

## COMPETING MENTALITIES: THE LEGISLATOR LEO VI AT WORK

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Emperor Leo VI (886-911) is one of the "great" Byzantine emperors - not in virtue of military success for in this respect he was a rather unsuccessful ruler - but on account of his fame as a man of wisdom. He has been famous as a jurist, theologian, poet, composer, and even as a prophet, astrologer and magician.

Does Leo really deserve this fame? We all know the tendency to ascribe spectacular works of art, learning or law to well-known persons with an already established fame. Is it the same case with Leo?

To some extent it is. Leo as a prophet, astrologer and magician should be discarded. The prophesies about e.g. the Fall of Constantinople carrying his name which achieved wide-spread popularity are probably of a much later date<sup>1</sup>. There is no doubt, however, that Leo was active in the fields of poetry and music.

Concerning Leo's activities in the theological and juristic sphere, there is one good reason for assuming that his authorship is genuine: amateurism. In both respects many of the texts reflect a personal touch and a way of reasoning which one would expect from an interested and well-educated layman rather than from a professional theologian or jurist.

In the field of legislation this phenomenon applies to Leo's 113 novels only<sup>2</sup>. The huge *Basilika* or Ἐξηκοντάβιβλος, the systematized collection of Justinianic law in Greek version was already prepared during the reign of his father, Basil I (867-886)<sup>3</sup>. It is clearly the product of professional jurists. With the possible exception of the preface this is also the case with the collection of trade laws known as the *Book of the Eparch* which has been ascribed to Leo even if it contains passages which suggest a later date<sup>4</sup>.

The novels, on the other hand, are characterized by two important features: their lack of system<sup>5</sup>, and their elaborate arengas which let us have a look into the mind of the legislator at work - or at least into the considerations and motives with which he finds it appropriate to justify his legislation.

George Ostrogorsky has suggested that the majority of the novels (a total of 88) which are addressed to the Master of Offices, Stylianus Zautzes, were in fact written by this powerful official who also held the key ministry of Post, Roads and Foreign Affairs (ὁ Λογοθέτης τοῦ Δρόμου)<sup>6</sup>.

It is natural to assume that Zautzes has had a certain influence on the relatively young emperor - Leo was born in 866 and thus only 20 years old when he succeeded his father Basil I; as Zautzes dies in 896 and most of the novels are addressed to him they must have been issued within the first decade of Leo's reign<sup>7</sup>. However, the 'Zautzes novels' do not differ in style from the rest of the novels, having the same 'amateurish' character as those, which is an argument in favour of the whole collection having one and the same author: Leo himself.

Leo's fundamental view on legislation is that it ought not to be necessary; if all people would follow the divine laws there would be no need for the secular ones. But due to the imperfection of the human being, secular legislation is needed to help man to act in the right way<sup>8</sup>.

Leo's attitude to his legal sources is characterized by a mixture of respect and independence. He respects the authority of Justinian I, Basil I, and Canon Law - but this does not prevent him from criticizing them<sup>9</sup>. Often he confirms custom even if it is contrary to written law<sup>10</sup>. He often lets himself appear as an arbiter between different views, acting in favour of one principle or tradition at one time, another one at another<sup>11</sup>.

In addition to the laws of previous emperors and Canon Law, Leo frequently refers to other sources of law: custom, equity, humanism, Nature, God. His use of the four latter in his argument functions as a justification of his deviations from the legal tradition or from custom. Thus, in his novels against castration (nov. 60) and the marriage of eunuchs (nov. 98), both God, Nature and humanism are used as arguments. Castration is against God, because it creates another species of man than the one created by God, and because it is wrong to deprive a man of his God-given gift of procreation. A marriage with a eunuch is against Nature in the first place because the natural meaning of marriage is procreation, in the second because the other natural function of mar-

riage - to provide a legal outlet for sexual desire - is irrelevant in such a marriage. Humanism is used as an argument for not punishing the surgeon carrying out a castration with the same treatment, as this would in fact be the repetition of an inhuman act<sup>12</sup>. - These examples further demonstrate the frequently appearing tendency of the legislator to combine arguments from different sources to support his decision.

The example is also characteristic of the religious fervour which often appears in Leo's novels. There is no doubt that the emperor felt strongly about religious issues. Thus, of the 113 novels, 40 deal in one way or another with problems of an ecclesiastical nature or with religious implications.

The novels show Leo as a deeply religious man, an impression which is corroborated by other parts of his literary production. But this did not lead him to subservience towards the Church. In the beginning of his reign he ousted the powerful Patriarch Photius - his own teacher - from his patriarchal office and replaced him with his own brother Stephen, a boy of barely 16 years of age. Stephen can hardly have had any significant influence on Leo's ecclesiastical legislation<sup>13</sup>.

A certain youthfulness, perhaps even naïvety, is apparent in many of the novels. Leo's attitude to his great predecessor, Justinian I, sometimes seems like opposition for the sake of opposition, as when he reproaches Justinian for confirming rules in the main corpus which Justinian himself afterwards abrogates in a novel<sup>14</sup>. Leo did exactly the same thing, publishing the Basilika and then abrogating the obsolete parts of it in his novels.<sup>15</sup> Or look at the arrogant remark he makes against the passage of Justinian's Digests legalising concubines; "Neither do we allow this error of the legislator (Just.) to dishonour our state - let the legislator keep silent forever"<sup>16</sup>. A remarkable utterance in view of the fact that Stylianus Zautzes, to whom this novel against concubines is addressed, in fact was the father of Leo's mistress.<sup>17</sup>

Was Leo a hypocrite? Not necessarily. His famous novel 90 against the third marriage, in which he even considers the second one improper (but does not forbid it), was issued when his first wife was still alive (she died in 897, the year after Zautzes to whom this novel, too, is addressed). Novel 90 should be seen as an expression of youthful Romanticism and lack of experience rather than hypocrisy.

Novel 90, by the way, is a typical example of Leo's way of argument. He cannot understand why secular law has not forbidden the third marriage, not only because it has been forbidden by the Church, but also because it is against Nature. Here he makes an interesting biological parallel, referring to certain species of animals (not specified by Leo) in which the remaining part of a couple remains alone for the rest of its life, in order not to 'bury' (ὥσπερ καταχωννύειν) the first union by concluding a second one<sup>18</sup>. And it is improper that human rules of marriage should contain a lesser degree of wisdom, in view of the fact that nature endowed with reason is superior to nature without reason. Human nature, however, does not consider that weakness intolerable which leads to the conclusion of a second marriage. But this must remain the ultimate limit of (human) debasement!<sup>19</sup>

How difficult it could be to act according to these elevated morals was proved by Leo's later experiences. After the death of his first wife, Theophano, in 897, he married his mistress, Zoë Zautzina, the following year. But Zoë died already in 899, like her predecessor without leaving any male heir. Then, in the summer of 900, Leo was married for the third time to Eudocia Baiana. But she too died shortly afterwards (901)<sup>20</sup>. Leo was again without a consort, and still without a male heir. Both in a personal and in a dynastic perspective the situation was desperate - the latter because Leo's brother and nominal co-ruler, Alexander, was also without an heir.

Anyhow, this time Leo did not remarry - he contented himself with having the beautiful Zoë Karbonopsina as a mistress. But then, in 905, Zoë bore him a son. Patriarch Nicholas acquiesced in baptizing the son (the future Constantine VII), but under the condition that Leo should separate himself from Zoë. But three days after the baptism Leo married Zoë and raised her to the rank of empress. The patriarch closed his church to the emperor, and a war of nerves broke out. In the end the emperor turned to the Pope, Sergius III, obtained a dispensation from him, deposed the patriarch and replaced him with another. The whole struggle did not end until 920 when a church council in Constantinople pronounced the fourth marriage illegal and the third one only admissible under certain circumstances<sup>21</sup>.

Leo's decrees against the third marriage and against concubinage thus did not prevent people, not even himself, from breaking such rules. His campaign against castration was equally unsuccessful - the institution of the eunuchs, for which particular state offices were reserved, was too important for the state. And his decree that marriage without the priestly blessing is not acceptable, does only seem to be a step in a process which lasted for several centuries<sup>22</sup>.

But the historical importance of Leo's novels should not be measured by the degree to which they were implemented. Their primary value as source material lies in the light they shed on the actual legal situation at the beginning of Leo's reign, the often conflicting principles on which juridical decisions were based, and the mentality of the legislator himself.

First of all, the freedom with which Leo deals with the legal sources shows how absolute the imperial power was, both in theory and in practice. As the vicar of Christ on Earth the emperor was the ultimate legislator. On the other hand the novels show that the emperor found it necessary to justify his decisions. This was not very difficult for him when he could refer to Canon Law. Thus, in seven novels he uses canonic rules to justify corrections of secular law, and in four to justify the abolishment of certain customs<sup>23</sup>. More interesting, however, are the cases in which he had to argue against ecclesiastical law (novels 35, 83 & 97). Let us, for instance, look at novel 83 in which he goes against the ecclesiastical ban on interest on loans.

Interest on loans was forbidden already in Mosaic Law, and the ban was taken over by the Christians as part of the Old Testament. It was reaffirmed by several councils of the Church. But there was no such ban in Roman Law, loans against interest being a normal part of the economic life of the Empire. Justinian made a compromise, fixing a maximum interest of 4-6% (in certain cases up to 8%), and with some modification this principle was upheld in the following centuries. Exceptions are Nicephorus I, who forbade interest, but on the other hand forced the shipowners to take loans from the emperor at an interest of 16%; and Basil I, whose regulation seems to have been a genuine attempt to abolish interest.<sup>24</sup>

In this case Leo follows secular legal tradition against his father and the Church. He implies that ideally the ban is right - but as it is not possible for everybody to ascend to the level of the Holy Ghost or to catch the echo of Divine Law (τοῦ θεοῦ νόμου τὸ ἀπήχημα δεῖξασθαι) this regulation makes people inhuman and inexorable towards other people who need money, because they make no interest from it, and the ban may have even more detrimental consequences. Thus, despite the spiritual merits of the ban he abstains from that beautiful provision, because it only makes things worse. He ends up by confirming the old legislation of a 4% interest.

One may question the philanthropy of novel 83, but not its expediency. Another possible example of philanthropy is novel 53 which supports custom against secular law in the case of burials. From Roman times it had been forbidden to bury people inside the towns, but this regulation was frequently violated. Of course there were sound hygienic reasons for it, but most Byzantine cities had shrunk since Late Antiquity and even Constantinople had plenty of space within her walls. But Leo's argument runs differently: he finds that the rule is socially discriminating, as it is costly to be transported outside the city walls for burial, and because it makes it much more difficult for the relatives to seek comfort by visiting the grave. Therefore he completely liberates the burial practice.

Thus Leo's novels reflect a legislator who on one hand is deeply rooted in his own time and tradition, on the other hand has a relatively open mind which mediates between the various traditions of law and usage, adding considerations of principle which are of a more personal nature. This legislation is not only a continuation of the legislation of the past, it also contains changes in the general system of law. At the same time it is an expression of competing mentalities in Byzantine society about A.D. 900.

1 George Ostrogorsky, *History of the Byzantine State*, First Paperback Edition, Oxford 1980, p. 242.

2 Edited with a parallel French translation by P. Noailles & A. Dain, *Les Nouvelles de Léon VI le Sage*, Paris 1944.

- 3 Basilicorum libri LX, ed. by G.E. & C.G.E. Heimbach, Leipzig 1833-1870. New edition in progress by H.J. Scheltema et al., Groningen, 1953- .
- 4 Latest edition: Ivan Dujcev, *The Book of the Eparch*, London 1970. It contains a facsimile of the manuscript, J. Nicole's edition from 1893 with Latin translation, Nicole's French translation from 1894, and E. H. Freshfield's English translation from 1938. - Concerning the dating of the Book of the Eparch there are different opinions ranging from the reign of Leo VI to the reign of Nicephorus II Phokas. - For literature on the Book of the Eparch, see G. Ostrogorsky, *op. cit.*, p. 253, note 1.
- 5 The novels are not arranged according to any systematic principle. But novels with related themes often follow each other. One almost has the impression that the novels were written down in the order in which they occurred to the author.
- 6 G. Ostrogorsky, *op. cit.*, pp. 245 & 250.
- 7 *ibidem*, p. 250.
- 8 Novel 51, Noailles/Dain, *op. cit.*, p. 197, l. 1-9.
- 9 The whole beginning of novel 1 is a critical evaluation of Justinian's work. Noailles/Dain, *op. cit.*, pp. 11-13.
- 10 E.g. novel 53, see below.
- 11 A typical example is novel 69, in which Leo makes the wills of women - and of blind and illiterate people - valid also when made in secrecy. Here he mediates between different laws and custom.
- 12 In fact the argument is rather complex, combining considerations of equity and philanthropy. Noailles/Dain, *op. cit.*, p. 225.
- 13 Stephen died already in 893, cf. G. Ostrogorsky, *op. cit.*, p. 245, note 1.
- 14 Novel 1, Noailles/Dain, *op. cit.*, p. 13.
- 15 See for instance novel 47 which abrogates a law in Book VI,7,7 of the Basilika about the nominations of praetors by the Senate in Constantinople and of duumvirs by the decurions in the provinces. Noailles/Dain, *op. cit.*, p. 184.
- 16 Novel 91, Noailles/Dain, *op. cit.*, p. 301, l. 3-4.
- 17 Leo was married to Theophano from his early youth. It does not seem to have been a very happy marriage. The relationship with Zoë Zautzina started long before the empress' death, and as a sort of reward Stylianos Zautzes got the title *basileopater* especially created for him.
- 18 Noailles/Dain, *op. cit.*, p. 297, l. 20 - p. 299, l. 2.
- 19 "καὶ μέχρη τούτου τὸ ἑαυτῆς ὠφελῆεν ὀρίζεσθαι ἐλάττωμα" - *ibidem*, p. 299, l. 5-6.

20 G. Ostrogorsky, *op. cit.*, p. 259.

21 *ibidem*, p. 260.

22 The topic was discussed at the 17th International Byzantine Congress in Washington, D.C., in August 1986, in connection with Peter L'Huillier's contribution *Novella 89 of Leo the Wise on Marriage: An Insight into its Theoretical and Practical Impact*. (Abstracts of Short Papers, pp. 184-186). The general opinion was that it took considerable time before this law was generally implemented.

23 Novels 7, 8, 54, 74, 89, 90 & 91; novels 58, 73, 86 & 87.

24 Theophanes, *Chronographia*, ed. C. de Boor, Leipzig 1883-1885, p. 487 (p. 153 in Leopold Breyer's German translation, *Bilderstreit und Arabersturm in Byzanz*, *Byzantinische Geschichtsschreiber VI*, Graz 1957). - About Basil I, see Noailles/Dain, *op. cit.*, p. 281, l. 10-12 and p. 280, note 3. - For a brief survey of the development of interest in Byzantium, see G. Ostrogorsky, *op. cit.*, p. 190, note 1.