

BALSAMON AND THE BASILICA

I

In the history of Byzantine law the Nomocanon of the Fourteen Titles occupies a prominent place. It belongs to a genre of legal literature that is typical of Byzantium. In that society where Church and State were inextricably bound up with one another, there could be no question of a total separation of the legislative competences of the ecclesiastical and the secular arms, if such a division existed at all. Indeed, there was never any doubt that the Emperor had a say in the affairs of the Church. Small wonder, then, that the body of rules applicable to churches, monasteries, ecclesiastical organization, marriage, and so on, always consisted of both imperial laws, *nomoi*, and ecclesiastical canons, *kanones*. Hence the name to indicate a collection of such rules, *nomokanon*.

Of this genre the Nomocanon of the Fourteen Titles is the most successful representative. It was first compiled in the early seventh century and was revised in the time of Photios, Patriarch of Constantinople at the end of the ninth century; in other words, about the time of the compilation of the Basilica. Our manuscripts usually contain this second recension, never the first; it is the text that was edited by Rhalles and Potles in 1852 and by Pitra in 1868.¹

The term nomocanon can be used in two senses: in a wider sense it is applied to a collection of canons of Church Councils in chronological order, followed by a number of pronouncements by certain Fathers to which the Church had attributed the status of canons; but it is only the repertory preceding this kind of collection which can be called a nomocanon in the strict sense, as it alone contains, in addition to a conspectus of the canonical material under systematic headings, a citation of the *nomoi* relevant in each case. I shall reserve the term 'nomocanon' for this systematic repertory.

The Nomocanon mentioned above is divided into fourteen titles, each of which is subdivided into a number of chapters. Each chapter contains (a) a delineation of the subject; (b) a list of canons of Church Councils and Fathers dealing with the subject (for instance, 'of the Sixth Council canon 22', or 'of Basilios canon 27'); and in most cases also (c) the civil legislation on the subject in the form of extracts from Code, Institutes, Digest and Novels. The names and numbers of the canons refer the reader to the collection of canons following the Nomocanon and giving their text in full; of the fragments taken from the civil law the full text is cited in the repertory itself.

There is a tradition attributing this second recension to Photios, who was Patriarch, on and off, between 858 and 886; but there is a striking discrepancy between

¹ On the Nomocanon and its editions, see Van der Wal-Lokin, *Delineatio*, 66 ff. and 131; 87 ff. and 133.

the Nomocanon of the Fourteen Titles and the Basilica, although the latter are dated only a few years later. In the Basilica as we have them, the titles of the Code and Digest, and the Novels are included only insofar as they were still considered to be relevant in the late ninth century. Yet certain fragments from the Code, Digest and Novels that have been omitted from the Basilica, are included in the second recension of the Nomocanon.

At this point we turn our attention to Balsamon.² Theodore Balsamon was born in Constantinople about 1140, and followed a career in the Church, through which he rose to be Patriarch of Antioch. His heart's desire to be Patriarch of Constantinople remained, however, unfulfilled. He seems to have been an ambitious man, full of hatred towards the Latin West, and a good lawyer, although perhaps not as good as he himself considered. He probably died about 1200. His main work is a commentary on the Nomocanon of the Fourteen Titles and on the accompanying collection of canons which was mentioned above. This commentary is most easily accessible in the edition by Rhalles and Potles; I had better say at this point that I have based myself entirely on this edition, whatever may be its faults. The first volume gives Balsamon's commentary on the Nomocanon itself; his notes follow immediately after each *keimenon*, that is after the section of citations from the civil law which closes each chapter. The commentary is titled: 'A commentary on the holy and divine canons etc. ... with an explanation of the laws, whether operative or inoperative, which are arranged under the Fourteen Titles preceding the canons. This explanation was laboriously produced at the imperial and patriarchal command etc.' Balsamon explains his labours in a prologue: 'Having been commanded by our ... Emperor Manuel Comnenos and ... by our Patriarch ... Michael of Anchialos to scrutinize the canons and to clarify and interpret what is unclear in them and what seems to be in conflict with the laws; and likewise to make a careful investigation into the writings of the Patriarch Photios, namely his observations under the Fourteen Titles, which are set out compactly before the canons; [and furthermore having been commanded] to point out what is legally binding in them, and to demonstrate moreover what is obsolete, i.e. what has been excluded by the latest Purge of the Laws, namely that which was undertaken by ... the Emperor Constantine Porphyrogenetos,³ lest some readers should take for valid and binding laws which are no longer in force, and so, like vagrants, wander off the straight path of the Royal Road — something which our most reverend lord [Patriarch] was in danger of doing in the case of Leo, the metropolitan of Amaseia —; therefore, [having been thus commanded] we boldly ventured upon the present labour, taking courage from the concern and the prayers of those who have entrusted us with this task. First, then, after examining the laws collected under the said Fourteen Titles by the Patriarch

² See, e.g., E. Herman, *Dictionnaire de Droit Canonique* II (Paris 1937), 76–83.

³ Here Balsamon seems to refer to the Basilica, but see also below.

[Photios],⁴ who compiled the Nomocanon before the Purge of the Laws, as has been said, we divided them into two categories; on the one hand we have made clear, which of these are still in force, since they were included in the Sixty Books which form the foundation of the imperial law, and, on the other hand, which ones are entirely obsolete since they were excluded by the Purge. Next we have pointed out which of those laws which were previously included in the fifty books of the Digest and the twelve books of the Code, are now to be found laid down in which books and titles of the Basilica; likewise, we have also solved the apparent conflicts according to the ancient interpretation, supplemented by our own modest knowledge; similarly those passages from the Justinianic Novels which were listed as binding by the Patriarch [Photios], but excluded by the Purge, we have removed, as being a stumbling-block. Furthermore we have included in the present work certain other necessary and binding laws, promulgated after the Purge, from imperial ordinances [and decrees]⁵ and novel constitutions, and moreover from the Acts of the Councils, so that the readers may have a basis that is stable and unshakable in all respects. If by any chance there are imperfections, either in this commentary [on the Nomocanon] or in the interpretation of the canons, we hope to be forgiven; for the scale of the undertaking is not due to boldness on our part; rather it was begotten of obedience under necessity.'

Balsamon's prologue presents a few problems, which I do not wish to go into just now, such as the 'latest Purge' etc. by Constantine Porphyrogennetos and Photios' authorship of the Nomocanon. The case of the metropolitan of Amaseia is referred to again in the commentary on Nomoc. 1,9. The episcopal see of Amisos fell vacant and the metropolitan of Amaseia neglected to appoint a new bishop within the canonical time. The Patriarch of Constantinople Michael III of Anchialos, who held office from 1170 to 1178, then proceeded to appoint a bishop himself, on the basis of Novel 123, ch. 1, fragment 2, a passage that was in the Nomocanon under Title 1, ch. 9, but one which had not been included in the Basilica; on the grounds of this exclusion his opponents argued that it was not binding. The Emperor had to give judgment on this point and ruled in favour of the Patriarch's opponents. Thus the principle was acknowledged that the Basilica provided the standard of what was valid and what was not. In the light of this decision Balsamon was asked to write a commentary on the Nomocanon of the Fourteen Titles. His own description of this commentary is accurate enough, as I have found from taking my daily dose of Balsamon before breakfast in order to prepare this paper.

⁴ Here, as also below, the manuscripts seem to read either 'the Patriarch', or 'Photius'.

⁵ καὶ σημειωμάτων; apparently not in all manuscripts.

II

Insofar as Balsamon's commentary is concerned with the Basilica, many of the interesting points were noted a century ago by Heimbach in the Prolegomena to his Basilica edition.⁶ Heimbach of course concentrated on Balsamon's value as a witness to the Basilica text, an aspect which presents some thorny problems, as Balsamon must have had a text that was in some respects different from our present edition. Stevens' book on Balsamon⁷ provides us with over 50 pages of useful indices to Balsamon's commentary, and these indices are supplemented by Papagianni's and Troianos' tables of Balsamon's quotations from the Basilica.⁸ I can only thank them all sincerely for having made my burden so much lighter.

'Balsamon and the Basilica' seemed a particularly suitable subject for this symposium. Balsamon wrote his commentary on the Nomocanon primarily as a comparison between the 'ancient', that is, the Justinianic laws, and the Basilica, for which he also uses the names of ὁ βασιλικός [νόμος], or ἡ ἀνακράθαρσις [τῶν νόμων], Purge (of the Laws), 'the Purge' for short. One may therefore expect to learn from his notes something about both the Justinianic legislation and the Basilica. As a tribute to the spirit in which the new Basilica edition was undertaken, I would like to concentrate on two topics: first, on the form in which the Justinianic legislation was available to Balsamon, and second, on his view of the Basilica as a legal source. I have restricted myself, as a rule, to his commentary on the Nomocanon in the strict sense, which, I hope, will enable me to present a fair image of Balsamon's views. I do not doubt that much might be gained from a study of his commentary on the collection of canons as well, but for the moment I have firmly stuck to Balsamon's own advice in scholia on Nomoc. 8,10 and 13: 'do not take pains needlessly'.

1. The Justinianic legislation

Balsamon's commentary is interesting for, among other things, his quotations from the 'ancient laws'. A full treatment of this subject would be impossible within the compass of this paper. If we were to give a wider interpretation to the term παλαιοὶ νόμοι, we would also have to include his quotations from Stephanos, Palaios — if that really is a name —, and the 'Scholiastes', all possible contributors to a palingenesis of sixth-century jurisprudence. Instead I shall concentrate on one aspect only.

Within the Justinianic legislation, Balsamon distinguishes its different parts. His treatment of Code, Digest and Institutes is unremarkable as far as his terminology is concerned. For the Novels he uses the numbers of the Collection of 168

⁶ 111–117; 126; 151–153.

⁷ G.P. Stevens, *De Theodoro Balsamone. Analysis operum ac mentis iuridicae* [Corona Lateranensis 16], Rome 1969.

⁸ E. Papagianni — Sp. Troianos, Διατάξεις τῆς πολιτειακῆς νομοθεσίας εἰς τὸ ἐρμηνευτικὸν ἔργον τῶν Ἀριστηνοῦ, Ζωναρᾶ καὶ Βαλσαμώνος, *ΕΕΒΣ* 45 (1981–2), 201–238.

Novels⁹ instead of the references in the Nomocanon, which are, rather curiously, to the number of the relevant title and constitution in the arrangement of the Epitome Athanasii, although with a different text.¹⁰ The only remarkable term is τὸ πλάτος. Balsamon often compares the *platos* of the Novels and sometimes of the Code with the text of the Basilica. Τὸ πλάτος is a chameleonic term, meaning various things with various authors. It has been used for the entire Corpus iuris, for the Basilica themselves, for Stephanos' commentary on the Digest, for Thalelaeus' commentary on the Code etc. As far as I can see the term sometimes has a concrete meaning and is at other times an abstraction indicating the law in general, 'the expanse of the laws'.¹¹ It is only in order to ascertain in what shape the Justinianic sources were available to Balsamon that I wish to examine what he meant by this *platos*. The following passages may shed some light on this question.

When commenting on Nomoc. 8,2 Balsamon distinguishes (152,9)¹² between the reading of Novel 86, ch. 8 in the *platos* of the Novels and in the Basilica, where it occurs in 6,22,8. Now there can be no doubt about what Balsamon read in the Basilica, as he quotes the passage in full: it reads exactly as in our edition, and this in turn has the same text as the Collection of 168 Novels. So the *platos* cannot be this text. Interestingly, the Epitome Athanasii and therefore also the Collectio Tripartita, of which the third part — regarding the Novels — is entirely dependent on the Epitome Athanasii and the Breviarium Theodori, have a text which does not differ from the Basilica on the point that interests Balsamon, so they cannot be the *platos*, either. The only text known to me which corresponds to Balsamon's *platos* is the text of the Nomocanon itself (151,6), but that cannot be Balsamon's meaning. In other words, in this case the *platos* cannot be identified; in any case it is not identical with the Collection of 168 Novels.

The *platos* is further highlighted in a scholion on Nomoc. 1,34. Balsamon remarks (75,5) on the different wording of Novel 123, ch. 17,1 before and after the *platos* of the Novels was made and then tells us that the text has been transferred into the Basilica as it was in the *platos*. As, once again, the Basilica have the same text as the Collection of 168 Novels, but the Nomocanon reads differently, one is tempted to draw the conclusions that (a) the *platos* is the Collection of 168 Novels,

⁹ If these really are Balsamon's numbers; see below.

¹⁰ Cf. K.E. Zachariä von Lingenthal, 'Über den Verfasser und die Quellen des (pseudo-photianischen) Nomokanon in XIV Titeln', *Mémoires de l'Académie impériale des sciences de St.-Petersbourg*, 7e série, XXXII, 16 (1885), 4–23 [= idem, *Kleine Schriften* II (Leipzig 1973), 148–167], esp. 5–6; B.H. Stolte, 'The Digest Summa of the Anonymus and the Collectio Tripartita, or the Case of the Elusive Anonymi', *SG* 2 (1985), 47–58, esp. 53–54.

¹¹ There is no comprehensive treatment of *platos*. Some of its occurrences are found through DuCange, *Glossarium ... Graecitatis*, s.v.

¹² The numbers between brackets refer to page and line of Σύνταγμα τῶν θεῶν καὶ ἱερῶν κανόνων κτλ. [edd.] G.A. Rhalles — M. Potles, I (Athens 1852, repr. 1966).

and (b) Balsamon imagines this collection to have been compiled after the Nomocanon, and (c) speaks of textual differences without making it clear that the Collection of 168 Novels contains full texts, whereas the Nomocanon simply has abridged versions. If we rule out the possibility of a simple mistake on Balsamon's part or of mere scribal error, these two scholia would seem to mention the *platos* in such a way that one partly contradicts the other.

We are granted another glimpse of the *platos* of the Novels in Balsamon's commentary on Nomoc. 1,28. The Nomocanon cites the second constitution of the first title of the Novels — its location in the Epitome Athanasii — as stating, amongst other things, that a priest who is ordained must not be less than 30 years old, a deacon 25, a lector eight, and a bishop 35. Balsamon (66,14 ff.) first identifies the Novel as Novel 123 and gives its place in the Basilica as 3,1,28; the current numbers are Novel 123 chapter 13 (except for the bishop) and Bas. 1,3,25. Once more he quotes the Basilica in full; there are no important discrepancies with our edition. Then he comments: 'But you should know that the Novel of Justinian that is found in the *platos* states, that a lector must be at least eight years old and a bishop at least thirty-five, just as is also stated in the present book [i.e. the Nomocanon]. In the Purge the age of the bishop has been left out altogether and the age of the lector is raised: for instead of eight, it says the lector should be eighteen years old.'¹³ The rest of the scholion, which I am not going to discuss just now, is interesting in other respects as well; suffice it to say that Balsamon notes that Novel 137 supersedes 123 and that it gives the age required to become a bishop as 30 [ch. 2]. With regard to the *platos*, the difficulty is in the bishop's age. Ch. 13 does not mention a bishop, but ch. 1 does. The place of the required age of a bishop in the Nomocanon, after the other offices (which are all in ch. 13), suggests that it has been added from a different source, namely ch. 1. Balsamon's commentary does not record this. He only remarks that the *platos* has 35 years and that the Basilica omit this requirement altogether, which is correct insofar as Nov. 123,1 has not been included; the Basilica have Nov. 137,2 giving 30 years as the bishop's required age. All would be well but for textual problems in Nov. 123 ch. 13. The Latin *kata poda* translation of the Novels, the Authenticum, reads at this point: 'Presbyterum autem minorem *trigintaquinque* annorum' etc., 35 being confirmed by the reading of the Laurentian manuscript of the Greek text and also by the Breviarium Theodori. No bishop is mentioned, but he occurs in a variant reading of the text of its summary in Epitome Athanasii 1,2,25, where the Parisinus has ἐπίσκοπος πρεσβύτερος ἢ διάκονος.¹⁴ It is possible, but probably too hazardous to conjecture from these two traces that there once existed a full text of Novel 123,13 serving Balsamon for his *platos* and speaking about bish-

¹³ Balsamon apparently takes the number eight seriously; of course it could be a textual corruption (ἡ' < ιη').

¹⁴ See the edition by G.E. Heimbach, 8 with n. 90.

ops having to be at least 35 years old. It is curious, on the one hand, that the canons quoted in the Nomocanon do not mention 35 years, and on the other hand that the *Epitome Athanasii* and the *Collectio Tripartita* in their summaries of Nov. 123,1 both have 30 years and no variant readings in the manuscripts. On balance I think the evidence is not strong enough to infer from Balsamon's commentary that his *platos* contained a divergent text of Nov. 123,13. From the passages discussed here I get the impression that when Balsamon speaks of τὸ πλάτος τῶν νεαρῶν, we may think of the Collection of 168 Novels, although perhaps with considerable textual divergences, an example of which would be Novel 86,8, where Balsamon apparently read a different text. The identification of Balsamon's *platos* with this Collection rests in part on the numbers quoted in the existing editions of his commentary; if a critical edition should prove them wrong, the question appears in an entirely different light. There is a special problem contained in the question whether this *platos* included the Latin Novels, and if so, in what version. This problem will remain insoluble, as Balsamon does not quote Novels that are generally acknowledged to have been originally issued in Latin.

In the case of the Code references to a *platos* are too few to admit of any firm conclusions. When commenting on Nomoc. 7,4 Balsamon (141,20 ff.) contrasts the *platos* of the Code (3,12,9) with the Basilica: the *platos*, Balsamon says, only speaks of Sundays, but the Basilica (7,17,27) rule that all days assigned to the worship of God should be observed equally. From the text of the Basilica preserved to us (BT 393,3 ff.) I cannot see the difference with C. 3,12,9; Thalelaeus' version, which one would expect to be the *platos* in the case of the Code,¹⁵ has not been transmitted.

In his commentary on Nomoc. 9,1 Balsamon observes (171,30 ff.) that 'the *platos* of the 29th constitution, which [constitution] does not occur in the Basilica, is as follows'; the text he then quotes is the same as par. 3 of the Greek constitution C. 1,4,29. Although this constitution is in fact to be found in the Basilica once in a brief summary (B. 3,1,6), this case may be special in that the original text of this constitution in the Code is in Greek and was therefore dealt with in a different way or perhaps even passed over by Thalelaeus in his course.¹⁶

Obviously it is impossible to infer from these two cases what exactly the *platos* is as far as the Code is concerned. It is quite possible that it is Thalelaeus' commentary; as the exact shape of this commentary is far from clear,¹⁷ this still would leave the problem what exactly Balsamon had on his desk. A systematic perusal of Balsamon's

¹⁵ Heimbach, *Prolegomena*, 72.

¹⁶ Cf. H.J. Scheltema, *L'enseignement de droit des antécédents* [= *Byzantina Neerlandica*, B 1], Leyden 1970, 38.

¹⁷ N. van der Wal, *Les commentaires grecs du Code de Justinien*, 's-Gravenhage 1953, 64-104; D. Simon, 'Aus dem Kodexunterricht des Thalelaios', *SZ* 86 (1969), 334-383, esp. 334-347; Scheltema, *Antécédents*, 32-40.

commentary, preferably with the help of a computer into which a modern critical edition of this commentary¹⁸ has been fed, might yield more precise information than I am able to give at present.

2. Balsamon's view of the Basilica

There can be no doubt that Balsamon considers the Basilica to be the final word on any legal question, unless they have been amended by subsequent Novels, a number of which he quotes at length, as one can see at a glance from Papagianni's and Troianos' tables. Still this is far from being the whole story. If we look again at the case of the metropolitan of Amaseia, we see that the question was whether Novel 123 ch. 1,2 was included in the Basilica. When this was found not to be the case, the decision went against the metropolitan who had based himself on the Novel — probably as it was represented in the Nomocanon. Now suppose the Novel had been included in the Basilica: which text would have been binding, the Novel, the Nomocanon or the Basilica? There is no lack of texts to instruct us on this point. For Balsamon the text as provided by the Basilica sets the standard against which diverging texts, be they *keimenon* or *platos*, are to be measured. Time and again the reader is admonished not to pay attention to the 'ancient' laws: 'You should pay more attention to what is written in the Basilica than to what is laid down in the books in force before the Purge and now out of use' [meaning the Novels] (ad Nomoc. 1,28 [66,29 ff.]); 'and the version of the Basilica is more accurate [than the Digest]' (ad Nomoc. 9,25 [198,27 ff.]); 'rather pay attention to the Basilica [than to the Nomocanon]' (e.g. ad Nomoc. 2,2 [94,5 f.]). All things considered Balsamon takes a lot of trouble to inform his readers about the ancient laws. Occasionally he even goes as far as telling us why a passage from the Justinianic legislation has been omitted from the Basilica. I shall give just two examples. In the case of Nomoc. 1,10 reference is made to the 36th canon of the Council of Carthago, and to two constitutions from the Code. The constitutions do not occur in the Basilica, although, Balsamon tells us, one might argue that they are not in conflict with the canon (51,2). Balsamon attributes their having been omitted to the fact that they would be in conflict with St. Paul and explains why this should be so: apparently this was not the case as far as the canons were concerned. In a scholion on Nomoc. 2,1 part of D. 41,2,30,2 is said to have been omitted from the Basilica because 'the executor of the Purge thought it to be unjust (ἄδικον)' (94,31 f.). It is clear that Balsamon ascribed to the compiler of the Basilica the intention as well as the ability to purge the law in the sense of making a new codification. One certainly does not

¹⁸ Which does not exist, but would be much welcomed. Cf. also D. Simon, 'Balsamon zum Gewohnheitsrecht', *ΣΧΟΛΙΑ. Studia ... D. Holwerda oblata* edd. W.J. Aerts et al., Groningen 1985, 119–133, esp. 121.

get the impression that he was aware that the original purpose of the Basilica might have been something different.¹⁹

The conception of the Basilica as a true code of law, that is, giving an exhaustive statement of the law insofar as it has not been amended by subsequent legislation and outside which therefore no law could be binding, does not solve all problems. One of the most interesting ones, from a legal as well as from a political point of view, is the relation between *nomos* and *kanon*.²⁰ Balsamon does not leave any doubt that he considers the *kanones* to take priority over the *nomoi*. But even a systematic application of this principle does not suffice. Let us consider the case of Nomoc. 1,2, on 'which canons must be binding'. The *keimenon* gives the following rules: (a) on the basis of Novel 131 the canons and doctrine of the Seven Ecumenical Councils have the status of divine writings; (b) C. 1,3,44 and Novels 6 and 73 state on the one hand that canons have the same force as laws, on the other hand that the laws follow the canons; and (c) C. 1,2,12 invalidates those decrees that are contrary to the canons. Rhalles and Potles ascribe the two scholia to Balsamon; both are interesting enough to be discussed here. In the first one (36,15 ff.), Novel 131 is identified as Bas. 5,3,1,1 [new edition: 5,3,2] and quoted. Now of course Novel 131, dating from 545, could not have known more than four Ecumenical Councils; the Basilica contain a revised version which mentions seven. The scholion then notes the absence from the Basilica of the other Justinianic laws and ends: 'pay no attention to these, first, because they are not in conflict with the 131st Justinianic Novel, and second, because they have been excluded from the Basilica' (37,9 ff.). In a note²¹ it is added that not only are the canons of the Seven Councils binding, but also the canons of those local councils that they have ratified, and there is a reference to the second canon of the Council in Trullo that adds certain other writings.

So far, so good. In fact, nothing more is said than that Novel 131 is binding by virtue of its incorporation in the Basilica, and that other laws are not because of their absence from the Basilica. No attention at all is paid to a possible discrepancy between the Novel and the Basilica: the text of the Basilica is taken for granted. Much more interesting is the second scholion (37,20 ff.), as it informs us that this very point had been debated. Some people, Balsamon says, have argued in the presence of our Emperor that canons should not be binding where they conflict with the laws because the canons were proclaimed before the Purge. Others have advanced such

¹⁹ See Van der Wal — Lokin, *Delineatio*, 81–86 with references, 133, but also the discussion in A. Schminck, *Studien zu mittelbyzantinischen Rechtsbüchern* [= Forschungen zur byzantinischen Rechtsgeschichte 13], Frankfurt am M. 1986, 37 ff. Fortunately it is Balsamon's, not our opinion that matters.

²⁰ See H.-G. Beck, *Nomos, Kanon und Staatsraison in Byzanz* [= Österr. Akad. der Wissenschaften, Philos.-hist. Kl., Sitzungsber. 384], Vienna 1981.

²¹ I pass over the question whether Balsamon is the author of this note, as also the same question with regard to the second scholion mentioned below.

canons and pleaded their legal validity on the basis of Novel 131 in Basilica 5,3,1. When their opponents said that this Novel, reported to be Justinianic, but also mentioning Councils of the time after Justinian, was inadmissible, it was answered that the Emperor who had compiled the Basilica had made the words of the Novel his own. 'For if this were not so, he would not have added that the canons of the subsequent Councils were binding as laws and as divine writings, but this as well as other Justinianic Novels would have become obsolete through not having been laid down in the Basilica, and this was accepted by the Emperor' (38,7 ff.). Through this legal fiction it is made historically acceptable that the Emperor mentioned these more recent Councils; it is not Justinian who is speaking, but the Emperor who had compiled the Basilica. In other words, the Novels are postdated to the time of the promulgation of the Basilica. On the other hand Balsamon does not draw the ultimate logical and legal consequence, namely that, by the same fiction, all Novels have lost their own date and now have the same status. For proof of this we turn once more to Balsamon's scholion on Nomoc. 1,28, where, as has been said, he notes that Novel 123 has been superseded by Novel 137 on certain points (67,8 f.); both Novels, however, occur in the Basilica, including these points. Apparently Balsamon had no clear view of the consequences of the promulgation of the Basilica for the 'ancient' laws, once they were found to have been included. The only clear principle is that they had lost force by their exclusion.

There is further evidence that the fact that a law occurs in the Basilica does not automatically mean that it was held to be binding. Thus, for instance, the 28th and 29th Novels are now obsolete, Balsamon says in a scholion on Nomoc. 1,20, because the 'godless barbarians' have changed the situation so much in those parts of the Empire for which they were intended (57,12 ff.). This may be just common sense, but more telling is the rest of this scholion. C. 1,3,35 is identified as Bas. 3,1,3, and quoted in full. Then, curiously, as a sort of afterthought, the reader is warned: 'Nota bene: do not pay attention to the law laid down here, that is, in the third chapter of the first title of the third book [of the Basilica], for it was nullified by the 17th canon of the Council of Chalcedon and the 38th canon of the Council in Trullo. Read the 38th canon and its explanation. For in it have been laid down decrees stating, in the Emperor's words, how it is permitted for Emperors to modify ecclesiastical rights and privileges' (57,26 ff.). As both Councils took place before the Basilica were promulgated, this means that the Basilica are submitted to the test of conformity with the canons and declared not to be binding if the result is negative; in other words, the relevant passage in the Basilica must have been considered to be void from the beginning. This principle is stated expressly when a similar case is discussed in a scholion on Nomoc. 1,23, where the reader is referred to the 48th canon of the Council in Trullo rather than to Novel 137, although the latter occurs in the Basilica: '... the canons are preferred to the laws' (60,15 f.). The principle

that the laws have a subsidiary role to the canons is further manifested in a scholion on Nomoc. 1,29. Once more the age of the lectors is at issue. The canons quoted do not contain a rule on this point. Some people, Balsamon says, therefore deny that there is a minimum age. Wrongly, for, in Balsamon's words: 'Where the canons are silent, we must follow the laws and decide by way of analogy' (68,23 f.), and in this case there was a secular law to turn to.

Apart from the case of nullity *ab initio*, a law, though valid, may not have been followed in practice. For this aspect I refer to Simon's paper in the Festschrift for Douwe Holwerda: 'Balsamon zum Gewohnheitsrecht'.²² Balsamon acknowledges the possibility of custom derogating from the law and therefore also from the Basilica.

III

To conclude. By making my remarks on τὸ πλάτος, I hope to have demonstrated that at least its relation with the Justinianic legislation is sufficiently strong to make a detailed study of Balsamon's commentary rewarding from this point of view, too. In collecting notes on Balsamon's view of the Basilica I have reached the preliminary conclusion that he did not have a theory of the hierarchy of legal sources, in which the Basilica had been allocated their place. The general trend is clear enough, above all as far as the primacy of the canons is concerned. However, when he decides that the Emperor has made the words of a Justinianic Novel his own, this is not part of a general theory, but rather an isolated solution to one particular problem. Further study of Balsamon's commentary might make a significant contribution to our understanding of the concept of law and legislation in Byzantium.

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²² Above, n. 18.

