Introduction: Reciting Homer in the Courtroom – Byzantine Legal Culture

Likely sometime in the second quarter of the eleventh century, a widow living in the Byzantine Empire was accused of having a lover. The indignant trustees of her deceased husband's estate charged her with adultery and took her to court. If convicted, the widow stood to lose her share of her first husband's estate. Surprisingly, the judge argued that the law did not prohibit an adulteress from enjoying the estate of her husband, but rather those who marry twice. While the woman who marries twice clearly casts aside her husband's memory and dishonors the children of her first husband by introducing the children of her second husband, the judge reasoned, a woman who has sex outside of marriage merely sins in secret. Having already invoked the law to make his point, the Byzantine judge finalized his decision to dismiss the charge of adultery by quoting some lines of Homer. The context for these verses from the *Odyssey* is Athena urging Telemachus to return home to Ithaca before his mother Penelope chose a new husband in place of Odysseus: "But you know what kind of spirit is in the breast of a women – she resolves to make prosper the house of the man who marries her, and no longer remembers the children of her first husband after he is dead."[1] Upon further examination it was found that her lover was a priest residing in her household in the guise of a servant. Although the ecclesiastical authorities were alerted, the priest was not defrocked.[2]

[1] *Peira* 25.25; *Odyssey* 15.20–3. This passage is discussed in Macrides 2005: 134–6. Although the passage does not explicitly state that the first husband had died, the eventual verdict otherwise makes little sense. The fact that the executors of her husband's estate brought the suit forward suggests the legal incapacity of her husband, due to death, minority or mental illness.

[2] A very similar case (Grumel 1989: n. 883) – I would argue in fact the one described above – was addressed by a decision issued by the patriarch Michael I Keroularios (1043–59). In it the patriarch was asked to clarify the status of a priest named John who claimed that his wife had committed adultery: was he still allowed to celebrate the liturgy? The patriarch answered that, although a candidate for the priesthood married to an adulteress could not be ordained, since John was already ordained and had discovered that she had committed adultery and as a result had separated from

This case, incidentally, was judged by the most renowned Middle Byzantine jurist, Eustathios Rhomaios, and it is recorded along with numerous other verdicts, perhaps around 300 in total, in an anonymously compiled collection, the so-called *Peira*. Eustathios' judgment serves as an excellent entree into the subject of this book, Byzantine legal culture, because it exemplifies its three salient characteristics: (1) a Roman legal and political framework, which extended far beyond the state to encompass the commonweal, the *politeia*;[3] (2) the ethical and moral perspective of Orthodox Christianity; and (3) a Hellenic cultural and linguistic orientation. To Byzantinists, it is the combination of these three aspects which is thought to embody what we term Byzantium.[4] The present study thus follows these three lines of inquiry to argue that together they represent a unique legal culture, a way of thinking about, rationalizing and practicing the law. This book is an examination of this mechanism at a unique moment in Byzantine history, namely during the Macedonian dynasty (867–1056). It analyzes how Byzantines during this period – emperors, judges, intellectuals and (to the meager extent to which it is possible) the non-elite – used, emphasized, downplayed and interwove these three threads of Byzantine legal culture. It is to be hoped that the reader will at the end of this examination not only be convinced that Byzantine legal culture existed, corresponding to some extent to its presentation here, but that it is a phenomenon worthy of further study.

To elucidate why legal culture, a concept that has developed at the intersection of anthropology and legal studies, is a useful heuristic device for this period, it is worth first outlining in some detail the history of scholarship on Byzantine law and exploring the interrelated question of the sources available to the historians who study it. Like any historical sub-field, the quantity and type of sources have dictated to a large extent the sorts of studies that have been produced. For reasons outlined below, the distribution of sources for Byzantine law has led to an unusually sharp

her, then he was still allowed to celebrate the liturgy. This act of adultery also had property implications. Two-thirds of the dowry of John's wife was to stay with their child, and a further third was to go to the convent where the wife would now reside. The main difference between the two cases – whether the priest and the woman were actually married – could possibly have reflected conflicting testimony. The patriarchal decision seems to be based solely on the word of the priest, indicated by the telling phrase "if John is telling the truth." I have consulted the longer version of the decision in *PG* 120: 749, which gives many details lacking in the highly abbreviated summary of the decision in *PG* 119: 852 = *Rh.-P.* 5: 46.

[3] On the Byzantine conception of *politeia*, which has been mistranslated as "state," see now Kaldellis 2015: 1–61.

[4] Discussed in Rapp 2008: 134; Kaldellis 2015: pp. x–xi.

divide in training, interests and methods between Byzantine legal scholars on the one hand and historians on the other.[5]

A New History of Byzantine Law?

From a constitutional perspective Byzantium had a codified legal system – based on the application and interpretation of a written set of laws, such as is the case today with the majority of European countries – rather than a so-called common law system, a feature of the English legal tradition as well as its former colonies and dependencies around the world, based on case law and precedent.[6] The upshot of having a codified legal system is that the normative laws – the "law in the lawbooks" – generally do not adapt to reflect changing political, social and economic circumstances.[7] Though the Byzantine Empire was hardly unique by medieval or modern standards in this regard, its codified laws were technically valid for an unusually long period of time. The compilation of Roman law commissioned by the Emperor Justinian I (527–65) – a body of law which is now commonly referred to as the *Corpus Iuris Civilis* (*CIC*) – cast a long shadow. In theory, this compilation of Roman law, in the form of its Greek redactions, particularly the so-called "imperial" books (*Basilika*), remained the law of the land throughout the entire political existence of the Byzantine Empire.

This façade of legal continuity has long proved a major impediment for examining Byzantine law in its contemporaneous societal context, since the sources for its actual implementation and societal praxis are to a large extent lacking. Indeed, until the first part of the twentieth century it was assumed that Roman law had not only remained in force but was scrupulously observed throughout Byzantine history. It was a not a legal historian or historian as such but rather an Austrian papyrologist, Artur Steinwenter, who on the basis of papyri from Late Antique Egypt first questioned the actual implementation of Justinianic law. The divergence between Roman law and societal praxis was particularly noteworthy

[5] Stolte 1998 contains a useful discussion of the different approaches to the study of Byzantine law utilized by historians and by legal scholars.

[6] The notion that Byzantium had a civil-law system is not uncontroversial, although it still represents the scholarly *opinio communis*. However, Oikonomides 1986 presented an impressive argument on the basis of the *Peira* that by the eleventh century Byzantium was well on its way to developing a legal system based on precedent, more along the lines of a common law system, although in his narrative this reform failed.

[7] Stolte 1998: 270–2.

in an area where Justinian had enthusiastically legislated, namely on the status of church and monastic property, yet Steinwenter proved that Justinian's provisions had been widely ignored at the time they were issued and indeed well afterward. In Late Antique Egypt church and monastic property was alienated to laypersons; monks could own and dispose of property in a will; and churches, monasteries and pious foundations were treated as private property.[8] All these practices undercut basic principles of Roman and Byzantine law. Steinwenter was thus the first to propose a new history of Byzantine legal institutions (*Institutionengeschichte*) which would not only be based on normative legal sources – which he had demonstrated did not represent the reality on the ground – but would take into account evidence reflecting their implementation.[9]

Though Steinwenter's work on the legal status of ecclesiastical property in Late Antique Egypt garnered much attention at the time it was written, his exhortation for a new history of Byzantine legal institutions remained mostly unheeded until it was made again in the 1980s by the Russian émigré Byzantinist Alexander Kazhdan, who arrived at the same conclusions of the shortcomings of studying Byzantine law solely through normative legal texts, without however explicitly referencing Steinwenter.[10] Harshly criticizing Byzantine legal historians, Kazhdan called for a new history of Byzantine law which would examine law as it was actually practiced in Byzantine society, with such an examination to be made on the basis of a wide range of sources instead of documents representing the official legal regime. Responses to Kazhdan's proposal have been mostly lukewarm or pessimistic, with legal historians in particular critical of the feasibility of writing a history of legal institutions or *Institutionengeschichte*.[11]

Legal Culture as a Heuristic Paradigm

The approach adopted in this book of examining Byzantine law in its wider historical and societal context, although certainly conditioned by the debate surrounding Kazhdan's proposal, is altogether different. Rather

[8] Alienation of church and monastic property: Steinwenter 1958: 32–4; full property rights of individual monks: Steinwenter 1932; foundations as private property Steinwenter 1930: 36.
[9] Steinwenter 1932: 64.
[10] Kazhdan 1989. An earlier version of his argument was published in Italian but attracted less attention: Kazhdan 1988.
[11] Burgmann 1991a: 198–200; Simon 2005: 1–4. Bernard Stolte has penned one of the most thoughtful responses to this debate by contextualizing Kazhdan's critique amidst the historical development of the study of Byzantine law as a field; see Stolte 1998.

than attempting to write a new history of Byzantine legal institutions, a Herculean task that could in this day and age not be undertaken by a single individual, this monograph has made use of the heuristic device known as *legal culture*.[12] *Legal culture* is a somewhat amorphous concept, the theoretical origins of which lie in comparative law, legal anthropology and the sociology of the law.[13] One basic definition runs "it presupposes and invites us to explore the existence of systematic variations in patterns in 'law in the books,' in 'law in action,' and above all, in the relation between them."[14] The idea of legal culture can be traced back to the early days of the field of legal anthropology and is based on the notion that law cannot be understood apart from its wider cultural and societal environment.[15] Initially, legal anthropology was developed as a means of analyzing oral cultures which did not possess a written legal tradition. Lawrence Friedman introduced the term legal culture into the field of the sociology of the law as the amalgamation of a society's legal ideology, practices and social pressures. He distinguished between *inner* and *external legal culture*. Within Friedman's schema, *inner legal culture* encompassed legal professionals, while *external legal culture* referred to the rest of society; the influence of the former, according to Friedman, is often exaggerated by legal scholars.[16] Recently, legal culture has been used with reference to the modern nation-state, to describe for instance the cultural factors which account for differing rates of litigation among various contemporary European countries.[17]

In this study I have refrained from distinguishing between an inner and an external legal culture because, above all, it does not reflect the way law was practiced in the Byzantine Empire. The vast majority of persons who were invested with some degree of juridical power were not professional jurists. Both military governors and the heads of imperial bureaux,

[12] The standard reference work on Byzantine legal institutions remains Karl Eduard Zachariä von Lingenthal's *Geschichte des griechisch-römischen Rechts*, 3rd edn (1892). Although Zachariä's history is still indispensable for anyone interested in Byzantine law, it is a history based on normative legal sources. Archival documents, particularly the acts of the Athonite monasteries, were only just beginning to be published in Zachariä's day, and he understandably therefore made no use of them. A new history of Byzantine law based on archival documents would present a very different picture of how the legal institutions Zachariä surveyed functioned in Byzantine society.

[13] Merry 2012: 58–62.

[14] Definition from Nelken 2007. Nelken 2007: 4–11 discusses the various meanings as well as the relative drawbacks and advantages of using the term legal culture; in short, despite its occasional vagueness, it is preferable to alternatives such as "legal system," "legal tradition," etc.

[15] Goodale and Mertz 2007.

[16] Nelken 2007.

[17] E.g. Bell 2001; Blankenburg and Bruinsma 1994.

to say nothing of the more *ad hoc* forms of justice meted out by large landowners and monasteries (of which we know very little for the period under examination), judged cases as part of their broader administrative duties. Although those who were forced to render judgment without legal training apparently did so with the assistance of *symponoi* (administrative functionaries with some knowledge of the law), ultimately justice and the functioning of the law lay in the hands of those who had, at least for the most part, never formally studied either.

A professional juridical cadre, to the extent that one existed, was confined during the period under examination to the realm of high judges, jurists, lawyers and upper-level legal functionaries. This stratum of Byzantine legal culture was, in its legal orientation, almost completely dominated by its interaction with the Roman legal tradition, not directly via the Justinianic corpus of law, but rather through the medium of the paraphrases and didactic writings of Late Antique jurists, the various Macedonian redactions of the *CIC*, as well as the special treatises and textbooks authored in the tenth and eleventh centuries. In general, these professional jurists were capable of engaging with the Roman legal tradition at a sophisticated level; this much is clear from the jurisprudence of the greatest Middle Byzantine legal scholar, Eustathios Rhomaios, as practiced in the *Peira* and legal treatises like the *Meditatio de nudis pactis*; in both works, despite occasional errors, to a large extent Roman law was correctly interpreted. This relatively small cadre of legal professionals, confined essentially to the capital, drew on its knowledge of the Roman legal tradition as a source of prestige and social status. Middle Byzantine jurists had a professional obsession centered not only on practical knowledge, but also, as is particularly evident in the juristic writings of Michael Psellos, on legal arcana, a state of affairs which has long been a source of bafflement and frustration to historians of Byzantine law. Perhaps the greatest source of cultural cachet it possessed was its claim to know Latin; this skill, which was demanded of the "guardian of the laws" instituted by Constantine IX Monomachos' (r. 1042–55) founding of the Law School in Constantinople, allowed these Byzantine jurists to trumpet a special connection with Byzantium's late Roman political legacy.

Despite the usefulness of legal culture as a heuristic tool of historical analysis, its use has been criticized for its vagueness: "[a]ll too often, legal culture is a term used to account for that which cannot be accounted for in any other way – that is, culture becomes the beneficiary of the residual term in explanatory equations."[18] Along these lines, other scholars have

[18] Gibson and Caldeira 1996: 56.

suggested dividing legal culture into smaller and more specific discrete categories, such as a culture's "attitudes," "expectations," "knowledge" and "values" with regard to law.[19] While duly acknowledging the drawbacks of using the concept "legal culture," its utility as a shorthand way of collectively referring to different aspects of the interaction between Byzantine law and society outweighs its potential drawbacks. In this study as well, the term Byzantine legal culture is employed in a general way as referring to any aspect of the interaction between the official legal regime and various phenomena – be they ideas about justice, customs and practices of a particular social group, or the influence of unofficial legal texts – of Middle Byzantine society.[20] The principal objection of the sociologist of law to defining a modern legal culture in such an open-ended way – that such a definition impairs quantification – is in this case unfounded, since quantification of legal cultural phenomena (e.g. the percentage of the population which was regularly involved in civil suits) is in any case impossible because of the paucity of the sources.

Sources

Why then is the concept of legal culture particularly suited to the study of law in the Middle Byzantine period? This approach was chosen, in part, because it can be employed with the types and quantities of sources, particularly legal sources, which are available to the historian for this era, about which more shall be said later in the introduction, but which can be broadly characterized as follows: an abundance of lawbooks, imperial novels (new legislation issued from the time of Justinian onwards) and legal textbooks (which will be referred to as *official legal sources*), but relatively few records of cases or examples of what legal historians like to call "the law in action." This imbalance has impinged upon the type of work which most Byzantine legal historians have undertaken in the past, which is primarily *Quellenkritik*.

Although it is worth going into greater detail as to the official legal sources which this study utilizes, it should be noted that there exist numerous and much more exhaustive studies of Byzantine official legal sources.[21]

[19] This is essentially the critique of Von Benda-Beckmann and Von Benda-Beckmann 2012.

[20] This study is not the first to use the term "Byzantine legal culture." It has been used, among others, by the Russian Byzantinist I. P. Medvedev, in his monograph *The Legal Culture of the Byzantine Empire* (in Russian); see Medvedev 2001.

[21] The modern pioneer of this type of study was once again Zachariä von Lingenthal 1839. Pieler 1994 is a much-updated Greek translation of Pieler 1978, though the latter remains the perhaps common

Here, official legal sources include the following: lawbooks, imperial novels, legal textbooks, scholia and commentaries on other legal sources and legal treatises.[22] Among lawbooks a distinction is to be made between *official* or imperially sanctioned collections of law and so-called *private* collections. The former were compiled and sanctioned by the imperial regime and represented the official law of the land. The chronology and content of the major imperially sanctioned lawbooks of this period, which include the *Prochiron*, *Eisagoge*, Leo VI's *Sixty Books*/*Basilika*, and the *Epitome* are explored in detail in Chapter 1. It is important to note that the most important of these codifications, that of the *Basilika*, has not survived in its entirety; sixteen of its sixty books are not directly transmitted.[23] Private collections of law, such as the Farmer's Law, Mosaic Law and Rhodian Sea-Law for the most part have unclear origins and were not imperially sanctioned, although sometimes forged histories of imperial promulgation were appended to these texts. The chronology and content of these private laws is presented in Chapter 4. The major collection of post-Justinianic imperial novels, that of Leo VI, is examined in Chapter 1.

This study makes major use of legal textbooks from this period, particularly the so-called *Peira*, an anonymously compiled casebook consisting of the judgments and verdicts of Eustathios Rhomaios, a jurist whose activity as a judge spanned the last quarter of the tenth and the first two quarters of the eleventh century.[24] Of the 200 to 300 decisions (*hypomnemata*)

basic reference for Middle Byzantine official legal sources. Troianos 2011 is the up-to-date and most thorough reference, though it is inaccessible to those without a reading knowledge of Modern Greek. The portions of Troianos' work which treat canon law are however now available in English translation, see Troianos 2012a (to 1100) and 2012b (twelfth to fourteenth centuries). The overview of Van der Wal and Lokin 1985 has much to recommend itself due to its brevity and clarity. Mostly concerned with Roman law but with some treatment of the Middle Byzantine period as well is Wenger 1953.

[22] An exhaustive discussion of the history (from around the year 1500 to the present day) of the editions of imperial novels issued from the time of Justinian onward can be found in Burgmann 2005a. As Burgmann points out, only a small portion (around one-fifth) of the novels issued from 912 to 1204 are in editions which meet contemporary standards of textual criticism (ibid. 126–7). Regarding the twenty-three surviving novels issued by emperors of the Macedonian dynasty after Leo VI, see Andreas Schminck 2005b.

[23] On this see Van der Wal 1989.

[24] There are no hard and fast dates for Eustathios' life; Nicholas Oikonomides conjectured that he was born around 970 and died sometime in the early 1030s (see Oikonomides 1986). Arguing for a somewhat older Eustathios Rhomaios, Andreas Schminck believes that the Byzantine jurist was born no later than the early years of the 960s (Schminck 2005b: 305–6) and possibly considerably earlier than that. I would argue based on the case presented at the beginning of this chapter that he lived until at least 1043. There are numerous articles and studies of the *Peira*, but relatively few of them have attempted to place the work within its wider historical and societal context.

which Eustathios wrote and which were used along with his shorter pronouncements of a verdict (*semeiomata*) as the basis for the *Peira*, only six decisions have survived in their entirety.[25] Very soon after the composition of the *Peira* in the middle of the eleventh century it was used as a legal textbook, as a school text stemming from the first half of the twelfth century testifies.[26] Eustathios also wrote a legal treatise on the bride-gift (*hypobolon*), referred to in the secondary literature as the *De hypobolo* ("On the bride-gift").[27] Finally, later tradition identifies Eustathios as the author of a text on the property acquired or delegated to those who under Roman and Byzantine law did not theoretically have the right of ownership (such as slaves or minors), the so-called *peculium* (Gr. *pekoulion*).[28]

The *Peira* is one of the few sources which allow historians to see how the law was applied and interpreted by Byzantine jurists at the higher Constantinopolitan courts of the Hippodrome and Velum. In analyzing the *Peira*, one must be careful to distinguish, where it is possible, between the work's anonymous redactor, who added the references to the *Basilika*, and the oeuvre of Eustathios himself.[29] Despite its obvious importance, the *Peira* remains in many ways a source which is underutilized by Middle Byzantine historians. A number of reasons have contributed to this state of affairs. Zachariä's edition is imperfect, although given that the entire *Peira* survives only in a single manuscript, it is not to be assumed that a

Among the exceptions are Oiknomides 1986 and Vryonis 1974. The broad outlines of Eustathios' jurisprudence are presented in Simon 1973 as well as Weiss 1973a. In general, analyses of the *Peira* and of Eustathios' other writings tend to be specialist examinations of particular legal institutions. Marriage law, for example, has been extensively studied: see Burgmann 2003; Papagianne 2008; Simon 1987; Troianos 1986. Two articles of Antonio d'Emilia (see d'Emilia 1965–6 and 1967) treated the law of sale and inheritance law respectively. Other aspects of the *Peira* which have recently been examined include slavery (Köpstein 1993) as well as the sale of office (Tsourka-Papasthathe 2001; 2002). The text has even been used as an indicator of economic data; see Laiou 2003. For a detailed analysis of the terminology employed for the various documents mentioned in the *Peira*, see Burgmann 2005b.

[25] Four of these decisions are edited in Eustathios Rhomaios, *Hyponemata on Marriage Law.* The other two were for many years ascribed to the patriarch Alexios Stoudites (1025–43), but were in fact the work of Eustathios as well (see ibid. 222).

[26] Treu 1893. Treu dated this text to the end of the eleventh century on the basis of a mention of the *Tipoukeitos*, but, as Schminck observed, it was more likely composed in the first half of the twelfth century; see Schminck 1979: 221, n. 2.

[27] Eustathios Rhomaios, *De hypoblo*.

[28] Eustathios Rhomaios, *Tractatus de peculiis.* On the authorship of the tract, see ibid. 294–6.

[29] A very good point recently made by Sirks 2010: 198–9. In general, when the jurisprudence of Eustathios can be discerned, then it conforms to Justinianic law, see Sirks 2009: 590: "The conclusion is that in the early 11th century the law on the legitimate portion as collected in Peira 41 did not differ much or at all from the law in the 6th century and was applied in a way, basically consistent with 6th century law."

new edition would correct all of the ambiguities of the current printed text. The lack of a translation or commentary in any modern language hinders access to the text for non-specialists. The new edition, translation and commentary currently being undertaken by Lorena Atzeri will remove many of these obstacles when it is completed.[30]

This study also makes use of scholia, particularly the scholia to the *Basilika*.[31] These scholia are agreed to exist in two main divisions: "old" scholia dating from the sixth century and "new" scholia dating mainly from the eleventh and twelfth centuries.[32] Oftentimes a name at the beginning of the scholion indicates the author. Unfortunately, not all of the scholia to the *Basilika* can be dated: many are anonymous and dating them by other means, such as vocabulary, is a very tricky proposition. Additionally, some scholars have bemoaned, quite rightly, the practice of categorizing scholia into "new" and "old" in general, as oftentimes the scholia themselves are written in a much more complex fashion. For instance, a sixth-century scholion to the Justinianic corpus could be continually reworked by later scholiasts: in such a case does one classify the scholion as "new" or "old"?[33]

There are differing views as to whether when these scholia, particularly the "old" scholia, were attached to the text of the *Basilika* itself, and whether these scholia constituted a catena-style commentary.[34] According to one view, the surviving manuscripts indicate that there never existed any archetypal or standard collection of scholia; it appears as though scholia were selected and written *sui generis* for each manuscript.[35] According

[30] Atzeri is completing a project began by Ludwig Burgmann, who has published a sample of the work, a translation and commentary of *Peira*, chapter 51 "On Judges"; see Burgmann 2008.

[31] Contained in vols. 9–16 of the Groningen edition of the *Basilika*. For a detailed discussion of the *Basilika* scholia, see Pringsheim 1963. Since the publication of the Groningen edition of the *Basilika*, a number of new *Basilika* scholia have been discovered in manuscripts. Marie Theres Fögen brought to light two manuscripts which contained fragments of *Bas*. 37.1–2 (which is only reconstructed to a very small degree in the Groningen edition); see Fögen 1979 178–93. Somewhat later Fögen and Burgmann published scholia on books 2, 7–8 of the *Basilika*; see Burgmann and Fögen 1982. In 1993 fifty-one passages from the *Basilika* which to that point had not been directly transmitted (that is, only transmitted through direct quotations from later legal compilations) along with forty-four new *Basilika* scholia were published (see Tiftixoglu and Troianos 1993). Scholia from books 35–45 were edited in that same volume of *Fontes Minores*; see Dittrich 1993. Quite recently, two new *Basilika* manuscripts from the Austrian National Library were discovered. While they add little to the reconstructed text (mainly some better readings for book 19), they are important examples of the process of translating Latin legal terms into Greek in the *Basilika*; see Stolte 2010.

[32] See Schminck 1991a.

[33] Burgmann and Fögen 1982: 127.

[34] For a concise summary of these issues, see Troianos 2011: 281–4.

[35] See Scheltema 1960.