰ συμβαίνει, βλάβην ὑποστάντος τοῦ ζῶου ἢ ἐκτομῇ τὴν θεραπείαν φέρει, τοῦτο οὐθ' ἡμῖν, οὔτε τῷ νόμῳ ὑπεναντίον δοκεῖ· οὐ γὰρ λώβῃ, ἀλλὰ βοήθεια τοῦ πλάσματος τὸ πρᾶγμά ἐστί.

Nov.Leo. 26 (ed. Troianos, 110-2)

Ὁ αὐτὸς βασιλεὺς Στυλιανῷ τῷ ὑπερφυεστάτῳ μαγίστρῳ τῶν θείων ὁφικίων.

Περὶ τοῦ υἱοποιεῖσθαι εὐνούχους καὶ γυναῖκας.

Μέγα καὶ τίμιον ἀνθρώποις παρὰ τοῦ πλάσαντος Θεοῦ δῶρον ὁ γάμος· οὐ γὰρ μόνον δαπανωμένη θανάτῳ βοηθεῖ τῇ φύσει καὶ τὴν διαμονὴν τῷ γένει χαρίζεται οὐκ ἔδῳ ὑπ' ἐκείνου κατανεμόμενον παντελῶς διαρρηγῆναι, ἀλλὰ καὶ ἄλλως διὰ τῆς παιδοποιίας μεγάλα

τῷ ἀνθρωπίνῳ χαρίζομενος βίῳ. Τί γὰρ ἡδύτερον εἰς θυμηδίαν ἀνθρώπων τῆς ἐκ παίδων εὐφροσύνης; Τί δ' ὠφελιμώτερον ἐν τοῖς κατὰ τὸν βίον πράγμασι τοῖς τε ἄλλοις καὶ ἅ πρὸς γῆρας ἡμῖν συναντᾷ; Τῇ γὰρ τῶν παίδων ἐπικουρία κουφότερον τὸ βαρὺνον τοῦ γήρως ὁράται. Ἀλλὰ γὰρ ταύτης τῆς ὠφελείας ἐπεὶ μὴ πᾶσιν ἐστὶ μεταλαχεῖν διὰ τῆς τοῦ γάμου ὁμιλίας, ἐβουλήθη νόμος, καὶ καλῶς ἐβουλήθη, οἰκεία φιланθρωπία τοὺς μὴ παρὰ τῆς φύσεως λαβόντας τὸ δῶρον εὐεργετῆσαι. Πλὴν οὐκ εἰς πάντας ἐφύλαξε τὴν προαίρεσιν ἀνελλιπῇ τὴν εὐεργεσίαν πεποιημένος. Τοῖς μὲν γὰρ παρέσχεν ἐξουσίαν καὶ δίχα γάμου ποιεῖσθαι παῖδας, τοὺς δὲ ἀμετόχους τῆς χάριτος εἶασε, καίτοιγε τὸν ἅπαζ εἰς τοῦτο καταστάντα νόμον ἐφ' ᾧ λῦσαι τὴν ἀπαιδίαν τοῖς στερουμένοις δι' ἑαυτοῦ δεικνύντα πατέρας οἷς ἐκ τοῦ γάμου τοῦτο εἶναι οὐ γέγονεν, εἰς πάντας ἐχρῆν διαβιβάσαι τὴν φιλοτιμίαν. Ἀλλ' οὐχ οὕτω βούλεται, ἀποπέμπεται δὲ τούτους οἱ τὰ καιριώτατα ἐζημίωνται καὶ οὓς ἦν εἰκὸς ἡδικομένους καὶ τῆς παιδοποιῶ ἀφηρημένους δυνάμεως οἰκτείνειν. Καὶ ἡ αἰτία τῆς ἀποπέμψεως ὅτι φησὶν οὓς ἡ φύσις οὐκ οἶδε γονῆς κληρονόμους, τούτοις οὐδ' ὁ νόμος τοιαύτης μεταδώσει κληρονομίας. Τοὺς δὲ ἄρα οὐχὶ ἡ φύσις, ἀλλὰ ἀνθρώπων ἀδικία τὴν κληρονομίαν ἀφείλετο.

Οὓς ἡ βασιλεία ἡμῶν εἴ ἔχειν ὑπολαμβάνουνσα μὴ πρὸς τῇ ζημίᾳ ἦν ἐξ ἀνθρώπων ὑπέστησαν δευτέραν ὑπέχειν διὰ τοῦ νόμου ζημίαν, θεσπίζει βουλομένους υἰοποιεῖσθαι ἀκώλυτον ἔχειν τὴν βούλησιν. Οἶμαι γὰρ ἐκεῖ μᾶλλον ἀναγκαίαν ὁρᾶσθαι τὴν εὐεργεσίαν οὗ τὸ ἐξ αὐτῆς ὠφέλιμον χρεωδέστερον πέφυκεν. Εὐνούχοις δὲ μάλιστα ἡ ἐκ τοῦ νόμου παιδοποιία τοσοῦτον χρεωδεστάτη, ὅσον καὶ μόνον τούτῳ λαμβάνουσι τῷ τρόπῳ τὸ εἶναι πατέρες· καὶ τῆς παρὰ υἱῶν θεραπείας οὕτως αὐτοῖς ἀπολαύσειν ὑπάρξει, ἥς οὐκ ἐστὶ φιλάνθρωπον ὅτι τῶν γονίμων ἀπεστέρηνται μορίων συναποστερεῖσθαι. Ἀλλ' ὥσπερ ὁ φωνῆς ἀποτετμημένος οὐ κεκώλυται τὰ τῆς γλώττης ἀναπληροῦν διὰ τῆς χειρός, οὐδ' ὅς ἀπορεῖ λόγον διὰ χελέων ἐρεύζασθαι, τοῦτον διὰ τῆς γραφῆς εἰς τὴν περὶ τῶν οἰκείων διάταξιν προάγειν ἀποτρέπεται, οὕτω προσῆκε καὶ τοὺς ἀφαιρέσει τῶν παιδοποιῶν μελῶν τε καὶ μορίων γονῆς ἀποροῦντας μὴ κωλύειν ἑτέρῳ τρόπῳ παραμυθεῖσθαι τὴν ἀπορίαν.

Nov.Leo. 27 (ed. Troianos, 114-8)

Ὁ αὐτὸς βασιλεὺς Στυλιανῷ τῷ αὐτῷ.

Περὶ τοῦ ἐπίσης πάντας υἰοθετεῖσθαι.

Καὶ καλῶς πρέπον ὑπάρχει τὴν ὠφέλειαν ἐν κοινῷ κατατίθεσθαι τοὺς ὀφελός τι ἐξευρεῖν τῷ βίῳ σπουδαῖς οἰκείαις προθυμηθέντας ἢ τὸ βούλεσθαι μέχρις ἐνίων προσώπων περιορίζειν, τοὺς δ' ἄλλους ἀμετόχους ταύτης ἔαν· πολὺ δὲ πλέον προσῆκε τὴν ἐκ τῶν νόμων εὐεργεσίαν

εἶναι κοινήν. Ὡσπερ γὰρ ἐπὶ ἄρχοντος ἀρετῆς, οὕτω καὶ ἐπὶ νόμων ὀφείλομεν κοινή τοῦ ἐκεῖθεν ἀπολαύειν καλοῦ ἅπαν τὸ ἀρχόμενόν τε καὶ ὑποκείμενον. Τί τοῦτο λέγει τὸ προοίμιον; Ὅτι τοῖς ἀτυχοῦσιν ἀπαιδίαν λύνει βουλόμενος τὸ δυστύχημα νόμος ἐν τῷ υἰοθετεῖσθαι προστάσσειν καὶ γνώμη ἐκεῖνο κτᾶσθαι ὃ μὴ εὖπορον λαβεῖν παρὰ τῆς φύσεως, οὐ πρὸς πάντας ὁμοίως διέσωσε τὴν προαίρεσιν, ἀλλ' ἀνδράσι μὲν καὶ γυναιξὶν ἃς ἐγνώρισε μὲν ἢ φύσις μητέρας, εἰς ἀπαιδίαν δὲ ἀφαιρέσει τῆς γονῆς περιέστησε τὸ υἰοθέτημα ἐδωρήσατο, εὐνούχους δὲ καὶ γυναῖκα ὧν οὐπω τῶν κόλπων ὁ τοῦ γένους ἦνθησε στάχυς οὐκ ἀξιούς ἔκρινε τοῦ εὐεργετήματος, οὐχ ὁρῶ τίνα τρόπον οὕτω μικρολογούμενος. Οὐ γὰρ ὅτι ἐξημίωνται τὸ εἶναι φύσει πατέρες εὐνούχοι, διὰ τοῦτο νόμῳ τὴν ζημίαν ἐπιτείνειν χρή, ἀλλὰ τοῦναντίον μᾶλλον τὸ ἐκεῖθεν ἐνδεὲς ἐτέρῳ τρόπῳ μὴ κωλύειν πορίζεσθαι, καθὼς ἐν ταῖς ἄλλαις κολοβώσεσι τῶν φυσικῶν ἐνεργειῶν, οἷον ἐπὶ χειρῶν καὶ ποδῶν καὶ εἴ τι ἄλλο ἀπεστέρηται ἄνθρωποι οὐ κωλύονται τὸν δυνατὸν τρόπον παραμυθεῖσθαι τὴν κολόβωσιν. Καὶ μὴν οὐδὲ γυναῖκας, διότι μὴ ὥφθησαν μητέρες, εὐλογόν ἐστίν ἀποτρέπειν υἰοθετεῖσθαι. Τίς γὰρ ὁ λόγος τοῦ τὰς μὲν ὅτι ἀφηρέθησαν τῶν παίδων, φιλοτιμεῖσθαι πάλιν κτήσεται τῶν παίδων, τὰς δὲ ὅτι παντελῶς ἄποροι τοιοῦτου γεγόνاسιν κτήματος, διὰ βίου ταύτῃ τῇ ἀπορίᾳ βούλεσθαι ταύτας συζῆν; Εἰ γὰρ τοῦτο μάλιστα τὸ ἀπὸ τῶν παίδων χρήσιμον, λέγω δὲ γηροτροφία, πῶς οὐχὶ καὶ ταύταις κάκειναις ἐξ ἴσου μετέχουσιν τῆς εὐεργεσίας, ἔπρεπε παρασχεῖν; Οὕτω γὰρ ἂν καὶ ὅσαις ὁ βίος πένης καὶ ἄπορος, κουφοτέρα ὑπῆρξεν ἢ πενία τοῖς παισὶ βοηθουμέναις, καὶ ὅσαι τὸν βίον ἐν ἀφθονίᾳ καὶ πλούτῳ φερόμενον ἔχουσι, καὶ ταύταις υἰοθεσία συμφέρουσα· ὁ γὰρ εἰς τάξιν υἱοῦ προφερόμενος εἰς ἐκεῖνα καὶ ὑπηρετούμενος τῇ μητρὶ καὶ ὑπὲρ αὐτῆς σπουδάζων ἅπερ ἐστὶν εἰκὸς παῖδα φρονεῖν, τὴν τε περιουσίαν εἰς τὸ ἀκαινοτόμητον οἰκονομήσει καὶ τὸ βάρος τῶν φροντίδων συμεριζόμενος τῇ μητρὶ εὐθυμότερον αὐτὴν βιώνει παρασκευάσει.

Τοιγαροῦν ἡ ἡμετέρα βασιλεία, τοὺς μὴ ἐπιτρέποντας νόμους υἰοθετεῖσθαι ἅπερ ἔφημεν πρόσωπα τῆς ἐπιτροπῆς ἀποχειροτονοῦσα, πᾶσιν ἐκτίθεται νόμον τοῖς βουλομένοις υἰοποιεῖσθαι. ἂν τέ τις τὰ ἀρρένων ἀφήρηται, ἂν τέ τινα οὐπω ἥλιος εἶδε μητέρα, ἄδειαν παρεχόμενον, οὐ μόνον δι' ἅπερ εἶπον καλὰ ἐκ τῆς υἰοθεσίας γινόμενα, ἀλλ' ὅτι καὶ τὸ τῆς παρθενίας σεμνὸν καὶ ἐκ τούτου τιμώμενον καθορῶ. Αἱ γὰρ ὅσαι μᾶλλον γαμικῆς ὁμιλίας τιμῶσι μὲν τὴν παρθενίαν, προτιμῶσαι δὲ ὅμως παίδων ἔρωτι νύττονται, τοῦτο καὶ γαμικῆς ὁμιλίας ἐκτὸς προσγινόμενον αὐταῖς ὁρῶσαι τὸ σεμνὸν τῆς παρθενίας οὐ περιόψονται. Οὐ γὰρ δὴ ἄξιον, διότι θῆλυ πρόσωπον ὑπεξουσίους ἔχειν παῖδας οὐκ ἐφεῖται, διὰ τοῦτο μὴ ἐξεῖναι υἰοθετεῖσθαι. Πρῶτον μὲν ὅτι εἴ τις τοῦτο συγχωρήσῃ, οὐ μόνον τὰς ἀτόκους τῶν γυναικῶν τῆς υἰοθεσίας ἀπείργει, ἀλλὰ καὶ τὰς ὀφθείσας μητέρας· θῆλυ γάρ, ὥς φησι,

πρόσωπον ὑπεξουσίους οὐ δύναται ἔχειν παῖδας. Ἐπειτα δὲ ὁ τοῦτο θεσπίζων νόμος περὶ ἐκείνων λέγει ὅσοι προκρίνουσι τῶν μητέρων διαστάντες ἰδίως ῥυθμιζόμενον ἔχειν βίον, ἀλλ' οὐ περὶ τούτων ὅσοι τὴν μητρικὴν ἐξουσίαν ἡδέως φέρουσι καὶ διὰ βίου τὴν ὑποταγὴν αὐταῖς σφάζειν ἐγνώκασιν. Οὐκ οὖν ὁ νόμος τὴν ἀπὸ γνώμης ὑποταγὴν καὶ οἰκείωσιν, ὅπερ καὶ ἐνταῦθα συμβαίνει, <οὐκ> ἀπαγορεύει, ἀλλ' ἐκεῖ τὸ θῆλυ πρόσωπον ἀφαιρεῖται τὴν ἐξουσίαν, οὗ γνώμης ἐκουσιότης εἰς ὑποταγὴν οὐ συνέρχεται.

Καὶ τοῦτο δὲ ἡ βασιλεία ἡμῶν τὸ ὑποχείριον φιλοτιμεῖται, ὥστε μὴ μόνον παρὰ βασιλέως, καθὼς οἱ πρόσθεν ἐπέτρεπον νόμοι, τὸν υἱοθετεῖσθαι βουλούμενον, ἀλλὰ καὶ παρὰ παντὸς τοῦ καθ' ἐκάστην χώραν τὸ ἄρχειν καὶ διέπειν λαχόντος τὴν ἐξουσίαν λαμβάνειν.

Nov.Leo. 98 (ed. Troianos, 272-6)

Ὁ αὐτὸς βασιλεὺς Στυλιανῷ τῷ αὐτῷ.

Ἡ τῶν νόμων γένεσις καὶ κατάστασις τῆς πολιτείας σκοπὸν ὑποβάλλεται καὶ τῇ φύσει ἐνίοτε ἀδικουμένη βοηθεῖν ἐπαγγέλλεται. Οὐκοῦν δίκαιον καὶ νῦν περὶ τῆς ζητουμένης ὑποθέσεως, ἡ δὲ ἐστὶν εἰ ἔξεστιν εὐνούχοις πρὸς γάμον συνάπτεσθαι, νόμον τυχεῖν γενέσεως. Ἀλλὰ πρὸ τῆς τοῦ νόμου ἐκθέσεως ἄξιον πρὸς ἐξέτασιν καταστῆναι τοῦ πράγματος καὶ συνιδεῖν, εἰ δυνατόν τὴν τοιαύτην συνάφειαν ἀποφέρεισθαι γάμου κλησιν, μᾶλλον δὲ εἰ ὅλως ἐπ' αὐτῇ θέμει τελεῖσθαι ἢ τῷ γάμῳ τελεῖται, οἷον εὐχὴν ἱερὰν ἢ τελετὴν ἢ ἀνθρωπίνην τινὰ τέρψιν καὶ θυμηδίαν καὶ ὅσα ἐπὶ μνηστεία γίνεται. Ὁ μὲν γὰρ ἱερεὺς κατὰ μίμησιν τῆς ἄνωθεν παρὰ τοῦ πλάσαντος εὐλογίας τοῦ πρὸς αὔξησιν τὰ γένη συναρμόσαντος ἔστηκεν ἱερολογῶν, ἡ δὲ ἐξ ἀνθρώπων προῖοῦσα θυμηδία καὶ ἀγαλλίασις πρὸς τὸ τῆς γεωργίας τέλος ἀφορῶσα καὶ τοῦ γένους ἐκάστου τὴν βλάστην λαμβάνει τὴν πρόοδον· οἱ τε γὰρ τῶν νυμφίων γεννήτορες ἐν ἐλπίσιν ὄντες τοῦ γονὴν ἐπόψεσθαι τῶν οἰκείων σπλάγχνων, οἱ τε νυμφαγωγούμενοι τοῦ δοῦναι τῷ βίῳ γένους διαδοχὴν τῆς περισταζούσης αὐτοὺς ἀπολαύουσιν ἡδονῆς. Ὡς δὲ μηδὲν ὕπεστι τοιοῦτον, ποία μὲν ἀνθρωπίνη εὐφροσύνη συνέλθοι, ποίᾳ δ' ἱερᾷ συνεπιλήψεται τελετῇ; Οὕτω δὲ τῆς συναφείας ὀρωμένης ἀνευφράνου καὶ ἀνιέρου καὶ ἀτελέστου καὶ ἀμεθέκτου εὐλογίας, πῶς ἢ γαμήλιος κλησις ἀρμόσει; Μᾶλλον δὲ πῶς οὐχ οἷα καὶ ἐκθέσμων κόλασις ἔψεται ἢ ἐπὶ τοῖς ἐκθέσμοις ὀφειλομένη; Ἀλλ' ὅτι μὲν οὐδὲ τὴν ἀρχὴν γάμος δύναται ἂν λέγεσθαι, ὡς ἐν τύπῳ οὕτως· θεωρεῖται δὲ μᾶλλον ὁ λόγος καὶ ἀκριβέστερον τὴν ἀδικίαν τοῦ πράγματος.

Τὸ ἄρσεν καὶ θῆλυ συναρμόζων ἐξ ἀρχῆς ὁ Πλάστης πρὸς τὸν ἐκεῖθεν πληθυσμὸν ἀφορῶν διετίθει τὴν συναρμοστίαν, καὶ μὴν καὶ τῇ φύσει, καθόσον δυνατόν οἷα δούλη σφάζειν τοὺς δεδομένους παρὰ τοῦ κτίσαντος λόγους, σκοπὸς ἐπὶ τούτῳ γαμικὴν ὁμιλίαν συνίστασθαι,

ἐφ' ᾧ τῶν γενῶν ἡ διαδοχὴ προίει μέχρις ἂν δι' αὐτῆς ὁ κτίσας βούλοιτο τὴν τοιαύτην ὑπ' αὐτῆς λειτουργίαν διακονεῖσθαι. Εἰ οὖν ἐστὶ κἀνταῦθα ὁ καὶ τῷ Πλάστῃ τῆς φύσεως καὶ τῇ φύσει νενόηται, μὴ κωλυέσθω τὸ κωλυόμενον· εἰ δ' οὐκ ἐστίν — ὥσπερ οὐδ' ἐστίν, ἀλλὰ πᾶν τοῦναντίον, ἄπορον μὲν εἰς ἐκπλήρωσιν τῆς δεσποτικῆς βουλῆς, ἔκφυλον δὲ καὶ οἶον μὴ ἔγνωκεν ἡ φύσις — πῶς οὐ παντὶ κωλυθήσεται τρόπῳ; Εἰ δέ τις λέγοι τὸ φιλονεικεῖν ἡδὺ ποιούμενος ὥς εἴ γε διὰ τὸ ἄγονον ἀποκλείεται γαμεῖν εὐνούχοις, πολλῶν καὶ ἄλλων ἀποκωλύσεις γάμους, οὐ γὰρ πάντες ὅσοι πρὸς κοινωνίαν ἔρχονται τοιαύτην φύσιν ἐκ τῆς κοινωνίας ἔδειξαν, πρὸς τὴν φιλονεικίαν ἕτοιμος ἡ ἀπόκρισις, ὅτι ἐπ' ἐκείνων μὲν, εἰ καὶ μὴ καρπὸς φύεται, ἀλλ' οὖν οὐκ ἐπὶ τούτῳ συνῆλθον οὐδ' ὥστε μὴ δοῦναι τῷ βίῳ τῆς γαμικῆς γεωργίας ὠφέλειαν, ἀλλὰ δῆλον ὥς πόθῳ μὲν παιδοποιίας, ὑπειληφότες δὲ ὅτι πρὸς ἔργον ὁ πόθος χωρήσοι, εἰ καὶ πρὸς ἔκβασιν ἡτύχησεν ἡ ἐλπίς. Ἐνταῦθα δὲ οὐκ ἔστι τοιοῦτον εἰπεῖν, πολλοῦ γε καὶ δεῖ, ἀλλ' ἀκριβῶς εἰδότες οἱ κατὰ τὴν ἔκφυλον συνιόντες μῖξιν ὥς ἄγονοι καὶ ἄκαρποι, ἐπ' αὐτὸ τοῦτο καὶ συνῆλθον καὶ καθάπερ τῇ φύσει ἐπιβουλεύοντες. Ἀμφότεροι τοίνυν καὶ κατὰ τοῦτο μόνον μισητοὶ ἢ μὲν ὅτι ἐξὸν αὐτῇ, εἰ τὴν διὰ γάμου ἐπόθησεν ὁμιλίαν, κοινωνῆσαι γονίμῳ φύσει τὴν ἄγονον ἡλλάξατο καὶ τὴν ἄκαρπον, ὁ δὲ ὥς τῇ ἑαυτοῦ ἀχρηστία περιστῶν εἰς τὸ ἀχρηστον εὐλογίας ἐνεγκεῖν τῷ ποιήσαντι.

Εἶτα καὶ χώραν μὲν ἐξ ἧς ἂν τις ἕτερος δρέψαιτο, εἴ τις ὀφθεῖη διαλυμαίνόμενος καὶ πρὸς τὸ ἄργον αὐτῇ χρώμενος, ὥς πονηρὸν καὶ λυμεῶνα μισήσομεν καὶ εἰ δυνατόν ἐφέξομεν αὐτοῦ τὴν προαίρεσιν, τὸν δ' εἴ τις ἐξ ἧς ὁ λογικὸς ἀναβλαστάνει στάχυν χώραν ἐξερημοῖ καὶ ἀχρηστον δείκνυσι, τούτῳ ὥς μηδὲν ἄδικον δρῶντι παραχωρήσομεν; Καὶ τί ἂν <τις> φαίη; Ἀλλά, φασι, Παῦλος εἶπε· «κρεῖττον γαμεῖν ἢ πυροῦσθαι»· ὥστε διὰ τὴν πύρωσιν ἀκώλυτος ἡ συνάφεια. Ὁ τὸν Παῦλον εἰς μέσον προάγων, πρόσσχετο τοῦ Παύλου τοῖς ῥήμασι. Γαμεῖν εἶπε, τουτέστι διὰ τῆς γαμικῆς ὁμιλίας συναρμόζεσθαι γυναικί. Εἰ μὲν οὖν καὶ ἡ σὴ πρὸς γυναῖκα μῖξις συνάρμοσις γαμικῇ καὶ ἀξία τυχεῖν εὐλογίας, ἣτις ὀφείλεται τοῖς νυμφαγωγουμένοις, γάμον αὐτὴν ἐξονόμαζε καὶ περισκόπει νύμφην. Εἰ δ' εὐλογίας οὐκ ἂν οὐδ' ὄναρ ποτὲ μετάσχοις — τίς γὰρ ἂν ἡ ποία ἱερολογία ἐπὶ τοῖς ἀπ' ἐναντίας μὲν συναπτομένοις τῷ τοῦ Πλάσαντος δόγματι, ἀπ' ἐναντίας δὲ τῷ νόμῳ τῆς φύσεως προέλθοι; — τί τὸν Παῦλον εἰς συμφωνίας ἔλκειν τολμᾷς τοῦ σοῦ ἀγάμου καὶ ἐκφύλου γάμου; Ἄλλως τε δὲ καὶ τοῖς ἀποτέμνουσι τούτων τὴν ἀρρενοποιίαν εἰ τοῦτο ἡ ἐπίνοια βούλεται, εἰ καὶ σφαλερῶς καὶ Θεῶ ἀντιπράττοντες ἤκουσιν ἐπὶ τὴν πρᾶξιν, ὥστε μηκέτι δρᾶν αὐτοὺς ἄπερ ἄνδρες, ἀλλ' ὅσα γε τὴν πρὸς τὸ θῆλυ γένος ἐπιθυμίαν ἀπομαρᾶναι καὶ τῆς εὐνῆς ἀνυπόπτους φύλακας εἶναι — τοῦτο γὰρ ἡ κλησις ἐγγυᾶται — πῶς κατὰ τοῦτο δικαίαν οὐ χαλκεύουσιν καθ' ἑαυτῶν ἀγανάκτησιν, δι' ὧν οὐ μόνον τῇ φύσει ἐχθρὰν προαίρεσιν κέκτηνται, ἀλλὰ καὶ αὐτοῖς

ἐκείνοις οἷ, εἰ καὶ κακοτέχνως, ὅμως σπουδὴν ἔθεντο πρὸς τὸ δόξαν αὐτοῖς χρησίμους ὀφθῆναι ἐναντιούμενοι ἀπεδείχθησαν, καὶ ξένον τι γένος ὑπάρχουσιν μήτε τῇ ἐξ ἀρχῆς προβαλὺση φύσει, μήτε τῇ μετὰ ταῦτα μεταπλασασμένη κακοτεχνίᾳ συνοικειούμενοι;

Διὰ τοῦτο θεσπίζομεν τὸν εἴ τις εὐνούχων πρὸς γάμον ἦκων φωραθείη καὶ αὐτὸν μὲν τῇ τῆς πορνείας ὑποκεῖσθαι κολάσει καὶ τὸν ἀνιέρως δὲ τολμήσαντα ἱερέα τὴν τοιαύτην συναρμοστίαν τελέσαι τῆς ἱερατικῆς ἀξίας ἀπογυμνοῦσθαι.

Nov.Leo. 89 (ed. Troianos, 254)

Ὁ αὐτὸς βασιλεὺς Στυλιανῶ τῷ αὐτῷ.

Ὡσπερ τὰ τῆς υἰοθετήσεως πράγματα πρὸς τὸ ἀδιάφορον διακείμενα παρῆδεν ἡ ἀρχαιότης, ἦν χωρὶς εὐχων καὶ τελετῆς ἱερᾶς τελεῖσθαι νομίζουσα οὐδὲν ἐδόκει ὀλιγωρεῖν, οὕτως ἔοικε καὶ τὴν ἀκριβῆ τῶν συνοικεσίων παρεωρακέαι κατάστασιν καὶ δίχα τῆς νενομισμένης εὐλογίας αὐτὰ συγχωρεῖν. Ἀλλὰ τοῖς μὲν ἀρχαίοις ἴσως ἂν πρόφασίς τις εὐρεθείη προαιρέσεως, ἡμῖν δὲ θεία χάριτι πρὸς κοσμιωτέραν πολλῶ καὶ ἱερωτέραν ἐπίδοσιν τοῦ βίου καθεστηκότων <τῶν> πραγμάτων οὐδέτερον ἄξιον τῶν εἰρημένων παροφθῆναι.

Τοιγαροῦν καθάπερ ἐπὶ τέκνων εἰσποίσεως ἱεραῖς ἐπικλήσεσι τὴν εἰσποίησιν προβαίνειν διωρισάμεθα, οὕτω δὴ καὶ τὰ συνοικέσια τῇ μαρτυρίᾳ τῆς ἱερᾶς εὐλογίας ἐρρῶσθαι κελεύομεν, ὥς ἔνθα γε μὴ ὀρῶτο τοῖς συνοικεῖν βουλομένοις τοιαύτη διαιτῶσα ἀρμογή, οὐδὲ τὴν ἀρχὴν ῥηθήσεται συνοικέσιον, οὐδ' ἐπιτεύξεται τῶν τούτου δικαίων ἢ τοιαύτη συμβίωσις. Μεταξὺ γὰρ ἀγαμίας καὶ γάμου οὐκ ἔστιν εὐρεῖν ἀκατηγόρητον τὸ γινόμενον. Ἐστὶ σοι γαμικῆς πολιτείας ἔφεσις; Ἀνάγκη τὰ τοῦ γάμου τηρεῖν. Ἀλλ' ἀπαρέσκει τοῦ γάμου τὰ πράγματα; Διοκείτω σε ἀγαμία· καὶ μήτε γάμον κιβδηλεύσης μήτε ψευδῶς τὴν ἀγαμίαν ὑποκορίζῃ.

Peira 31.1 (ed. Zepos, 137)

Ἐὰν γράψῃ τίς· καταλιμπάνω τὸν οἶκόν μου τοῖς συγγενέσι μου τοῖς εὐνουχίζομένοις, οὐκ ἀκούεται· παράνομος γὰρ ἡ αἵρεσις. καὶ τοῦτο ἔκρινεν ὁ βασιλεὺς κύρις βασιλείας.

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