

## THE CORPUS OF LEO'S NOVELS

### Some suggestions concerning their date and promulgation<sup>1</sup>

The new edition of the Novels of Leo VI the Wise by Spyros Troianos<sup>2</sup> is perhaps a good occasion to review several arguments concerning the dating and constitution of this collection of 113 Novels which has long attracted the interest of scholars but of which no systematic study has been undertaken since those of Monnier and Spulber at the beginning of the 20th century. It is the purpose of this article to encourage such a study by proposing new arguments. In particular, we shall question the prevailing *communis opinio*, according to which Novels were published in 888, simultaneously with the *Basilica*. This dating of the Novels was first proposed by Andreas Schminck and supported by the analysis by the late Marie Theres Fögen of its connection with the *Basilica*.<sup>3</sup> Both articles were published in the same number of *Subseciva Groningana* some twenty years ago.

#### 1. The relation between the Novels and the Basilica

The Novels of Leo have been always thought to be connected with the *Basilica*, the systematic rearrangement of the *Corpus Iuris Civilis* also published by Leo, following the previous work of his father Basil.<sup>4</sup> The two works have been presented as a common project whose main aim was the completion of the ἀνακάρσις of the ancient laws already begun by Basil with (the *Prochiron* and) the *Eisagoge*.<sup>5</sup>

However, there was no firm evidence that the *Basilica* referred to the norms issued by Leo in his Novels, which would be odd if both texts were indeed issued by the same emperor. This objection seemed to be eliminated when Marie Theres Fögen, in a revealing study, showed that some of the norms of Leo's Novels (at least 20, perhaps even 29) were in fact considered in the *Basilica*, although this is due more to the elimination of ancient

<sup>1</sup> This article has been published with the financial support of the Spanish research project HUM 2005-05285/FILO of the Ministerio de Educación y Ciencia. I thank Michael Featherstone for correcting my English.

<sup>2</sup> Σπ. Τρωϊάνος, *Οι Νεαρές Λέοντος Γ' του Σοφού*. Προλεγόμενα, κείμενο, απόδοση στη νεοελληνική, ευρετήρια και επίμετρο, Αθήνα 2007. This includes studies of various Novels as well as a very useful appendix with the vocabulary.

<sup>3</sup> A. Schminck, 'Frömmigkeit ziere das Werk'. Zur Datierung der 60 Bücher Leons VI., *SG III* (1989), pp. 79-114 and M.Th. Fögen, 'Legislation und Kodifikation des Kaisers Leon VI.', *SG III* (1989), pp. 23-35.

<sup>4</sup> For a discussion of the XL Books of Basil and their relation to the *Eisagoge*, cf. J. Signes Codoñer/F.J. Andrés Santos, *La Introducción al Derecho (Eisagoge) del Patriarca Focio*, [Nueva Roma. Bibliotheca Graeca et Latina Aevi Posterioris, 28], Madrid 2007, p. 273.

<sup>5</sup> In Signes Codoñer/Andrés Santos, *La Introducción al Derecho*, pp. 189-274 I defend the traditional dating of the *Prochiron* ca. 872 and not 907 as argued by A. Schminck, *Studien zu mittelbyzantinischen Rechtsbüchern*, [Forschungen zur byzantinischen Rechtsgeschichte, Band 13], Frankfurt/M. 1986, pp. 55-107. Cf. also Th.E. van Bochove, *To Date and Not to Date. On the Date and Status of Byzantine Law Books*, Groningen 1996.

norms contradicting Leo's Novels than to the inclusion of or reference to them. Indeed, the explicit mention of a Novel by Leo appears only once in the *Basilica*, in B 59.11.16 = Leo's Novel 71.<sup>6</sup> Fögen thought that the (routine) adherence of the redactors of the *Basilica* to ancient Roman law hindered a wider acceptance of the Novels and their insertion into the corpus.<sup>7</sup> Thus Fögen's article seemed to most of scholars to provide enough evidence for a dating of the *Basilica* subsequent to the publication of some of Leo's Novels. Fögen's suggestion that Leo conceived his Novels as a 'kodifikationsbegleitende Legislation', that is to say, as a project that ran parallel to the composition of the *Basilica*, was also generally accepted by scholars. As Fögen puts it, the detailed analysis on secondary legal matters approached in the Novels could only be conceivable in the background of a systematic rearrangement of Justinianic law such as the one aimed at in the *Basilica*:

'Wenn man nicht annehmen will, daß Leon seine schlaflosen Nächte mit der systematischen Lektüre des gesamten justinianischen Corpus, bzw. der gesamten Basiliken verbrachte, so wird man die eklektizistische Wahrnehmung solcher Spezialfälle wohl nur mit einem äußerst nahen Zusammenhang von Kodifikation und Legislation erklären können. Weder nach Abschluß der Kodifikation noch vor Beginn eben dieser, sondern nur während der laufenden ἀνακρίσεις scheint mir eine, sei es auf Anfragen der Redakteure der Basiliken, sei es durch sonstige, gelegentliche Kenntnisnahme vom Inhalt des Corpus veranlaßte Reaktion in Form von legislativen Entscheidungen auch randständiger Einzelprobleme plausibel.'<sup>8</sup>

In section 4 of this article we will discuss the occasion of the promulgation of Leo's Novels. There I will try to refute the idea that the Novels were conceived together with the *Basilica* and will instead argue that their separate promulgation was prompted by different circumstances. As for Fögen's defense of the chronological priority of Leo's Novels to the *Basilica*, it may well have been their abhorrence of anything novel that kept the redactors of the *Basilica* from including or inserting most of Leo's Novels in their all-embracing corpus of Roman Law, but the absence of the Novels could also be easily explained by the fact that the redactors completed their work before Leo passed most of his laws or issued any Novel. In my opinion, the fact that the *Basilica* occasionally mention some Justinianic laws in accordance with certain of Leo's Novels is not particularly significant and could be the result of a subsequent transmission, as the text of the *Basilica* was probably amended by the hands of copyists and jurists. More relevant would be the *systematic* insertion of Leo's Novels in the *Basilica*, for this kind of interpolation could be scarcely credited to a copyist. But only in one case, as we have already said, has a Novel of Leo been inserted in

<sup>6</sup> Fögen, 'Legislation und Kodifikation', p. 30.

<sup>7</sup> Fögen, 'Legislation und Kodifikation', pp. 34-35.

<sup>8</sup> Fögen, 'Legislation und Kodifikation', p. 31.

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the *Basilica*. Finally, there are too many uncertainties concerning the original form of the *Basilica* to base any conclusion on single passages.<sup>9</sup> When one sees, for example, that B 6.4.2 pr. preserves the outdated reference to Italy of D 1.12.1 pr. when describing the functions of the *praefectus urbi*, now located in Constantinople, a reference already suppressed in *Eisagoge* 4.1, the question arises whether we can speak of a systematic ἀνακάθαρσις of Justinianic Law in the *Basilica*.

More significant is another argument brought forward by Fögen to defend the promulgation of the Novels before the *Basilica*. This is related to Leo's Novel 1, where the emperor criticises Justinian for having passed new laws after completing his codification. These new laws, Leo asserts, contradicted and disputed in many points the norms of the previous codification:

ἔλαθεν (i.e. Justinian) οἷς ὕστερον ἐνομοθέτησε καὶ τῷ πρώτῳ λυμηνάμενος ἔργῳ καὶ τὸ δεύτερον οὐκ ἐργασάμενος ἄμεμπτον, ἀντιλογίας καὶ ἔριδος ἐκ τῆς ὕστερον αὐτῷ πεπραγμένης ὑποθέσεως οὐκ ὀλίγης πρὸς τὴν προτέραν ἀνακεινημένης (p. 13.6-10 N/D; p. 44.30-33 Tr)<sup>10</sup> – 'He (Justinian) unadvisedly damaged his former legislation with the laws he promulgated afterwards and did not accomplish this latter task without fault, for not a few contradictions and disputes arose over the matters he treated first on account of the second ones.'

Fögen comments the passage in this way:

'Die Gesetze, die Justinian später erließ und die seine frühere Kodifikation zunichtemachten, können nur seine Novellen sein. Hätte nun Leon, wenn seine eigenen Novellen nach seiner eigenen Kodifikation ergangen wären, eine Kritik an Justinians Verhalten formuliert, welche dann ebenso zutreffend für ihn selbst gewesen wäre – und dies ausgerechnet in der Einleitungsnovelle zu seinen Novellen, so daß jedermann klar werde, daß er, Leon, gerade dabei ist, denselben Fehler wie Justinian zu begehen? So schillernd und unbegreiflich die Person Leons als Gesetzgeber auch häufig erscheint, eine Selbstkritik in Form einer Kritik an Justinian möchte ich ihm doch nicht zuschreiben. Leon will – entgegen der Lehr- und Handbuchmeinung – Justinian nicht imitieren, er will es besser machen als sein großer Vorgänger, nämlich erst die reinigenden Novellen erlassen und dann eine bereinigte Kodifikation präsentieren.'<sup>11</sup>

<sup>9</sup> See for example Schminck, *Studien*, pp. 17-54.

<sup>10</sup> For these and other passages of Leo's Novels I cite the editions of P. Noailles/A. Dain, *Les Nouvelles de Léon VI le Sage. Texte et traduction*, Paris 1944 [= N/D], and Γρωιάνος, *Οἱ Νεαροὶ Λέοντος Γ'* [= Tr] with page and line numbers.

<sup>11</sup> Fögen, 'Legislation und Kodifikation', pp. 32-33.

There are some remarks to be made on this argument. First, Leo in fact failed in his purpose, for most of his Novels were not taken into account in the *Basilica*, as we have already seen. So in a certain way, if we follow Fögen, he discredited himself by making a statement he could not fulfil.

Second, even if Leo wanted to surpass Justinian, there is no assurance that he attained his goal. To change a tradition as well established as the one represented by the *Corpus Iuris* was surely not an easy task in Leo's time. We have no exact idea of how the jurists worked who would have taken part in the commission (if there was one) which completed the *Basilica*.<sup>12</sup> That jurists tended to be conservative and reject any 'novelty' is perhaps related to the difficult conditions for the diffusion of new regulations or norms in the empire. Laws passed in Constantinople did not always reach the provincial courts, so jurists adhered only to laws with a long tradition behind them. This might also explain why the Isaurian *Ecloga*, mostly preserved through provincial manuscripts, was still popular at the end of the ninth century, when it was translated into Russian.<sup>13</sup> We cannot, therefore, judge Leo's legislative work by his declared intention, just as the impact of a law cannot be judged by the aims of the legislator.

Third, there is no evidence that the *Basilica* were considered a 'new' project. They were in fact only a systematic rearrangement of the *Corpus Iuris Civilis*, probably based on a Greek standard edition of this corpus sanctioned by Basil I and known in the sources as the Πλάτος τῶν νόμων.<sup>14</sup> This would explain the lack of a constitution confirming the legal force of the new work, for the existing preface of the *Basilica* is only rhetorical and informative. As Van Bochove puts it:

‘The preface (of the *Basilica*) neither formally abrogates law, nor explicitly confirms the legal force of existing regulations. Both abrogation and confirmation would have required a specific relevant legislative act on Leo's part. And the preface lacks such a legislative act. Because of the absence of a *dispositio*, the preface cannot be regarded as a constitution of Leo's. As appears from the *Basilica*-preface, Justinian's legislation was only given a different division as well as a thematic rearrangement. Leo neither renewed the legal force of Justinian's provisions incorporated into the *Basilica*; nor did he explicitly abrogate laws not included in the *Basilica*.’<sup>15</sup>

Work on the *Basilica* could thus have taken place simultaneously with the Novels without the need being felt for a 'modernisation' of the corpus, in as much as it simply preserved

<sup>12</sup> The only notice about such a commission is given in the proem to the *Epitome legum*, where a certain Symbatios is held responsible for the completion of the *Basilica* with the help of 'the other divine men expert in law' (λοιπῶν θείων εὐνόμων ἀνδρῶν); cf. Schminck, *Studien*, pp. 118-119.

<sup>13</sup> Cf. Signes Codoñer/Andrés Santos, *La Introducción al Derecho*, p. 225, note 627.

<sup>14</sup> Arguments for this hypothesis in Signes Codoñer/Andrés Santos, *La Introducción al Derecho*, pp. 246-270.

<sup>15</sup> Van Bochove, *To Date and Not to Date*, p. 208.

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ancient law. It was perhaps in the subsequent tradition, through the work of jurists, that the content of the *Basilica* was altered at some points according to the changing necessities of the users.

Fourth, the parallel drawn by modern scholars between Justinian and Leo has sometimes been pushed too far. To suggest, for example, that Leo's Novels paved the way for the *Basilica* in the same manner as the *Quinquaginta decisiones* of Justinian did for the *Codex* is perhaps a nice image, but it goes beyond any evidence.<sup>16</sup> Leo probably did not have any idea of what the *Quinquaginta decisiones* were; and in any case he never compared his Novels with those of Justinian in this sense.

And fifth and last, the most important argument: Leo does not mention any 'bereinigte Kodifikation' that was to follow the Novels. He thought apparently only of correcting certain flaws in the Justinianic law in order to suppress contradictions. If this project had been conceived as a preparatory step to the *Basilica*, he would undoubtedly have mentioned this latter work. But he did not. Scholars have, however, thought otherwise because they have not rightly understood two passages in the so-called proem of Leo's Novels and in his Novel 1. Let us now examine these passages.

To begin with Novel 1, Leo orders judges to no longer use the norms suppressed by his Novels but to apply instead ancient law together with the norms passed by him and his late father:

τούτων οὖν ἡμῖν οὕτω διωκημένων, ἀπὸ τοῦ νῦν καὶ εἰς τὸν ἔπειτα ἅπαντα χρόνον, ἅπαντιν εἰς οὗς ἀνήρτηται τὰ τῆς δίκης ζυγά, ἄρχουσι καὶ δικασταῖς, ἐντελλόμεθα τοὺς μὲν ὅσοι νόμοι παρὰ τῆς βασιλείας ἡμῶν τοῦ νομίμου ἐδάφους τὴν ἀπαλλοτριώσιν κατεψηφίσθησαν, τούτους ἀχρηστούς ἡγουμένους ἔαν ἐρρίφθαι, κατὰ δὲ τοὺς λοιποὺς ἐγγράφους, τοὺς τε ἀρχαίους καὶ τοὺς μικρῶ μὲν πρόσθεν παρὰ τοῦ ἀειμνήστου πατρὸς ἡμῶν, νῦν δὲ παρ' ἡμῶν ἐγκεικλιμένους ἢ τεθεσπισμένους, ταῖς δίκαις βραβεύειν τὰς διαλύσεις (p. 15.3-10 ND; p. 46.53-61 Tr).

Van Bochove's translation of the passage:

'Therefore, these things having been taken care of by us in this way, we command all those to whom is entrusted the yoke of judgement, [both] magistrates and judges, from now on and for all time to come, to permit all those laws that were condemned by our imperial majesty to alienation from legal soil, to be thrown away, regarding

<sup>16</sup> Cf. M.Th. Fögen, 'Gesetz und Gesetzgebung in Byzanz. Versuch einer Funktionsanalyse', *Ius Commune* XIV (1987), pp. 137-158 (149-153); G. Dagron, 'Lawful Society and Legitimate Power: ἔννομος πολιτεία, ἔννομος ἀρχή', in: A.E. Laiou/D. Simon [eds.], *Law and Society in Byzantium: Ninth-Twelfth Centuries*. Proceedings of the Symposium on Law and Society in Byzantium, 9th – 12th Centuries, Dumbarton Oaks, May 1-3, 1992, Washington D.C. 1994, pp. 27-51 (40), and J.H.A. Lokin, 'The Significance of Law and Legislation in the Law Books of the Ninth to Eleventh Centuries', in: Laiou/Simon, *Law and Society in Byzantium*, pp. 71-91.

them as useless; but [we command] that in lawsuits they pronounce sentence in accordance with the remaining written laws, viz. in accordance with the ancient laws, and the laws that were admitted or promulgated a short while ago by our father of eternal memory on the one hand, and now by ourselves on the other hand.<sup>17</sup>

After translating the passage Fögen rightly remarked: ‘Eine Erwähnung der Basiliken vermag ich in diesen Worten nicht aufzuspüren’. Leo only contrasts (in chronological order) the Ancient Law (meaning especially the Justinianic *Corpus Iuris*) with the norms issued by his father Basil (i.e. the *Prochiron*) and his own Novels.<sup>18</sup>

This Novel is in fact a doublet of the so-called proem of the collection of 114 Novels, as we will see in section 3 below. Here we find similar ideas concerning the aims and purpose of the Novels (the paragraph numbering is ours):

[§1] τοιγαροῦν οὐκ ἄξιον παριδεῖν κρίναντες ἐν τοσαύτῃ συγχύσει καὶ ταραχῇ φέρεσθαι ὧν ἡ γαλήνη καὶ ἀταραξία τῆς πολιτείας ἐξήρηται, ἐπισιπέως τε ὡς ἐνὶ μάλιστα ἐπιμελεστάτης τοὺς νόμους ἠξιώσαμεν, [§2] καὶ ὧν λυσιτελὲς ὑπάρχειν τὸ κράτος κατενοήσαμεν, τούτων ἐκλογὴν ποιησάμενοι, δόγματι ἐγγράφῳ τῆς βασιλείας ἡμῶν τῆν εἰς τὴν πολιτείαν αὐτοῖς παρησίαν ἐβεβαιώσαμεν καὶ τοῖς πράγμασι διαιτᾶν ἐπεψηφισάμεθα: [§3] οὕς δὲ ἔγνωμεν ἀσυμφόρους, τούτων δὲ ἄρα ἐνίους μὲν καὶ αὐτοὶ δόγματι τῆς τῶν νόμων τιμῆς καὶ τάξεως ἐξωστρακίσσαμεν εἰς σιγὴν διηνεκῆ συνελάσαντες, ὧν δὲ οὐδ' εἰς μνήμην ὄλως κατέστημεν διὰ τῆς ἀμνηστίας καὶ αὐτοὺς παραπλησίως ἐκείνοις συνεξωστρακίσσαμεν. [§4] ἐπεὶ δὲ καὶ ἐν ταῖς κρατούσαις συνθηταῖς ἐφάνησάν τινες οὐ παράλογοι οὐδὲ τοιαῦτα οἷας ἂν νοῦς συνετὸς ἀτιμάσειε, καὶ ταύτας νόμου προνομίῳ τιμηκότες, ἀντὶ δὲ συνθηταῖς ἀλόγου εἰς νόμου πρόσταξιν καὶ τιμὴν ἀνηγάγομεν (p. 7.10-24 N/D; p. 40.26-42.40 Tr).

The translation of Van Bochove:

‘[§1] Therefore, deeming it inappropriate to disregard the so great confusion and disorder of things upon which the serenity and tranquility of the state depend, we have thought the laws worthy of an utterly careful inspection, [§2] and after having made a

<sup>17</sup> Van Bochove, *To Date and Not to Date*, p. 211. Cf. also Fögen’s translation in Fögen, ‘Legislation und Kodifikation’, pp. 31-32: ‘Wir beauftragen alle Beamte und Richter, denen die Waage der Gerechtigkeit anvertraut wurde, von nun an und auf alle Zeiten, diejenigen Gesetze, die unsere Majestät dazu verurteilt hat, aus dem Gebiet des Rechts zu verschwinden, als unwirksam zu betrachten und als aufgehoben zu belassen, statt dessen aber die Rechtsstreitigkeiten gemäß den übrigen schriftlichen Gesetzen zu entscheiden, nämlich gemäß den alten Gesetzen und den vor kurzem von unserem Vater ewigen Andenkens, nun aber von uns selbst zugelassenen und verkündeten Gesetzen.’

<sup>18</sup> Cf. however Van Bochove, *To Date and Not to Date*, p. 213, who, after comparing Leo’s Novel 1 with the proem of the *Basilica* concluded that the texts were related to each other and stated: ‘The ἀρχαῖοι νόμοι in the dispositio of Nov. Leon. 1 can be identified as the entire Justinian legislation as structured and incorporated into the *Basilica*.’

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selection of those laws, the legal force of which we considered useful to maintain, we have secured for them freedom of speech in the state by means of a written decree issued by our imperial majesty, and we have approved, that they are the umpires in law business; [§3] but the laws which we have deemed useless, some of these, then, we ourselves ostracized from the dignity and rank of the laws by means of a decree, driving them into eternal silence; but the laws we did not mention at all, these laws we have ostracized as well, by not mentioning them, in a way almost equal to the former ones. [§4] And since amongst the prevailing customs some have appeared to be not beyond reason, whereas others are such, that an intelligent mind cannot dishonour them, we have raised these customs to the rank or dignity of law, instead of irrational custom, honouring them with the privilege of law.’<sup>19</sup>

Andreas Schminck interpreted this passage as follows:

‘Nun ergibt sich aus der Vorrede der Novellensammlung, daß zu dem damaligen Zeitpunkt – also vermutlich Weihnachten 888 – nicht nur die leontischen Novellen verfaßt, sondern auch die 60 Bücher [the name the Basilica had originally according to Schminck] abgeschlossen waren; es heißt dort nämlich, daß Leon aus der Masse der Gesetze die nützlichen ausgewählt und durch eine schriftliche Anordnung bestätigt habe, während er die unnützen teils durch eine ausdrückliche Anordnung, teils durch einfache Nichterwähnung aufgehoben habe.

Da es sich aber bei der *ἐπισημειωσις* um die *ἀνακρίθαρσις*, bei der *ἐκλογή* um die 60 Bücher, bei dem *δόγμα ἔγγραφον* um das Prooimion der 60 Bücher, bei den (anderen) *δόγματα* um die leontische Novellen und bei der *ἀμνηστία* um die Aussonderung der nicht in die 60 Bücher aufgenommenen Rechtsstoffes handeln muß und da in diesem Passus beständig das Vergangenheitstempus des Aoristes verwendet wurde, kann es keinem Zweifel unterliegen, daß das Prooimion der Novellensammlung – Leons ursprünglicher Absicht zufolge – den Abschluß des gesamten *ἀνακρίθαρσις τῶν παλαιῶν νόμων* bilden sollte.’<sup>20</sup>

This interpretation seems convincing and was in fact accepted by the majority of scholars.<sup>21</sup> But it presupposes too much that is not expressly said in the text. I think, therefore, that a more simple rendering of the passage should be attempted. In the first paragraph Leo refers to the confusion and disorder prevailing in the present laws (*συγχύσει καὶ ταραχῇ*) and to his purpose of submitting the laws to an attentive review (*ἐπισιέψεως τε ὡς ἐνι μάλιστα ἐπιμελεστάτης*). As a result of this review – and now we come to the second paragraph –, Leo confirmed and sanctioned (*ἐβεβαιώσαμεν... ἐπεψηφισάμεθα*)

<sup>19</sup> Van Bochove, *To Date and Not to Date*, pp. 215 and 219.

<sup>20</sup> Schminck, ‘Frömmigkeit ziere das Werk’, p. 93.

<sup>21</sup> See also Van Bochove, *To Date and Not to Date*, pp. 214-221.

through an imperial Novel (δόγματι ἐγγράφῳ τῆς βασιλείας ἡμῶν) every ancient law he considered useful (ὧν λυσιτελές ὑπάρχειν τὸ κράτος κατενοήσαμεν),<sup>22</sup> that is, not all of them, but only a selection (τούτων ἐκλογὴν ποιησάμενοι). The abrogated norms are mentioned in the third paragraph: some of them are expressly banished from the law (τῆς τῶν νόμων τιμῆς καὶ τάξεως ἐξωστρακίσασμεν) through a Novel (δόγματι), and condemned to an everlasting *damnatio memoriae* (εἰς σιγὴν διηνεκῆ συνελάσαντες); others, however, are suppressed exactly as the others but without any mention (ὧν δὲ οὐδ' εἰς μνήμην ὄλως κατέστημεν διὰ τῆς ἀμνηστίας καὶ αὐτοὺς παραπλησίως ἐκείνοις συνεξωστρακίσασμεν). I think Leo is distinguishing here between the ancient laws he expressly abrogated and mentioned in his Novels and other norms which were also superseded by his Novels but which he did not mention for one reason or another (perhaps he considered it superfluous or he did not want to disagree openly with ancient law). In the fourth and last paragraph Leo gave the status of law (νόμου προνομίῳ τετιμηκότες) to ancient usages that seemed well founded (ἐφ'ἀνησάν τινες οὐ παράλογοι).

Thus no evidence can be found that Leo's Novels and the *Basilica* were part of the same legislative work and complemented each other as Schminck contends on the basis of this proem. This, however, does not mean that the two works were not connected in some way, as both were promoted by the same emperor. This connection would explain the undeniable formal parallels scholars have found between the preface of the *Basilica* and Leo's Novel 1.<sup>23</sup> The common anthology of the *Basilica* and Leo's Novels found in the so-called *Florilegium Ambrosianum* also points to common use and transmission of both texts at an early stage.<sup>24</sup> But all these connections do not in any way prove that Leo conceived all his legislative activity as a coherent project. If this was the case, how could we explain the fact that he promulgated the *Prochiron* at the end of his reign, as Schminck argues, or, alternatively, encouraged its diffusion in a revised version, as I think?<sup>25</sup> Our study of the collection of 113 Novels will thus proceed without any reference to the *Basilica*.

## 2. Heterogeneity of the textual transmission

The Collection of 113 Novels of Leo is transmitted only by the Marcianus 179 of the beginning of 13th century. All later manuscripts are copies.<sup>26</sup> Each Novel in the Marcianus

<sup>22</sup> Noailles/Dain, *Les Nouvelles*, p. 6 translate 'par l'édit décrétoal' but the article is missing and if we substitute the indefinite for it the sense comes near to our proposed rendering. It must be understood that there is a δόγμα ἐγγράφον for each confirmed law.

<sup>23</sup> Van Bochove, *To Date and Not to Date*, pp. 212-221 deals extensively with this question. Cf. also Signes Codoñer/Andrés Santos, *La Introducción al Derecho*, pp. 234-240 for the connection between the proems of the *Basilica* and of the *Prochiron*.

<sup>24</sup> Cf. Van Bochove, *To date and Not to Date*, pp. 107-121.

<sup>25</sup> Arguments for a revised version of the *Prochiron* promoted by Leo in Signes Codoñer/Andrés Santos, *La Introducción al Derecho*, pp. 240-246.

<sup>26</sup> Noailles/Dain, *Les Nouvelles*, pp. XXVI-XXXVII. Cf. also L. Burgmann/M.Th. Fögen/A. Schminck/D. Simon, *Repertorium der Handschriften des byzantinischen Rechts*. Teil I: Die Handschriften des



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has been marked with a number written in the margin by a hand different from the one of the main text. However, though all 113 Novels are indeed extant in the manuscript, the last one is numbered 112 because the hand that made the marginal numbers missed out 64. The slip was surely caused by the fact that Novel 64 lacks of the initial capital written with red ink which marks the beginning of all the other Novels in the manuscript, undoubtedly a mistake of the copyist responsible for the ornamental initial letters.<sup>27</sup> Dain and Noailles dated this marginal hand to the 15th century and therefore paid no attention to this numbering for the understanding of the order of the Novels.<sup>28</sup> However, Spulber considered that this hand was contemporary with the copyist of the main text. Moreover, this hand must have numbered the Novels immediately after the main text was copied. Spulber advanced as evidence for this supposition the fact that the Marcianus numbers as Novel 113 the text of the so-called *μελέτη περὶ ψιλῶν συμφώνων*, copied after the last Novel, wrongly numbered 112. Only after this *μελέτη* does the colophon appear: *τέλος τῶν ἐπανορθωτικῶν τῶν νόμων ἀνακαθάρσεως*. This could only be explained, according to Spulber, by the will of the copyist to have 113 Novels copied in the text, for he knew that the collection included this number. In Spulber's words:

'Arrivé à la fin, il (the copyist) a dû être assez perplexe de voir qu'il n'a que 112 Novv. Comme il devait savoir qu'il y en avait 113, il a ajouté une pièce de droit grec (the *μελέτη*) qu'il avait sous la main, et en la numérotant 113, il a tranquilisé sa conscience de mercénaire.'<sup>29</sup>

If this argument holds true, it would imply that by the time the manuscript was copied the numbering of Leo's Novels was already a well established tradition. And before that date? Theodore Balsamon (d. after 1195) cites many Novels of Leo according to numbers which, in most cases, correspond exactly to their order in our collection of 113 Novels.<sup>30</sup> More

weltlichen Rechts (Nr. 1 – 327), [Forschungen zur byzantinischen Rechtsgeschichte, Band 20], Frankfurt/M. 1995, pp. 339 and 425-426.

<sup>27</sup> See C.A. Spulber, *Les Nouvelles de Léon le Sage*, [Études de droit byzantin, III], Cernăuți 1934, pp. 5-6 for all these details.

<sup>28</sup> Noailles/Dain, *Les Nouvelles*, p. XXIV and note 1.

<sup>29</sup> Spulber, *Les Nouvelles*, p. 6. His suggestion is not mentioned by Noailles/Dain, *Les Nouvelles*.

<sup>30</sup> Cf. J.A.B. Mortreuil, *Histoire du droit Byzantin ou du droit Romain dans l'empire d'Orient, depuis la mort de Justinien jusqu'à la prise de Constantinople en 1453*, I-III, Paris 1843–1846 (repr. Osnabrück 1966), Vol. II, pp. 324-325 and, especially, the complete list of G.P. Stevens, *De Theodoro Balsamone. Analysis operum ac mentis iuridicae*, [Corona Lateranensis, 16], Roma 1969, pp. 294-296. Leo's Novels cited by Balsamon by exactly the number they have in the collection of 113 Novels are the following: 2, 3 (two citations), 4 (five cit., of which two without any given number), 5, 6, 7 (two cit.), 8, 9 (two cit.), 10 (two cit.), 11 (two cit.), 14, 15 (four cit., of which one without number and another with number 5, probably a mistake by omission of the iota in τε), 16, 17, 24, 26, 27, 31, 32 (four cit.), 33 (two cit., of which one gives number 33/λγ and the other number 103/λγ, probably due to a mistake), 35 (three cit.), 48, 54 (three cit.), 58, 60, 65, 66, 68 (two cit.), 72, 73, 76, 79 (four cit.), 86 (two cit.), 87, 91, 93 and 96. In addition to these there are four other citations of Leo's Novels by

significant are the references to Leo's Novels we find in the more recent scholia to the *Basilica*. These scholia, perhaps to be dated to the end of the 11th century,<sup>31</sup> refer to twenty-two of Leo's Novels with numbers corresponding exactly with their order in the Marcianus, if we exclude some minor variations that could easily be explained as scribal errors.<sup>32</sup>

However, before this date, as Spulber rightly remarked, no source mentions Leo's Novels with numbers. This includes authors such as Psellos or Attaliates, works such as the *Peira* and the *Tipoukeitos*, and collections such as the *Epitome legum* or the *Eisagoge aucta*.<sup>33</sup> This could be evidence that the Novels were then mentioned by their rubrics or content but not according to a serial number which did not yet exist. It is also significant to observe the practice of the compiler of the much copied *Ecloga 56 Novellarum* who, as early as the 10th century, made a selection of Novels based on the Collection of 113 Novels.<sup>34</sup> He copied the Novels in the same order in which they appear in the Collection of 113 Novels, but, as he probably did not find any numbering in his source, he gave each Novel a number from 1 to 56.

If we suppose, therefore, that the Collection of 113 Novels did not have any numbering until the end of the 11th century, it may be that the total number of the Novels transmitted in it and, consequently, their order was subject to minor changes before this date. There is some evidence for this.

Balsamon, when commenting on *Nomocanon 14 titulorum* 13.4, refers to a Novel of Leo numbered 117 which decreed that a wife had no right to the hypobolon if her husband

Balsamon that do not fit in with the collection of 113 Novels. Their significance will be considered below.

<sup>31</sup> Σπ. Τρωιάνος, *Οι πηγές του βυζαντινού δικαίου*, Αθήνα/Κομοτηνή 1999<sup>2</sup>, pp. 204-206.

<sup>32</sup> For a complete list with the references see Τρωιάνος, *Οι Νεαρές Λέοντος Γ΄*, p. 34 note 62. The scholion 7 to B 11.1.7 refers to the Novel 73 (ογ΄) of Leo (BS 193.17), meaning actually Novel 72 (οβ΄), but a reference to the same Novel appears correctly in the scholion 57 to the same passage of the *Basilica* (BS 209.22) The scholion 7 to B 11.2.35 refers to the Novel 7 (ζ΄) of Leo (BS 411.1-2), meaning actually Novel 77 (οζ΄), but the error can easily be explained by the omission of the omicron. A correct reference to this very Novel appears indeed in B 60.41.55 (BS 3797.30). The *Ecloga Basilicorum*, to be dated ca. 1142, also refers to several of Leo's Novels by a number that corresponds to their order in the Marcianus, cf. L. Burgmann, *Ecloga Basilicorum*, [Forschungen zur byzantinischen Rechts-geschichte, Band 15], Frankfurt/M. 1988, p. 159.12-18 (NL 68), p. 163.15-20 (NL 16), p. 165.11-14 (NL 76), p. 206.1-4 (NL 4) and p. 228.20-24 (NL 84). However, NL 89 is mentioned in p. 95.19-20 without a number; a reference to NL 9 in p. 158.33-159.3 is mistaken, for NL 11 is in fact intended; and a reference to NL 72 in p. 540.25-29 does not match its content, as Burgmann rightly remarks in the *apparatus criticus*.

<sup>33</sup> Spulber, *Les Nouvelles*, pp. 59 and 84-91.

<sup>34</sup> Van Bochove, *To Date and Not to Date*, pp. 198-200. The author could have been working in the first half of the tenth century, cf. L. Wenger, *Die Quellen des römischen Rechts*, [Österreichische Akademie der Wissenschaften. Denkschriften der Gesamtakademie, Band 2], Wien 1953 (repr. as: [100 Jahre Bürgerliches Gesetzbuch. Pandektenrecht, 47], Goldbach 2000, pp. 707 and 709, and Τρωιάνος, *Οι Νεαρές Λέοντος Γ΄*, p. 31. Noailles/Dain, *Les Nouvelles*, pp. XLVI-XLVII refer to the beginning of the eleventh century as the date of the *Ecloga*.

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entered the monastic state: ἐρωτῶ δὲ τῆς ριζ' νεαρᾶς τοῦ βασιλέως κυροῦ Λέοντος τοῦ φιλοσόφου λεγούσης ἐξ ἀποκάρσεως τοῦ ἀνδρὸς μὴ διδύσθαι ὑπόβολου τῇ γυναικί.<sup>35</sup> Stevens identifies this Novel with Leo's Novel 22,<sup>36</sup> probably by mistake, for this Novel does not deal with the topic, and Novel 22 of Justinian (whose chapter 5 deals with the divorce that takes place when either the husband or the wife enters monastic life) is cited immediately afterwards. Moreover, Balsamon refers to Novel 117 of Justinian, specifically to chapter 10, further on in the text (p. 299). A Novel of Leo about hypobolon (probably Novel 20) is also cited (ἡ νεαρὰ τοῦ βασιλέως κυρίου Λέοντος τοῦ φιλοσόφου περὶ τοῦ ὑποβόλου, p. 298). There is a problem with this reference to a Novel numbered 117 which I cannot solve, but it would be risky to use this as evidence of the existence of more Novels of Leo than the 113 preserved in the Marcianus. However, the term hypobolon undoubtedly points to Leo and the fact remains that the regulation Balsamon mentions is not found in the collection of 113 Novels. It would appear that some of Leo's regulations went missing, perhaps confused with the Justinianic Novels.<sup>37</sup>

It could also be of significance that Balsamon numbered as 100 and 101 two of Leo's Novels that correspond to Novels 111 and 112 in the Marcianus.<sup>38</sup> We could posit an error in the transmission. But another likely explanation might be that there was more variation in the final part of the corpus. In fact, except for these two Novels and the already mentioned Novel 117, Balsamon does not cite any other after Novel 96. This is very curious, for some of the topics addressed by Leo in the last Novels of the collection would undoubtedly have been of interest to this canonist who was very careful in his reading of the imperial legislation. This is surely the case, for example, of Novel 109 which authorised the emperor to celebrate a betrothal under the minimum age of 7 years, against the whole canonical tradition. How could Balsamon have remained silent on this Novel? We will consider its significance below.

Finally, let us look at Balsamon's mention of Leo's ὑποτύπωσης in his commentary to canon 86 (95) of Carthage.<sup>39</sup> Here the emperor apparently established a fixed order of precedence for existing bishoprics of the empire and superseded the previous criterion whereby the precedence of the see depended on the seniority of its bishop. According to Balsamon this important document was preserved in the archives of Saint Sophia: κατὰ τὴν γενομένην ὑποτύπωσιν παρὰ τοῦ βασιλέως κύρου Λέοντος τοῦ Σοφοῦ τὴν ἐν τῷ χαρτοφυλακείῳ τῆς ἀγιωτάτης τοῦ Θεοῦ μεγάλης ἐκκλησίας ἀποκειμένην. This ὑποτύπωσης

<sup>35</sup> Γ. Ράλλης/Μ. Ποτλῆς, *Σύνταγμα τῶν θείων καὶ ἱερῶν κανόνων τῶν τε ἀγίων καὶ πανευφύμων ἀποστόλων καὶ τῶν ἱερῶν οἰκουμενικῶν καὶ τοπικῶν συνόδων καὶ τῶν κατὰ μέρος ἀγίων πατέρων*, τ. Α' – ΣΤ', Ἀθήνησιν 1852-1859 (ἀνατ. Ἀθήνα 1992) (= RP), I, p. 297.

<sup>36</sup> Stevens, *De Theodoro Balsamone*, p. 295.

<sup>37</sup> See note 31 above for the reference to NL 72 in *Ecloga Basilicorum* (Burgmann, *Ecloga Basilicorum*, p. 540.25-29) which does not match the contents in the Marcianus.

<sup>38</sup> RP, I, p. 331 (comment to *Nomocanon 14 titulorum* 13.30).

<sup>39</sup> RP, III, p. 516.

cited by Balsamon without any number or further reference must have been promulgated apart from the Corpus of Leo's Novels.

We must also consider the case of the so-called *Novellae extravagantes*. Andreas Schminck argued that two of these latter commonly attributed to Leon and numbered 114 and 115 by Zachariae are in fact later forgeries or recompositions.<sup>40</sup> However, the authenticity of Novels 116 (a *κατάκρισις* against judges) and 118 (about the hereditary succession in emphyteutic contracts) has not been seriously questioned until now, although Zachariä von Lingenthal expressed some doubts concerning their genuineness.<sup>41</sup> Both refer to Leo and Alexander as co-emperors, as to be expected, but it is difficult to conclude anything more from the text, for in the transmission the Novels seem to have been extremely abbreviated. The dating is also of no help, for Novel 118 is dated in the year ,ζυκζ' (6427 = 919), during the reign of Constantine and Romanus. Therefore Zachariae corrected the number into ,ζυιζ' (6417 = 909), which falls within Leo's reign.<sup>42</sup>

That some of Leo's Novels got lost or were not included in the collection of 113 Novels is also suggested by the testimony of a short history of the law preserved in the codex Mosquensis graecus 445, ff. 40v-41v. Here it is said that Leo published 120 Novels: ἐποίησε καὶ ὁ κῆρις Λέων νεαράς ρκ', οὐ πᾶσαι πολιτεύονται. According to the editor, Andreas Schminck, the text is to be dated ca. 1080.<sup>43</sup> The treatise had a certain diffusion, for Matthaios Blastares reproduces the same phrase in the prologue to his *Σύνταγμα κατὰ στοιχεῖον* composed in 1334/5.<sup>44</sup> Certainly, as Schminck stresses, this little text contains many inaccuracies and errors, but this is to be expected as the author deals with events many centuries before his time, such as law in the Republican period or the Justinianic Codification. But he seems to have been well acquainted with Leo's Novels, for in the last paragraph he speaks with detail of the validity and content of some of them. Moreover,

<sup>40</sup> A. Schminck, 'Novellae extravagantes' Leons VI.', *SG IV* (1990), pp. 195-209. His arguments for the inauthenticity of Novel 114 are somehow weaker. See for a strong defence of its genuineness N.G. Svoronos, *Les Nouvelles des empereurs macédoniens concernant la terre et les stratiotes. Introduction – Édition – Commentaires*, (Édition posthume et index établis par P. Gounaridis), Athènes 1994, pp. 41-45, who unfortunately does not mention Schminck's contribution.

<sup>41</sup> J. Zezos/P. Zezos, *Jus Graecoromanum*. I – VIII, Athenis 1931 (repr. Aalen 1962) (= Zezos, JGR), I, p. 188 note 1 and p. 189 note 1. See, however, Τρωιάνος, *Οἱ Νεαρές Λέοντος Δ'*, pp. 35-36: 'Ἐπὶ των δύο ἄλλων... δεν υπάρχουν - τουλάχιστον μέχρι τώρα - εμφανή στοιχεία, τα οποία να προκαλούν αμφιβολία για τη γνησιότητα τους.'

<sup>42</sup> The separate transmission of some Novels included in the collection of 113 Novels is of no relevance here, for it does not prove that they were transmitted previously to their integration in the corpus. See for them Noailles/Dain, *Les Nouvelles*, pp. XLIX-L and Τρωιάνος, *Οἱ Νεαρές Λέοντος Δ'*, pp. 30-35.

<sup>43</sup> A. Schminck, 'Ein rechtshistorischer 'Traktat' im Cod. Mosq. gr. 445', *FM IX* (1993), pp. 81-96 (93-95).

<sup>44</sup> RP, VI, p. 30.

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Schminck considers the author of the treatise to be a jurist.<sup>45</sup> Thus, it would be wrong to dismiss out of hand his reference to a collection of 120 Novels by Leo.<sup>46</sup>

But the most important evidence for the existence of an arrangement of Leo's Novels different from the one represented by the Marcianus was found by Nicolaas van der Wal more than thirty years ago in the *scriptura inferior* of the palimpsest codex F 106 sup. of the Biblioteca Ambrosiana (Milan).<sup>47</sup> There the Dutch scholar found the text of thirteen Novels of Leon whose numbering – for they are all provided with a number – did not match the sequence of the Novels in the Collection of 113 Novels. The numbers provided in the Ambrosianus, however, are not consecutive, a circumstance that makes it an anthology of a more complete previous collection of the Novels, no longer extant.<sup>48</sup> This original collection must have been very old, perhaps dating from the very reign of Leo VI, for the Ambrosianus, which is based on it and follows its sequence for the Novels, was copied already in the 10th century. Thus we can conclude that there was in the 10th century a collection of Leo's Novels whose numbering was considered authoritative by the compiler of the selection in the Ambrosianus. The fact that the numbering of the Collection of 113 Novels was not done before the second half of the 11th century could be a first clue, albeit tenuous, of the derivative nature of the Collection. This is an illuminating contrast to the compilation in the Ambrosianus, where even the order of the selected Novels is taken over from the source. The compiler of the Ambrosianus preserved also the wording of the original rubrics of the Novels, whereas most of the rubrics were abridged or suppressed in the tradition of the Marcianus.<sup>49</sup> This again makes the tradition of the Ambrosianus more reliable, that is, closer to the archetype of the Novels of Leo.<sup>50</sup>

<sup>45</sup> Schminck, 'Ein rechtshistorischer "Traktat"', pp. 95-96.

<sup>46</sup> Cf., however, Schminck, 'Ein rechtshistorischer "Traktat"', p. 92, note 25: 'Ganz unglaubwürdig ist etwa auch die – von Blastares [...] übernommene und dadurch bekanntgewordene [...] – Nachricht, daß Leon VI. 120 Novellen verfaßt habe.' Spulber, *Les Nouvelles*, pp. 58-59 also dismissed as unimportant the large number of Leo's Novels cited in Blastares (120) and the *Prochiron auctum* (201!) and already mentioned by Mortreuil, *Histoire*, II, pp. 291-292.

<sup>47</sup> N. van der Wal, 'La tradition des Nouvelles de Léon le Sage dans le manuscrit palimpseste Ambrosianus F 106 sup.', *TRG* 43 (1975), pp. 257-269.

<sup>48</sup> The numbers of the 13 Novels of the Ambrosianus (in bold) and their correspondence (in brackets) with the sequence-numbers of the Novels of the Collection of 113 Novels as supplied by modern editors are given by Van der Wal, 'La tradition des Nouvelles', p. 257 as follows: [no number extant] (25), **8** (19), **9** (28), **14** (66), [unreadable number] (29), **22** (20), **24** (10), **25** (51), **28** (37), **34** (41), **36** (21), **38** (42), [unreadable number] (22). For an explanation of the circumstance that no Novel number higher than 66 in the Collection of 113 is mentioned in the Ambrosianus, see the following section of this article.

<sup>49</sup> Spulber, *Les Nouvelles*, p. 59 gives the following explanation for the disappearance of the rubrics in the Marcianus: 'La chose s'explique directement par la paresse des copistes, puisqu'il y a des rubriques qu'ils ont cependant transcrites. Mais la rubrique étant le moyen d'identifier ou distinguer une loi, la paresse ne pourrait y avoir prise, si cette fonction de la rubrique n'était pas supplée par un autre moyen, c'est à dire, par la numérotation.'

<sup>50</sup> Needless to say, neither the Ambrosianus nor the Marcianus reflect the original form of the Novels, for some constituent parts of a law are lacking in both collections whereas explanatory elements strange to

Accordingly, Van der Wal already advanced the possibility that the collection of the Ambrosianus reflected a stage earlier than the Collection of 113 Novels. He even suggested that the Novels in the Ambrosianus might have been copied in chronological order, while the Collection of 113 Novels would have been arranged according to a thematic pattern (as we will try to prove below in section 3). This could only be true if we suppose that Leo promulgated his Novels separately at different times. In the words of the Dutch scholar:

‘D’abord, Léon le Sage a rédigé et promulgué, l’une après l’autre et séparément, les cent treize Nouvelles que nous connaissons; puis, ces lois ont été réunies, soit sur l’ordre de l’empereur soit par une initiative privée, dans la collection qui a servi de base à l’anthologie ambrosienne; dans ce recueil, l’ordre des Nouvelles était probablement chronologique. Enfin, l’empereur Léon a remplacé cette collection par une autre qu’il munit d’une préface et dans laquelle il tenta de classer les lois dans un agencement plutôt systématique.’<sup>51</sup>

Unfortunately, Van der Wal did not offer any evidence in support of the chronological order of the Ambrosian anthology and so his hypothesis, which I find particularly convincing, did not prevail in the later research, which persistently maintained the position of Dain and Noailles of simultaneous conception and promulgation of the Novels within the framework of a collection. However, insofar as the existence of two collections of differently arranged Novels can not be doubted, the question of the priority of one over the other must be approached in a more satisfactory way than it has been done until now. The transmission of a proem and a promulgatory Novel (NL 1) in the collection of 113 Novels of the Marcianus is clearly not evidence of its priority since both the proem and NL 1 could also theoretically have been preserved in the other branch of the transmission represented by the mutilated Ambrosianus. Only an internal analysis of the coherence of the collection of 113 Novels, as attempted in the next section, will show whether Leo could have promulgated his Novels all at once for the first time in such a collection as the one preserved in the Marcianus.

its conception have been added. A careless transmission is usually held responsible for these changes. It is worth quoting here the words of Τρωιάνος, *Οι Νεαρές Λέοντος Γ΄*, pp. 19-20: ‘... Σε κάθε Νεαρά, είτε λείπουν τελείως είτε είναι ελλιπή, πρωτόκολλο και εσχατόκολλο με υπογραφή (ή εκείνα τα στοιχεία που την αντικαθιστούν) και αναγραφή του χρόνου εκδόσεως ... Στη σημερινή μορφή της συλλογής φέρουν οι Νεαρές επικεφαλίδες που ασφαλώς δεν είναι αυθεντικές. Αυτό όμως δεν μπορεί να θεωρηθεί επιχείρημα για τον ανεπίσημο χαρακτήρα της, γιατί αυτές οι επικεφαλίδες πιθανότατα βρίσκονταν αρχικώς στο περιθώριο του κειμένου των επιμέρους Νεαρών (έχοντας προστεθεί από κάποιον χρήστη για διευκόλυνσή του μάλλον ως *summae*) και αργότερα μεταφέρθηκαν από τους αντιγραφείς μέσα στο κείμενο.’

<sup>51</sup> Van der Wal, ‘La tradition des Nouvelles’, p. 261.

We can thus conclude that, to our knowledge, most of the Novels written or promulgated by Leo were included in the Collection of 113 Novels.<sup>52</sup> This circumstance is open to various interpretations, but it does not necessarily imply that the collection of 113 Novels was the only corpus of Novels promulgated by Leo during his reign. On the contrary, the supposition that this collection was conceived at a very advanced stage of his reign on the basis of his previous legislation is quite plausible and consistent with the fact that almost no Novels exist outside the collection.<sup>53</sup> If we were to assume, following the *communis opinio* that this collection was made in the first two years of Leo's reign, it would be very difficult to understand why Leo promulgated virtually no other Novels in the following twenty-four years. In the light of the verbosity of our emperor in his extant Novels, this would imply a real change in his personality! Nor does this fit with the fact that Leo certainly commissioned such works as the *Kletorologion* of Philotheos (ca. 899) or the *Book of the Eparch* (ca. 912), which regulated important fields of administration, or the *Prochiron* if we accept the dating proposed by Schminck (ca. 907).

The usual explanation is that Leo avoided further legislation after the supposed promulgation of the *Basilica* in 888 because he did not want to follow the pattern of Justinian in his *Novels*, who introduced changes and innovations at variance with dispositions of the *Codex* and *Digest*. To be sure, Leo criticises Justinian in his Nov. 1 for this incongruity, but, as we have seen in the previous section, there is no reference in his Novels to any corpus like the *Basilica*. The idea that the Novels were conceived as a 'kodifikationsbegleitende Legislation', to use Fögen's words, is a modern inference, induced by the parallelism with Justinian, but has not been convincingly proved. The supposed 'legislative' silence of Leo between 888 and 912 is only hypothetical and must not be taken as starting point in an assessment of the facts.

### 3. Heterogeneity of the Corpus

It is not only the existence of two branches in the transmission of the Novels that argues against considering the whole collection of 113 Novels as an officially promulgated law corpus. The very structure of the collection of 113 Novels casts serious doubt on this conception. In fact, there is in this collection no clear arrangement of the legal material to suggest any imperial programme. But an attentive reader can perceive a division of the

<sup>52</sup> These are the Novels the scholiasts to the *Basilica* refer to; see Mortreuil, *Histoire*, II, pp. 321-322 and Τρωϊάνος, *Οι Νεαρχές Λέοντος Γ'*, p. 34, note 62.

<sup>53</sup> Whoever compiled the Novels of Leo, if it was not the emperor himself, must have been well acquainted with his legislative work. A figure like Symbatios, who apparently helped in the redaction of the Sixty Books and is usually held responsible for the composition of the *Epitome legum* ca. 913-914 (cf. Schminck, *Studien*, pp. 128-131), could be an excellent candidate for such a post. For the collectio as a result of a private edition, cf. Sp. Troianos, 'Die Novellen Leons VI.', in: Sp. Troianos [ed.], *Analecta Atheniensi ad ius Byzantinum spectantia*, I, [Forschungen zur byzantinischen Rechtsgeschichte. Athener Reihe, 10], Athen/Komotini 1997, pp. 141-154 (repr. in: Sp. Troianos, *Historia et Ius*. Band I: 1969 – 1988; Band II: 1989 – 2004, Athen 2004, II, pp. 603-619); cf. also Τρωϊάνος, *Οι πηγές*, pp. 160-167.

Novels into several groups according to strictly formal criteria. Let us consider these briefly.

**Part A** (proem and Novel 1)

At the beginning of the collection we find a text, entitled προοίμιον in the Marcianus,<sup>54</sup> where the emperor, after describing the confused state of the law in force because of the passing of time, declares his purpose of amending certain earlier laws whilst suppressing others and even conferring legal status on prevailing usages. We briefly considered a passage of this text in the first section of this study.<sup>55</sup> The so-called Novel 1 that follows the proem in the Marcianus repeats the same ideas with minor changes. The most significant difference from the proem lies in the fact that Novel 1 puts most of the blame on Justinian for the confused situation of extant law on account of the great number of Novels he promulgated after the completion of his Corpus (i.e. the Codex and the Digest). But except for this specific reference to Justinian, Novel 1 covers the same topics as the proem. It mentions also the amending and suppressing of previous law along with the new legal status conferred on old usages. The only difference here is that the proem specifically states that some abrogated laws are not mentioned by Leo in the corresponding Novels that supersede them, whereas this indication is lacking in Novel 1. However, even in minor details, such as the reference to the throwing of dice,<sup>56</sup> the two texts concur.<sup>57</sup>

This repetition puzzled scholars. Dain found a parallel in the proems written by Justinian in the Digest.<sup>58</sup> In particular, the constitutions *Deo auctore* and *Tanta/Δέδωκεν* repeat similar ideas and could have provided the classicist Leo with a model for his double proem. To be sure, there are in both constitutions certain ideas which Leo uses for his proem and the Novel 1. For example a confused and contradictory mass of laws is mentioned both by Justinian and Leo. Justinian refers to the Greek word ἀντινομία in *Deo auctore* § 8 to explain the contradictions of the existing law,<sup>59</sup> and a similar concept is used by Leo several times both in the proem and Novel 1.<sup>60</sup> There can be no doubt, then, that Leo was inspired by these Justinianic constitutions for the composition of the proem and Novel 1. However, I have serious reservations concerning the idea that Leo intended to

<sup>54</sup> Noailles/Dain, *Les Nouvelles*, p. XXIII.

<sup>55</sup> For a detailed interpretation of this Novel, cf. also Van Bochove, *To Date and Not to Date*, pp. 215-221.

<sup>56</sup> κατὰ κύβους πεττευόντων (proem. p. 7.8-9 N/D; p. 40.25 Tr) – ἔνω καὶ κάτω πεττευομένα τὰ πράγματα φέρεται (Nov. 1, p. 13.15 N/D; p. 44.38-39 Tr), cf. ἔνω καὶ κάτω πάντα στρέφουσά τε καὶ μεταφέρουσα (proem p. 5.14-15 N/D; p. 40.14-15 Tr).

<sup>57</sup> Cf. Spulber, *Les Nouvelles*, p. 61.

<sup>58</sup> Noailles/Dain, *Les Nouvelles*, pp. XIII-XIV.

<sup>59</sup> Cf. *contrarium* and *dissonantia* in const. *Tanta* § 15.

<sup>60</sup> Proem: ἀντιφθέγγεσθαι (p. 7.3 N/D; p. 40.19 Tr), ἀντεπιόντων (p. 7.5 N/D; p. 40.21 Tr), ἐναντιωθέντων (p. 7.6 N/D; p. 40.22-23 Tr), ἐναντίωσιν (p. 9.4 N/D; p. 42.44-45 Tr); NL 1: ὑπαναντίον (p. 11.18 N/D; p. 44.18 Tr), ἀντιλογίας (p. 13.8 N/D; p. 44.31-32 Tr), ἀντιλογίαν (p. 13.19 N/D; p. 44.43 Tr), ἀντίπαλον (p. 13.20 N/D; p. 44.44 Tr).



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publish both texts at the same time as a kind of introduction to his collection of 113 Novels. He had no reason to follow the repetition in the introductory constitutions of the Digest as a model for his Novels. Moreover, the differences in scope and function between Justinian's introductory constitutions of the Digest and Leo's proem and Novel 1 are so evident as to exclude any parallelism between them. Let us now consider briefly the evidence.

To begin with, Justinian composed the constitution *Deo auctore* in 530 before the commission led by Tribonian met to fulfil the task of composing the Digest. In this constitutio 'de conceptione Digestorum' Justinian drew the main lines to guide the members of the commission in their work. Thus, he addressed this constitution to Tribonian alone. After the commission had completed his task, Justinian promulgated the constitution *Tanta* in 533 addressed to the Senate and People of Rome with the purpose of promulgating the *Digest* ('de confirmatione Digestorum') to all the inhabitants of the empire.<sup>61</sup> This difference in date and addressee between the two texts explains why Justinian felt obliged in 533 to repeat certain ideas essential for a correct appraisal of the *Digest* which he had already expressed in 530. Nothing of the sort occurs, however, in Leo's proem and Novel 1. Both texts were written in preface to a finished collection of Novels and no difference of scope or function is perceived. Of course, the proem has no addressee whereas Novel 1 is addressed to Stylianos Zaoutzes in his capacity of *magister officiorum*, but considering the faulty transmission of the collection, as noted above, I would not press this evidence too far. Furthermore, I do not think that a word like *προοίμιον* would ever have been used by Leo to introduce a collection of his Novels if he had wanted to draw a parallel between this text and the constitutio *Deo auctore*.

The parallel between the Justinianic constitutions and the proem and Novel 1 of Leo is thus mistaken, for the former introduced not the collection of Justinianic Novels but the Digest. Leo could have borrowed some ideas from the constitutions to the Digest for a promulgatory Novel, but what sense was there in making a duplicate of it after the model of the Justinianic constitutions if the Digest and Leo's Novels were so different in scope? What is more, the constitutions in the Digest mention the relation of this text to the Codex, but Leo fails to refer to the *Basilica*, as we have already noted.

I therefore suspect that the so-called proem and Novel 1 were two alternative redactions of a promulgatory text to the collection of 113 Novels. The poor state of the transmission of Novel 1, in which Noailles and Dain conjectured three main lacunae, is perhaps evidence of its earlier transmission at the beginning of the collection, where the proem, which has reached us in a better state of preservation, was formerly lacking. This Novel 1 was probably conceived as a promulgatory Novel without any number and later

<sup>61</sup> For const. *Tanta/Δέδωκεν*, cf. T. Wallinga, *Tanta/Δέδωκεν. Two Introductory Constitutions to Justinian's Digest*, Groningen 1989 who argues that the purpose and intention of these constitutions must be considered in connection with the diffusion of the Digest intended by Justinian. He therefore disregards the constitution *Deo auctore* in his study.

given one when the whole collection was numbered at the end of the 11th century. The fact that the proem better describes Leo's legislative intentions (for example when it mentions that certain laws are not explicitly abrogated in the Novels) could be an argument for its later redaction and insertion at the beginning of the collection, perhaps when this latter was augmented with new Novels. It could be that after the publication of his first Novels (or first collection thereof, see below) Leo changed his mind about openly criticising Justinian and mentioning the legislative work of his father Basil: both are absent from the so-called proem, which contains a more straightforward exposition of the facts and purposes of the intended work.

If this inference turns out to be correct, the two texts at the beginning of the collection of 113 Novels would have been conceived at different times for different stages of the collection but copied together by the branch of the transmission represented by the Marcianus. This would make the collection of 113 Novels a work in progress and contradict the thesis that this law book was conceived by Leo from the beginning in its present form.

#### **Part B** (Novels 2-68)

The first 68 Novels of the collection present a more or less thematic arrangement, as noted already by Monnier, Noailles and Dain among others.<sup>62</sup> Novels 2 to 17 deal with ecclesiastical matters and are all accordingly addressed to the patriarch Stephen, Leo's brother, who held office from the beginning of his reign in 886 until 893, the year of his death. Novels 18 to 23 deal with marriage, dowry and betrothals. Related to them are Novels 24 to 35, treating adoption, emancipation, guardianship, adultery, abortion and rape. Novels 36 to 44 are devoted to inheritance. Novels 45 to 49 refer to legal procedures and magistracies (authentication of the sentences by judges, dispositions concerning curials and praetors, testimonies of women and slaves in court). Novels 50 to 57 are more various but deal mainly with the acquisition of property (Novels 50 to 52: donations, treasures, falsification of coinage) and usages (Novels 53 to 57: burial, work on Sundays, forceful conversion of the Jews, regulation of fishing posts). The last group, Novels 58 to 68, deals with forbidden practices and crimes and establishes their punishment.

Novels 18-68 are all addressed to Stylianos (Zaoutzes) as *magister officiorum*. Zaoutzes is well known as a dominant force during the first half of Leo's reign until his

<sup>62</sup> H. Monnier, *Les Nouvelles de Léon le Sage. Introduction - droit public - droit pénal - les personnes - les biens*, [Bibliothèque des Universités du Midi, 17], Bordeaux/Paris 1923, p. 6 and Noailles/Dain, *Les Nouvelles*, pp. XIX-XX.

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death in 899.<sup>63</sup> The dating of his tenure of office, however, is more problematic, and it is precisely on this that depends the date of Leo's collection.<sup>64</sup> Let us now consider the facts.

Although Zaoutzes was not the leading figure in Leo's reign when he came to the throne after the sudden death of Basil (this being the role of Andrew, the domesticus of the Scholae), he acquired a dominant position after the trial of Photius, probably already in 887.<sup>65</sup> The sources mention him holding the office of logothete of the Course in the early years of Leo's reign, with the title of *magistros*. A lead seal is preserved on which he is addressed with the ranks of *magistros*, *anthypatos*, *patrikiος*, *basilikos protospatarios* and, finally, *logothete of the Course*. The title of *magister*, which stands first on the seal, is not to be automatically identified with the office of *magister officiorum* used in the addresses of the Novels. This latter office had in fact practically disappeared in the 8th century. However, as Andreas Schminck has suggested, the title was probably revived by Stylianos, who sought to emulate Tribonian, 'welcher in den Jahren 528-529 und 533-534 'magister officiorum' gewesen zu sein scheint und als solcher in mehreren justinianischen Konstitutionen genannt wird.'<sup>66</sup>

Although we might assume that Stylianos was addressed by Leo as *magister officiorum* already in 887, it is more difficult to establish how long he remained in this office before being appointed βασιλειοπάτωρ. This last post was highly prized by Stylianos, as is shown by another seal of his where only this office is mentioned. It is therefore usually assumed that Stylianos could no longer be addressed as *magister officiorum* after he had been appointed βασιλειοπάτωρ. This appointment took place already in the third year of Leo's reign, that is to say, between August 888 and August 889, if we accept the evidence of the chronicle of Pseudo-Symeon, who recounts this with other events in the third year of Leo's reign. However, this dating has been disputed by Jenkins and others,<sup>67</sup> who based their arguments on the chronicle of Symeon the Logothete (on which Pseudo-Symeon is dependent), where the reference to Leo's third regnal year is missing. Moreover, Jenkins carefully followed the sequence of the events listed by the Logothete and noted that the appointment of Zaoutzes is mentioned after an eclipse of the sun on the Sunday 8th August of 891. After the appointment of Zaoutzes, the first event mentioned in the chronicle is the death of the patriarch Stephen in 893. Since Jenkins proved that the sequence of the events in the Logothete follows a strict chronological order, we must accordingly date the appointment of Zaoutzes between 891-893. This

<sup>63</sup> Cf. S. Tougher, *The Reign of Leo VI (886-912). Politics and People*, [The Medieval Mediterranean. Peoples, Economies and Cultures, 400-1453. Vol. 15], Leiden/New York/Köln 1997, pp. 89-109 for the person of Zaoutzes.

<sup>64</sup> For the offices and titles of Zaoutzes, cf. Schminck, 'Frömmigkeit ziere das Werk', notes 127-130 and Tougher, *The Reign of Leo VI*, pp. 98-99 with further bibliography and references.

<sup>65</sup> Tougher, *The Reign of Leo VI*, pp. 94 and 98.

<sup>66</sup> Schminck, 'Frömmigkeit ziere das Werk', note 127.

<sup>67</sup> R.J.H. Jenkins, 'The Chronological Accuracy of the 'Logothete' for the Years A.D. 867-913', *DOP* 19 (1965), pp. 89-112 (104-106) (repr. in: R.J.H. Jenkins, *Studies on Byzantine History of the 9th and 10th Centuries*, [Variorum Reprints. Collected Studies, 1], London 1970, No. III).

dating, accepted also by Tougher,<sup>68</sup> would make 891-893 the *terminus ante quem* for the composition of the collection of 113 Novels, for most of the Novels 69-104 are addressed to Stylianos as magistros and none of them calls him βασιλειοπάτωρ.

Jenkins's dating was rejected by Schminck, who argued that no relative chronology of the listed events, as represented by the sequence in Symeon Logothete (however trustworthy it may be), could outweigh the concrete and absolute reference to the third regnal year in Pseudo-Symeon. Indeed, if we agree that the eclipse occurred in 891, how can we explain that the events listed afterwards are all included in Leo's third regnal year, that is, between August 888 and August 889? However, if we accept the dating of Pseudo-Symeon as Schminck does, we have another problem. For if the appointment of Stylianos as βασιλειοπάτωρ before August 889 is the *terminus ante quem* for the collection of 113 Novels, we must conclude that the work was begun and completed in less than two years, since Stylianos was probably not appointed magistros before 887. However, such a swift completion of the Novels would appear highly unlikely and, as we will see, inconsistent with the evidence provided by the Novels themselves.

I argue, therefore, for a later dating of the appointment of Stylianos as βασιλειοπάτωρ, which would give more time for the completion of the collection of the Novels by Leo between 887 and 893. The reference of Pseudo-Symeon to a third regnal year could well be mistaken, as it does not occur in the original chronicle of the Logothete. But even if Pseudo-Symeon's date is correct, it does not necessarily apply to all the events recounted in the chapter. In fact, under the third regnal year of Leo the following events are listed in succession: a siege of Samos by the Arabs, the appointment of Zaoutzes as βασιλειοπάτωρ, a campaign of Tsar Symeon and the death of patriarch Stephen. This latter event, as we know, took place in 893. But what about the campaign of Symeon? It is mentioned before the death of Stephen in Pseudo-Symeon and after it in the original chronicle of the Logothete, which would appear to be more correct, for the campaign of Symeon took place ca. 894-896. This again raises suspicions concerning the rearrangement of the material by Pseudo-Symeon. In any case, if the sequence of Pseudo-Symeon is correct and we do not take into account the dating of the above mentioned eclipse, it would necessarily follow that the appointment of Zaoutzes occurred before 893 and after Leo's third regnal year 888.

It should also be noted that the appointment of Zaoutzes as recounted by the Pseudo-Symeon is presented as a consequence of the extramarital liaison of the emperor with Zoe Zaoutzina (she is mentioned first through a participle construed with the subject),<sup>69</sup> whereas the original text of the Logothete mentions first the appointment and then the

<sup>68</sup> Tougher, *The Reign of Leo VI*, p. 94.

<sup>69</sup> *Theophanes Continuatus... Symeon Magister*, ed. I. Bekker, *Theophanes Continuatus, Ioannes Cameniata, Symeon Magister, Georgius Monachus*, [Corpus Scriptorum Historiae Byzantinae], Bonn 1838, p. 701.20-22: συμφλιωθεις δε ο βασιλευς Ζωῆ τῆ θυγατρὶ τοῦ Ζαούτζα προχειρίζεται αὐτὸν βασιλειοπάτορα, αὐτὸς καινουργήσας τὸ ὄνομα.

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liaison.<sup>70</sup> It may be that Pseudo-Symeon put the liaison first for he considered that it actually began in the third regnal year, when Leo's wife Theophano was still alive. The appointment of Zaoutzes as βασιλειοπάτωρ would thus be in his eyes simply a consequence of this liaison, mentioned in the text before it occurred. In fact, the two events, Leo's liaison with Zoe and the appointment of Zaoutzes, are not related, as we will see. Equally wrong is the connection made by the Logothete between the death of Zoe's father and the liaison between his daughter and the emperor, for the *Vita Euthymii* expressly says that Zoe's father died shortly after Theophano ca. 896.<sup>71</sup> In any case, the connection of all these facts in the chronicle obviously affects the dating.

On the other hand, I do not think we can consider the appointment of Zaoutzes as βασιλειοπάτωρ as a valid *terminus ante quem* for the completion of the Novels without first taking into consideration the functions of this office. Philotheos lists the office at the top of his catalogue of dignities with words that leave no room for doubt concerning its significance: καὶ πρώτη μὲν καὶ μεγίστη ἡ τοῦ βασιλειοπάτορος παρὰ Λέοντος τοῦ φιλοχριστοῦ ἡμῶν βασιλέως ἐκφωνηθεῖσα ἀξία 'first and most important is the dignity of basileopator that was promulgated by our Christ-loving emperor Leo'.<sup>72</sup> Nevertheless, we know nothing about the real responsibilities of this office. Considering the ending -πάτωρ in classical compounds like προπάτωρ, πατροπάτωρ or μητροπάτωρ we might think that a rendering as 'Father' (or even 'Lord') would be most appropriate. But, conversely, other compounds such as θεοπάτωρ or χριστοπάτωρ are to be translated as 'son of God' or 'son of Christ'. The first option was usually taken for granted, as scholars (and also some Byzantine writers) thought that the title alluded to the fact that Zaoutzes was father-in-law of Leo. Strictly speaking, this relationship came into being only after Zaoutzes's daughter Zoe married the emperor ca. 898. But considering that Zaoutzes was already dead in 899 the title must be put in relation to the liaison Zoe had with Leo already during his first marriage with the empress Theophano, even before her death ca. 895-896. This explanation is unsatisfactory for two reasons. First, it seems too risky even for an emperor to concoct a title out of a pun on his own adultery. Second, although most of the Byzantine sources render the office as βασιλειοπάτωρ (because they were amused at the pun?), the

<sup>70</sup> *Symeonis Magistri et Logothetae Chronicon*, ed. St. Wahlgren, *Symeonis Magistri et Logothetae Chronicon*, [Corpus Fontium Historiae Byzantinae (Series Berolinensis), XLIV/1], Berolini 2006, c. 133.13 (p. 274.78-81): προεχειρίσατο δὲ Λέων ὁ βασιλεὺς Ζαούτζαν εἰς βασιλειοπάτορα, συμφλιωθεὶς ἤδη Ζωῆ τῇ αὐτοῦ θυγατρὶ, φαρμάκῳ τινὶ τελευτήσαντος τοῦ ἀνδρὸς αὐτῆς Θεοδώρου τοῦ Γουζουνιάτου. The adverb ἤδη underlines the anteriority value of the aorist participle συμφλιωθεὶς. This could be the reason for the change made by Pseudo-Symeon in the word order.

<sup>71</sup> *Vita Euthymii*, ed. P. Karlin-Hayter, *Vita Euthymii Patriarchae CP. Text, Translation, Introduction and Commentary*, [Bibliothèque de Byzantion, 3], Bruxelles 1970, p. 45.31-35.

<sup>72</sup> N. Oikonomides, *Les listes de préséance byzantines des IX<sup>e</sup> et X<sup>e</sup> siècles. Introduction, texte, traduction et commentaire*, Paris 1972, p. 101.

correct spelling is βασιλειοπάτωρ, as it appears on the lead seal of Zaoutzes and in the *Taktikon Benešević*.<sup>73</sup>

I find convincing the thesis advanced by Schminck that the first part of this compound actually referred to τὰ βασιλεια, that is to say, to the imperial palace.<sup>74</sup> Thus the office is to be rendered as ‘Palastchef’ or ‘Hofmei(st)er’. In order to explain this bizarre title, Schminck suggested that it might be a kind of translation into Greek of the office of *quaestor sacri palatii* (a sort of Lord Chancellor) that was held twice by Tribonian, from 529 to 532 and from 535 to 542. This parallel is tempting but should be rejected for several reasons. First, although τὰ βασιλεια is a perfect rendering of ‘sacrum palatium’, the office of ‘quaestor’ and the second part of our compound πάτωρ (to be rendered as ‘Lord’ or ‘Father’) have only one (unimportant) morphological element in common: the ending in -tor. Schminck argues that the Latin name of ‘quaestor’ could not be translated appropriately into Greek at this time and that a free rendering through the classicizing -πάτωρ was chosen instead. But the title κραιστωρ or κοιαιστωρ is well attested in this period and, even if it seemed inappropriate for one reason or another, other possibilities were surely at hand, for example ῥαικτωρ. The supposition that an appropriate rendering of the office of *quaestor sacri palatii* was not possible in the Greek of the time is in my opinion unfounded.

Secondly, Zaoutzes had already taken as a model the office of *magister officiorum* which had been held by Tribonian. This was according to Schminck, the reason why Zaoutzes was addressed as μάγιστρος τῶν θείων ὀφφικίων. Now, seeing that these ὀφφικια, because they are qualified as θεία, must have had to do with the imperial or ‘sacred’ palace, it would come as no surprise that this Latinate word for the court (inappropriate in the context of the ‘Exhellenismos’ promoted by the Macedonians) was substituted by the Hellenic τὰ βασιλεια. The plural form τὰ βασιλεια fitted in perfectly with the idea of a court sheltering a plurality of offices. Moreover, the Latinate μάγιστρος would also have been discordant in this classicizing context and could have been replaced by the Greek πάτωρ, which expresses approximately the same idea. In my opinion, then, βασιλειοπάτωρ was intended as a ‘Hellenic’ rendering of the ancient office of *magister officiorum* and should be translated as ‘Lord of the Imperial Court’. This corresponds exactly with the rendering ‘Hofmeister’ proposed by Schminck.

If this interpretation holds true, then we could suppose that at a certain point the office of μάγιστρος τῶν θείων ὀφφικίων held by Zaoutzes was transformed and changed (or simply renamed?) into βασιλειοπάτωρ. The circumstance that the two offices are not found together in any *Taktikon* could be put forth in support of this hypothesis. Zaoutzes probably omitted the ancient name of his office on his official seals, but it is doubtful that the new bombastic denomination of the office was consistently applied. It could also be that the βασιλειοπάτωρ was intended more as a title and that the office of μάγιστρος τῶν

<sup>73</sup> Oikonomides, *Les listes*, p. 245.

<sup>74</sup> Schminck, “Frömmigkeit ziere das Werk”, note 130.

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θειῶν ὀφφικίων continued to be used, as is proved by the addresses in the Novels. In any case, it is plausible that the Byzantine sources did not understand the identical nature of the title and the office and confounded them. Finally, it may also be that Zaoutzes was not appointed βασιλειοπάτωρ in the third regnal year of Leo (if this date is indeed to be accepted), but μάγιστρος τῶν θειῶν ὀφφικίων: the new name of the office could have been created some years later.

We can therefore conclude that the fact that Zaoutzes is called μάγιστρος τῶν θειῶν ὀφφικίων in the Novels does not exclude their dating any time up to his death in 899. However, Novels 2-17, dealing with Church law, are to be dated before 893, for all of them are addressed to the patriarch Stephen, who died this year. As there is no other Novel in this part B dealing with purely ecclesiastical affairs,<sup>75</sup> I infer that when the Novels of this section were ordered thematically Stephen was the only possible addressee of Church laws. Thus, we may date the Novels in this part between 886-893. More arguments for this dating follow in our comments on part C.

### Part C (Novels 69-104)

In clear contrast to the Novels of Part B there is no systematic arrangement in Novels 69-104 which deal with various matters. Moreover, topics dealt with in the previous part B appear in part C over and over at different points. Thus, Church law, as in the Novels 2-17, is the main topic of Novels 73, 75, 76, 79, 86, 87 and 88. Novels 74, 79, 85, 89, 90, 91, 93, 98, 100, 101, the most important group, deal with marriage, a topic that was already addressed in Novels 18-23. Problems related to the inheritance are treated in turn in Novels 69 and 82, although these matters were previously dealt with in Novels 36-44.<sup>76</sup> Novels 78 (senatusconsultum), 84 (the rights of the provincial magistrates), 94 (consulate), 97 (oath of judges) and 99 (oath of the plaintiff) could have been copied together with Novels 45-49 dealing with legal procedures and magistracies. Usages are handled in Novels 71, 80, 81, 95, 102, 103 and 104, exactly as in Novels 53-57. Finally, crimes are the main concern in Novels 70, 77, 92, 96, and would accordingly have been appended to Novels 58-68.

It would have taken a jurist little time to put all the Novels 69-104 in their proper place according to the distribution of the topics in part B. It is very significant that this was not done. This would indicate that Novels 69-104 were added without any arrangement (perhaps in their original chronological order?) to an already preexistent corpus of Novels 2-68 which had been arranged thematically. It we suppose that Novels 2-68 were promulgated between 886-893, then the Novels of part C must be of a later date. There are arguments to support this.

<sup>75</sup> Novel 54 dealing with working on Sundays, Novel 55 about the conversion of the Jews and finally Novel 68 about guardianship for monks and priests approach ecclesiastical affairs, but they could be also considered common laws.

<sup>76</sup> Cf. Τρωϊάνος, *Οι Νεαρχές Λέοντος Α'*, p. 22.

First of all, the addressees. All Novels of part C are addressed to Zaoutzes, except one, Novel 75, which is addressed to the patriarch Stephen. Curiously enough, this Novel 75 is a repetition of Novel 16 in as much as both treat the same problem, whether a subdeacon might be ordained at twenty years of age. More revealing, however, is the fact that Novels 73, 75, 76, 79, 86, 87 and 88, dealing with Church law, are addressed to Zaoutzes and not to Stephen. I think that if Stephen had still been in charge, Leo would also have addressed these Novels to him, as had been his custom. After the death of Stephen in 893, however, Anthony Kauleas was elected to the patriarchal throne. Kauleas was not simple the emperor's puppet as Leo's brother Stephen had been,<sup>77</sup> and thus the emperor must have found it easier after 893 to address even ecclesiastical matters to Zaoutzes. The increasing problems of emperor with the Church because of his liaison with Zoe Zaoutzina made it expedient for Leo to act thus. This could also be evidence that Novels 69-104 were promulgated between 893 (death of Stephen) and 899 (death of Zaoutzes).

That Zaoutzes is addressed as *μάγιστρος τῶν θείων ὀφφικίων* in this period would thus no longer pose a serious problem for our proposed dating. But the fact is that Zaoutzes is always addressed in part C without any title or office in the formula *ὁ αὐτὸς βασιλεὺς Στυλιανῶ τῶ αὐτῶ*, beginning with Novel 29. This formula is clearly an abridgment of the original address, but it does not allow any conclusions about the office held by Zaoutzes at this time. We must also consider a passage in Novel 92 (p. 303.12 N/D; p. 258.17-18 Tr) where a person alluded to as *ὁ τῶν ἐν τοῖς θείοις ἡμῶν ἀποφερόμενος* is mentioned by the emperor as the inspirer of the law. This expression has usually been taken to refer to the office of *μάγιστρος τῶν θείων ὀφφικίων*, thus suggesting that Zaoutzes held this function even after 893. Recently, however, Troianos argued in favour of the possibility of the expression being used for the patriarch.<sup>78</sup>

A second aspect to be considered is that some of the Novels of part C emend norms already dealt with in Novels in part B. I will mention three instances here.

Novel 22 deals with the *hypobolon* or *donatio ante nuptias*. The widow who does not remarry is given right to the possession of a child's part (*παιδὸς μοῖραν*) of the *hypobolon* as a kind of reward for her virtue. The Novel also specifies that this part intended for the widow must be calculated from the *hypobolon* given once by the husband, even if his inheritance does not provide the whole amount, so that the remaining part(s) of the child(ren) can be shortened or even disappear. Only at the end of the Novel the rights of the widower to a child's part of the inheritance of the wife, provided again that he does not remarry, are briefly referred to. The short Novel 85 is less precise, as if it presupposed the knowledge of a more detailed norm. It is said that in a previous norm on the *hypobolon*, undoubtedly Novel 22, the rights of the widower to the *hypobolon* were not duly considered. Again it is stated that the widower who does not remarry has right to a child's

<sup>77</sup> Tougher, *The Reign of Leo VI*, pp. 107-108 and 142.

<sup>78</sup> Cf. Σπ. Τρωιάνος, 'Παράτηρήσεις στη Νεαρά 92 του Λέοντος Γ'', in: Τρωιάνος, *Οι Νεαρές Λέοντος Γ'*, pp. 527-537 (529-531), following some suggestions made by Konstantinos Pitsakis.



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part of the inheritance left by his deceased wife. However, it is now added that if the amount of this part is lower than the *hypobolon*, he retains the *hypobolon* but renounces to get anything from the inheritance of his wife. It is clear that the two Novels were not published at the same time, otherwise the new specifications of Novel 85 would have been included at the end of Novel 22. It would also have made little sense to issue the two Novels with a short interval of time between them and then publish them both separately in an imperially promoted collection.

My second example is taken from Novels 24 and 89. Novel 24 makes a religious ceremony compulsory in any procedure for adoption. Thus Leo tries to avoid future marriage between adopted and natural children. Novel 89 extends the necessity of a religious ceremony to the marriage itself. This new prerequisite for a valid marriage seems to be an afterthought to the promulgation of Novel 24, as if Leo realised that it would be strange to require a religious ceremony for adoption without doing the same for marriage. But in fact the emperor mentions his previous decision on adoption in Novel 24 as the model for the present norm (NB the tenses of the verbs): *καθάπερ ἐπὶ τέκνων εἰσποιήσεως ἱεραῖς ἐπικλήσεσι τὴν εἰσποίησιν προβαίνειν διορισάμεθα, οὕτω δὴ καὶ τὰ συνοικέσια τῆ μαρτυρίᾳ τῆς ἱεραῖς εὐλογίας ἐρρῶσθαι κελεύομεν* (p. 297.1-3 N/D; p. 254.12-14 Tr) – ‘As in the case of adoption of children we decreed that this should be carried out through sacred invocations, so we order now that marriages be validated through the testimony of holy blessing’. A progressive introduction of religious ceremonies in the family law is taking place here. The two Novels must have been promulgated at different times.

Also revealing is the case of the five Novels dealing with fishing and fishing sites near the seaside.<sup>79</sup> Novel 56 gives the owner of a coastal estate the sole right to fish in the neighbouring sea, thereby contradicting D 48.10.13 § 7. This Novel thus precedes Novels 57, 102, 103 and 104 all of which contain regulations for fishing sites (*ἐποχαί*) near the seaside.<sup>80</sup> Novel 57 establishes a compulsory distance of 365 fathoms between fishing sites, excepting only those sites already in existence, which could remain as they were. But these two simple regulations were apparently not sufficient to settle the complicated usages of fishing of the time, as might have been expected. What happened, for example, if owners of coastal estates did not have sufficient property to set up their own fishing sites? To settle this point Novel 102 was issued. Here the association between owners of

<sup>79</sup> For all these Novels see E. Trapp, ‘Die gesetzlichen Bestimmungen über die Errichtung einer ἐποχή’, *Byzantinische Forschungen* 1 (1966), pp. 329-333, and Σπ. Τρωιάνος, ‘Οἱ Νεαρές Λέοντος τοῦ Σοφοῦ περὶ τῶν ἐποχῶν καὶ ἡ ἐπιβίωσή τους μετὰ τὸν 10ο αἰῶνα’, in: Τρωιάνος, *Οἱ Νεαρές Λέοντος C'*, pp. 549-563 (Revised translation of Sp. Troianos, ‘Die Gesetzgebung Leons VI. über die ἐποχαί und ihre Nachwirkung’, in: *Τίμαὶ Ἰωάννου Τριανταφυλλοπούλου*, Αθήνα/Κομοτηνὴ 2000, pp. 389-397. Both Trapp and Troianos discuss mainly whether these Novels remained in force after Leo.

<sup>80</sup> Trapp, ‘Die gesetzlichen Bestimmungen’, p. 329 speaks of it as a ‘vorbereitendes Gesetz’.

coastal estates is made compulsory if they cannot individually afford their own fishing sites according to the distances prescribed in Novel 57.<sup>81</sup>

But once the compulsory association is admitted, what is to be done if the associated estates were of unequal size? Should the owner of the bigger estate have a larger share of the fishing than that of the smaller estate? Novel 103 solves this problem by imposing on the common owners equal shares of the fishing. Leo argues that the amount of fishing should have no relation to the size of the estate.

Finally, as the distances between already existing sites were often not respected, more precise regulations were needed to solve disputes between fishermen. Especially important were the periods that should sanction the use of a disputed fishing site: 10 years in the presence of the plaintiff and 20 years in his absence. Moreover, the regulation ought to be different in the case of churches, monasteries or the treasury being the owners of the sites. Novel 104 was issued to cover all these problems and must be considered a revision of Novel 57.<sup>82</sup>

It would appear that the dispositions established by Novels 56 and 57 paved the way for new usages and new disputes, which in turn necessitated new norms. These problems were treated in Novels 102, 103 and 104. The fact that five Novels were promulgated to settle a single matter is understandable only if we postulate a sequence of Novels promulgated at different times to control fishing at the seaside. It is possible that the intensive fishing in the area of the Bosphorus and neighbouring areas (Marmara and Black Sea) prompted Leo's Novels, as the emperor was perhaps frequently witness to these activities.

We thus see that Novels of part C occasionally review dispositions already made in Novels of part B and should therefore be dated after these latter, probably between 893 and 899. For some Novels of part C one may be more precise. For example, in a certain way Novel 85 condemns second marriages, as did Novel 22, and must accordingly antedate the second marriage of Leo with Zoe Zaoutzina that took place ca. 898. As the liaison with Zoe began earlier, probably after the death of Teophano ca. 896, we might consider a *terminus ante quem* before this date. This argument extends also to Novel 91 condemning

<sup>81</sup> Τρωϊάνος, 'Οι Νεαρές Λέοντος του Σοφού περί των 'εποχών', p. 554: 'Αυτός ο νόμος [Novel 57], που δεν είχε αναδρομική ισχύ, προέβλεπε ακόμη ότι αυτή η απόσταση κατανεμόταν εξίσου ανάμεσα στα δύο συνορευόντα ακίνητα. Αν όμως οι λωρίδες στον πυθμένα της θαλάσσης που αντιστοιχούσαν στις γειτονικές ιδιοκτησίες δεν επαρκούσαν για την εγκατάσταση μιας εποχής στην καθεμία, τότε επέβαλε η Νεαρά 102 τη σύσταση μεταξύ των δύο γειτόνων μιας αναγκαστικής κοινωσίας.'

<sup>82</sup> Trapp, 'Die gesetzlichen Bestimmungen', p. 332: 'Falls man nicht den zeitlichen Abstand dieser Novelle von Nov. 57 mit mehr als zehn Jahren annimmt und die Bestimmung der Nov. 104 auf widerrechtlich nach dem Erlaß der Nov. 57 zu nahe nebeneinander aufgestellte έποχαι bezieht, wird man in diesem Gesetz eine Revision von Nov. 57 sehen müssen'. Τρωϊάνος, 'Οι Νεαρές Λέοντος του Σοφού περί των 'εποχών', p. 555: 'Οι ρυθμίσεις σχετικά με την απόσταση των εποχών που εισήχθησαν με τη Νεαρά 57 προκάλεσαν προφανώς πολλές διενέξεις. Για την άρση τους εξέδωσε ο Λέων τη Νεαρά 104.'

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concubinage. Novels 90-91, forbidding third marriages are also of interest, for although Leo married for a third time only in 900 (when Zaoutzes was already dead), both Novels speak contemptuously of second marriages.

A reference to Basil I, Leo's father, in Novels 73 is also of interest. Basil's reign is mentioned as if a long time had elapsed: καθ' ὃν χρόνον διείπε τὰ σκήπτρα ὁ περιώνυμος ἐν βασιλεῦσι πατήρ ἡμῶν (p. 261.14-15 N/D; p. 230.13-14 Tr), 'at the time when our father, famous amongst emperors, held the sceptre'. Other measures taken by Basil are mentioned in Novels 35, 41, 55 and 83, but in none of them is there any such sense of the distant past. The use of the present tense for a norm issued by Basil in Novel 35 (ἐναρμόζεται... θεσπίζει, p. 143.10 N/D; p. 140.24-25 Tr) should also be noted.

In sum, we can conclude that the Novels of part C were apparently issued after those of part B and after the death of the patriarch Stephen in 893, though still under the influence of Zaoutzes.

### **Part D** (Novels 105-113)

The last Novels of the collection form a group separate from the preceding for one single reason: in none of them, except Novel 111 addressed again to Zaoutzes, has the name of the addressee been preserved. This circumstance is usually attributed to weariness on the part of the scribe who stopped copying the addressees of the last Novels of the collection since the name of Zaoutzes was repeated in all of them. However, it seems to me very strange that this scribe, after faithfully copying the name of Zaoutzes in Novels 18-104 (except for Novel 75 addressed to Stephen), would suddenly have got tired just before the end of the collection and neglected to copy Zaoutzes's name - with the strange exception, of course, of Novel 111, where the name again reappears. I rather think that Novels 105-110 and 112-113 were not addressed to Zaoutzes precisely because he was already dead. It is generally supposed that, because an addressee was required for the Novels,<sup>83</sup> the absence thereof could only be explained by the repetition in this last set of Novels of the same name as in the previous ones. A new addressee would have been indicated by the copyist. However, even if we accept the necessity of an addressee for every imperial Novel, a separate transmission of these later ones might explain their different form. It should be noted for example that Novels 110-113 have the longest rubrics of the entire collection, with the exception of several Novels at the very beginning. These rubrics seem to preserve Leo's original wording. Perhaps the rubrics were deemed more important by the copyist than the original inscriptions of the Novels with the addressees. This could have been the case if the inscriptions did not mention any concrete person as addressee, but an institution such as the senate. It is also possible that the person responsible for the transmission of

<sup>83</sup> Cf. already Spulber, *Les Nouvelles*, p. 60.

these last Novels was the addressee proper, jurists like Symbatios or the magister Cosmas, who appear to have been prominent in the first years after Leo's death.<sup>84</sup>

In any case, it is very difficult to find any positive evidence for a later dating, after Zaoutzes's death, of the last Novels of the collection (again with the exception of Novel 111), for we know nothing about the addressees or the circumstances of the Novels in question. However, in the case of Novel 109 we have perhaps a clue.

Novel 109 deals with a matter already treated in Novel 74 of part C<sup>85</sup> and must have been issued afterwards. Novel 74 prescribed a blessing for the betrothal only when the betrothed reach the legal age for marriage, fixed in 15 for men and 13 for women. Novel 109 repeats these indications (although the requisite age is expressed in a different way)<sup>86</sup> just adding that a betrothal cannot be celebrated when the betrothed are less than seven years old. Until this point there seems to be no reason for this Novel, which repeats previous regulations on this matter. But then Leo adds an exception to this norm:

Εἰ δὲ βασιλεὺς, οἷα πολλὰ συμβαίνει, πράττων οἰκονομίαν τινὰ καὶ μνηστείαν καὶ τὴν ἐξ ἱερολογίας συνάρμοσιν τοῖς μνηστευομένοις ἔνδον τῶν διορισθέντων ἐτῶν ἐπιψηφιεῖται, τοῦτο πρὸς τὸν νόμον οὐδὲν ἀντικείμεται. Ἐξεσι γὰρ τοῖς ἐκ Θεοῦ τὴν οἰκονομίαν τῶν κοσμικῶν ἐγκεχειρισμένοις πραγμάτων ὑπέριτερον ἢ κατὰ νόμον οἰκονομεῖν ὃς ἄγει τοὺς ὑπηκόους (p. 357.1-6 N/D; p. 300.17-302.23 Tr) – 'If an emperor, making use of a certain dispensation, as often occurs, grants those betrothed a betrothal and a blessed union before the aforementioned years, this will not contradict the law in any way, for those who are granted dispensation in worldly matters by God are entitled to grant dispensation beyond the law which rules their subjects.'

Novel 109 thus authorizes the emperor to celebrate a betrothal *under* the minimum age of 7 years. It seems likely that this extraordinary exception to the rule with an appeal even to *οἰκονομία* (the same *οἰκονομία* that permitted Leo to celebrate a third and even a fourth marriage!) was intended with a particular case in view. Leo must have had an interest in such an uncanonical betrothal and decided to promulgate a law making this not only possible but legal. Was the betrothed in question a member of his family?

Between 900 and 902, as Otto Kresten established in a well-documented study,<sup>87</sup> Leo negotiated a betrothal between his daughter Anna and Lewis of Provence, King of Italy

<sup>84</sup> See for them Schminck, *Studien*, pp. 128-131 and Signes Codoñer/Andrés Santos *La Introducción al Derecho*, pp. 167-168.

<sup>85</sup> Τρωιάνος, *Οἱ Νεαρχεὺς Λέοντος Γ'*, p. 21.

<sup>86</sup> The Novel says now that the man should have completed his 13th year and the woman her 14th (τοῦ τρισκαίδεκάτου ἔτους ἐνδεοῦσης τῆς νύμφης, τοῦ δὲ νυμφίου τὸν τεσσαρεσκαίδεκάτον μὴ διαμετροῦντος, p. 355.23-24 N/D; p. 300.14-16 Tr).

<sup>87</sup> O. Kresten, 'Zur angeblichen Heirat Annas, der Tochter Kaiser Leons VI., mit Ludwig III. 'dem Blinden'', *Römische Historische Mitteilungen* 42 (2000), pp. 171-211 (176 note 11).

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(the future emperor Lewis III the Blind). We do not know how the negotiations were conducted or if the betrothal was in fact contracted (probably not, according to Kresten), but it seems certain that the marriage between Anna and Lewis never took place. In any case, what matters to us here is Anna's age at the time of the betrothal. We know that she was the daughter of Zoe Zaoutzina, but not whether she was born after Zoe's marriage to Leo or before it, as in the case of Constantine Porphyrogenitus in 905. If Zoe and Leo were married on 16 April 898, Anna would have been scarcely two years old by autumn 900 and four years old in 902, even supposing that Zoe was already pregnant when she got married. It would therefore have been uncanonical to arrange a betrothal at this age, and it may well be that Leo promulgated Novel 109 at this time to make an exception to the norm. If, however, Anna was born earlier, during Zoe Zaoutzina's extramarital liaison with Leo, we gain a couple of years, for the birth must have followed the death of Leo's first wife Theophano in 896: before this date we would surely have expected some mention in the sources (particularly the *Vita Theophanous*) considering the scandal it would have occasioned. But even in this case her canonical betrothal would not have been possible in 900-902. A dispensation from canon law for such a betrothal between Anna and Lewis would perfectly explain the reason for Novel 109.

It is possible that Leo also intended such a dispensation for his son Constantine VII. Constantine was born the 3rd September 905. As Leo had had serious problems with the legitimisation of his son, he might well have thought of Constantine's betrothal quite early on, particularly after Constantine's baptism on 6 January 906 and Leo's marriage to Constantine's mother Zoe some months later. A law concerning betrothals in this same year, when Constantine was already a baby-emperor, might seem unlikely, but Leo could have been preparing his later moves in advance. A serious objection to such a supposition is that Constantine was betrothed only after his father's death in 912, through the agency of the patriarch Nicholas, when he had already attained the canonical age for betrothal. If Leo promulgated Novel 109 for his son Constantine, why had he not had him betrothed before his own death?

However this may be, I think it can be proved that Novel 109 was promulgated after Zaoutzes's death in 899 and that the betrothal of one of Leo's children was the reason. This could have consequences for the dating of all the Novels of group D, except Novel 111 addressed to Zaoutzes. This Novel must antedate Zaoutzes's death. Interestingly, it is devoted to the case of a man seeking divorce from his wife after a term of three years once she has been declared mentally insane. One wonders whether this Novel could have been initially conceived so that Leo might get a divorce from Theophano... It may have remained as a draft, which would explain its separate transmission and later inclusion at the end of the collection. Of course, this is only a hypothesis, but it would explain the constitution of the different parts of the collection of 113 Novels.

#### 4. Occasion of the laws

The collection of 113 Novels has been shown to consist of heterogeneous parts apparently issued at different times and only later gathered into a single collection. The chronology of these parts proposed in the previous section of this study must remain hypothetical until more conclusive evidence is discovered, but it would now appear that the *communis opinio* whereby Leo's Novels were all written at one time for publication in a single book is mistaken. The separate transmission of some of the Novels, as is evident in the manuscripts, is subsequent to the composition of the collection proper.

The main argument for the collective publication of Leo's Novels has been always the existence of internal references within the collection. This fact, already remarked by Noailles and Dain has been stressed recently by Troianos.<sup>88</sup> There are, however, two kinds of internal references in the collection. First we find what we might call long-distance references, such as those considered in the previous section in Novels 22 and 85; 24 and 89; 56, 57, 102, 103 and 104; 74 and 109. These references, as we have seen, speak for the progressive composition of the corpus and not for any simultaneous writing and publication of the Novels. The second sort of references might be called short-distance ones and group together several Novels on the same theme with consecutive numbering. As Van der Wal remarked many years ago, this proves only that Leo occasionally promulgated together two or three or even more Novels on the same subject, at one time.<sup>89</sup> These groupings were then preserved in the final collection. It should also be stressed that the groupings of Novels with short-distance references are most frequent in part B of the collection, which we think was issued separately by the emperor ca. 893.

There is another problem with the hypothesis of the collective publication of Leo's Novels. This involves the time needed for the conception of such a work. The date generally accepted for the publication of the collection is the year 888. But this would mean that Leo had it prepared in less than two years. Since more time was certainly needed to compose the highly rhetorical proems in Novels dealing with various legal matters, Troianos advanced a supplementary explanation.<sup>90</sup> He argued that the Novels were originally published without the rhetorical proems and contained only the dispositions. Only in a later period, after the collection had been formed, were the proems added. This explanation is tempting but no evidence can be adduced in support of it. There is also a serious objection. If Leo took such pains to write these highly rhetorical proems for the Novels with a view to their collective publication within a collection, why was he so careless in the arrangement of Novels in part C, in contrast to the good order of part B?

But there is still another question with regard to this hypothesis. How could Leo have invented the circumstances (described in the proems) that prompted the publication of

<sup>88</sup> Cf. Noailles/Dain, *Les Nouvelles*, pp. X-XII and Τρωϊάνος, *Οι Νεαρχές Λέοντος Α'*, pp. 20-21.

<sup>89</sup> Van der Wal, 'La tradition des Nouvelles', p. 261: 'l'empereur aurait parfois travaillé à la rédaction de plusieurs lois à la fois.'

<sup>90</sup> Τρωϊάνος, *Οι πηγές*, p. 165 and Τρωϊάνος, *Οι Νεαρχές Λέοντος Α'*, pp. 21-22, 26-27.

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single Novels? Are his proems and the alleged occasions for certain of the Novels pure fiction? Surely Leo's proems are bombastic, but are not the Justinianic proems equally so? I think on the contrary that Leo's proems try to reflect faithfully the occasion for which each Novel was promulgated. This point deserves much further study and is the clue to the correct understanding of Leo's legislative intentions.

Contrary to the idea of Fögen that Leo conceived his Novels as a 'kodifikations-begleitende Legislation', I am convinced that the *Basilica* have no causal relation to them. As we saw in section 1 above, there is not a single mention of the *Basilica* in any of the Novels or the proem to the collection. Moreover, the legal issues treated in the collection have for the most part no connection with the Justinianic tradition and were not included in the *Basilica*. And, more conclusively, how could Leo have bothered about the marginal issues in the Novels if he was working on the *Basilica* at the same time?

The term 'Anlaßgesetzgebung' has been used to characterise Leo's Novels. Thus Otto Kresten posited that Novel 109 was written with the betrothal of some child of the emperor in view.<sup>91</sup> We have confirmed his supposition. The long-distance references considered in the previous section, as in the Novels on fishing sites, are also to be explained in the context of the ongoing publication of the Novels that followed its own internal logic and was prompted by external circumstances. But we do not need to speculate further: some Novels are quite explicit in describing their occasion.<sup>92</sup>

In Novel 5 Leo says that the patriarch Stephen prompted him to pass a law regulating the administration of properties by monks: ἐπει οὖν περὶ τοῦτο ἀμφιβάλλοντες διαφόροις ἡμᾶς ἐξαιτήσεσι πρὸς τὴν ἐπισκοπεῖν συναντιλαμβάνειν προούτρεψασθε (p. 27.11-13 N/D; p. 54.24-56.25 Tr) – 'Since you (the patriarch) have raised doubts about this matter, you have persuaded us by means of various petitions to proceed with its evaluation'. Novel 17 is also a response to Stephen's entreaties, as is clearly expressed at the beginning: ἡ μὲν ἀξίωσις τῆς ὑμετέρας μακαριότητος ὑφ' ὑμῶν μᾶλλον δικαία προέρχεσθαι ἢ ἢ παρ' ἡμῶν τὴν γένεσιν λαβεῖν (p. 63.17-18 N/D; p. 82.3-4 Tr) – 'It would be more fitting that your Holiness's opinion came from you rather than originating from us'.

In Novel 92 the emperor says that on one occasion he did not apply the law of retaliation to a man who blinded another by violently putting out his eyes. He considered that the victim would have no advantage from the aggressor being blinded in turn in both eyes but that it would be more humane and profitable to impose a compensation (through work or payment). However, he did not then pass a general law on the basis of this sentence, as he explicitly says on two passages of the Novel: ἀλλ' οὖν οὐκ ἤλθεν κατὰ δάνοιαν εἰς νόμον τὴν τοιαύτην διατυπῶσαι κρισιν (p. 303.1-2 N/D; p. 258.6-7 Tr) – 'It did not occur to me then to elevate such a decision to the rank of a law'; ἀλλὰ γὰρ εἰ καὶ οὕτω κέκριται οὐκ ἤν, ὥσπερ εἶπον, γνώμη τὸ κριθὲν ποιεῖν νομοθέτημα (p. 303.10-11 N/D; p. 258.15-17 Tr) – 'But although such was the decision taken, it was not my

<sup>91</sup> Kresten, 'Zur angeblichen Heirat', p. 185 note 50.

<sup>92</sup> See Van der Wal, 'La tradition des Nouvelles', pp. 258-259.

intention then, as I said, to convert my judgement into law'. It was only some time later, at the entreaty of the *magister officiorum* or of the patriarch, that Leo promulgated a law based on this former sentence: ἐπειδὴ δὲ ὁ τῶν ἐν τοῖς θείοις ἡμῶν ἀποφερόμενος, οὗ ἐγὼ πῶς ἂν ἀποπέμψαιμι τὴν ἀξίωσιν, εἰς νόμους ἀξιοῖ τὴν τοιαύτην κρίσιν διασκευασθῆναι (p. 303.11-14 N/D; p. 258.17-19 Tr) – 'For the man in charge of our divine offices, whose opinion I could never dismiss, judged it suitable to pass such a decision as law'. I find no reason to doubt of the words of the emperor concerning the concrete circumstances that moved him to legislate against the strict application of the law of retaliation.

Finally, in Novel 102 Leo says that this new norm on fishing sites was prompted by certain reports that had reached him concerning disputes between owners of coastal estates: Τοιοῦτόν τι προσῆλθε ταῖς ἡμῶν ἀκοαῖς γινόμενον ὑπ' ἐνίων οἱ θαλαττίου νομῆς εὐποροῦντες (p. 337.12-13 N/D; p. 286.19-20 Tr) – 'It has come to Our ears that something of the sort has happened to some of the people who own coastal states'. This explanation was considered necessary as the emperor had already passed Novel 57 concerning the same matter.

To be sure, Leo did not explain in every single Novel the circumstances that moved him to legislate on a particular matter, but this does not mean that these circumstances did not exist. He simply does not mention them. There can be no doubt that most of Leo's Novels were conceived in response to individual issues and not forged en bloc in an all-embracing collection. As Fögen rightly puts it: 'Abgesehen vom Ehe- und Ehegüterrecht haben die Novellen in ihren dispositiven Teilen nichts 'programmatisches', sondern erwecken den Eindruck des 'Herumstocherns' in beliebigen, zufälligen, gar kleinlichen Rechtsfragen.'<sup>93</sup>

## 5. Some conclusions

The Novels of Leo were promulgated during his reign, particularly under the influence of Stylianos Zaoutzes ca. 887 and 893 approximately.

Novels 2-68 were probably arranged in a thematic collection ca. 893 with its own promulgatory Novel, of which we have a double version in the so-called proem and Novel 1 of the collection. The rest of the Novels were added at a later stage without any order.

The collection of 113 Novels was perhaps conceived in the last years of Leo's reign or even after his death with the purpose of gathering together the most important of his laws. However, there is evidence for previous collections such as that preserved in the Ambrosianus F 106 sup., which may have been arranged in chronological order.

The Novels of the collection of 113 Novels seem to have been numbered only in the second half of the 11th century.

There seems to be no causal connection between the composition of the *Basilica* and the promulgation of Leo's Novels, for Leo does not refer to the *Basilica* in his Novels nor do the *Basilica* contain any laws passed by Leo in his Novels, with one exception.

<sup>93</sup> Fögen, 'Legislation und Kodifikation', p. 30.



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Leo conceived his legislation as a correction of flaws in prevailing norms and usages and, with the help of Zaoutzes, devoted most of his time to solving specific problems posed by particular circumstances. This continuous legislative activity was perhaps one of the main reasons for his being called 'The Wise'.<sup>94</sup>

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<sup>94</sup> P. Magdalino, *L'orthodoxie des astrologues. La science entre le dogme et la divination à Byzance (VII<sup>e</sup>-XIV<sup>e</sup> siècle)*, [Réalités byzantines, 12], Paris 2006, p. 70 argues also for Leo's theological and astrological concerns as a reason for his surname. See also S. Tougher, 'The wisdom of Leo VI', in: P. Magdalino [ed.], *New Constantines. The Rhythm of Imperial Renewal in Byzantium, 4th – 13th Centuries. Papers from the Twenty-sixth Spring Symposium of Byzantine Studies, St Andrews, March 1992*, [Society for the Promotion of Byzantine Studies. Publications, 2], Aldershot 1994, pp. 171-179.

