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- **a manual of roman law the ecloga, 1.0, a manual of roman law the ecloga.**

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In the middle of the sixteenth century, while Sicily and Calabria formed part of the Spanish dominions of Philip II, an attempt was made to reform the Greek Basilian monasteries in those provinces. This reform was undertaken by a certain Cardinal Sileto, the prefect of the Congregation for the Reform of the Greek rite, attached to the Vatican. The Cardinal appears to have been a man of considerable erudition and a bibliophile, and under his auspices the books of the libraries of the lesser monasteries were collected and deposited in one or other of the principal monasteries, notably St Salvatore dei Greci at Messina. At a later date in the sixteenth century they were brought to Rome, and in 1780 eventually found a home in the Vatican and Grotta Ferrata. In 1826 and 1830 a list of these manuscripts in the Vatican was made by Cardinal Mai Vat. Lat. 9582. Another list of the manuscripts found in these Sicilian and Calabrian monasteries was published in 1891 by Monseigneur Batiffol. The first printed edition of the *Ecloga* was made by J. Leunclavius Johann Loewenklaus. To their two names should be added that of Martin Crusius, professor at the University of Tübingen, with whom S. Gerlach corresponded. During his travels, probably at Constantinople and under the auspices of Gerlach, Leunclavius came across a manuscript of the *Ecloga* and published it, with a Latin translation, at Frankfurt in 1596. The volume contains some other legal treatises and a miscellaneous collection of documents. The next publication was made by Zacharia von Lingenthal in 1852. With the *Ecloga* he included the *Epanagoge* and some other manuscripts of the Isaurian and Basilian laws, including the *Ecloga privata aucta*, and the *Ecloga ad Procheiron mutata*, found among the manuscripts from Sicily and Southern Italy. The Greek texts only are given. This text is only given in Greek.

I have adopted it for making this translation, using the versions of Leunclavius and Zacharia von Lingenthal when the Athens manuscript was defective or difficult to interpret. I have adopted Monferratus text for two reasons. First because it is the earliest in point of date; and next because the manuscript at Athens, including the Appendix of the Mosaic law, appears to be the counterpart of one of the manuscripts found at St Salvatore dei Greci. I take the title of it from Mon. These chapters relate to the office and duties of the Emperor, the Patriarch, and other high officials, and are interesting. But they do not figure either in the Athens manuscript or in the text published by Zacharia von Lingenthal. Otherwise the title, preamble, and chapters 11 to 19 and 28 in Leunclavius, and the whole of Z. von Lingenthal's text correspond, minor verbal differences apart, with the Athens manuscript. It is my present intention to translate these chapters and with them the *Ecloga ad Procheiron mutata*, on a future occasion. I accept the dates of these three texts of the *Ecloga* with reserve. We are dependent on the accuracy of the scribe, and Siletos report shows that the Calabrian and Sicilian monks, of his day at any rate, were not good scholars. The date of the original edition as given in the Athens manuscript is A.M. 6234, or A.D. 726, of Z. von Lingenthal's text, A.M. 6249, or 741 A.D., and of Leunclavius, A.M. 6347, or A.D. 839. The first two dates fall in the reign of Leo III and the third in that of the Amarian Emperor Theophilus. In any case the existing manuscripts now available were made many centuries after the original version of the *Ecloga*.  
PREFACE. XI first saw the light of day. The Athens manuscript is attributed to the later thirteenth century.

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It is perhaps hardly necessary for me to point out the important place which the *Ecloga* occupies in Later Roman law, more particularly in South Italy where it came in practical contact with the laws of the Lombards and the Normans. Leo III marked a new chapter in Roman history, and in the *Ecloga* we perceive a change in Roman ideas and ideals of which Leo was perhaps less the author than the exponent. It is the first book on Roman laws, as distinguished from occasional Edicts, in which a Roman Emperor uses Greek and not Latin as the official language; he speaks of himself as the *Basileus* and of his Empire and his subjects as *Romaic* and *Romaioi*. It is moreover the first Christian law book, the first, as the Emperor explains in his title and preamble, in which an attempt was

professedly made to introduce into Roman law some of the principles of Christian equity. I have acknowledged my indebtedness to the various authors consulted in a note at the conclusion of the list of books, and I have dedicated this book to my friend Professor Bury to whom I owe all I know on Later Roman history, and who has very kindly helped me to render some of the passages in the translation. Guardians Freemen and Slaves. Sale and Purchase Loan and Pledge Deposit Emphyteusis Leases Testimony Dissolution of Contracts Property of Soldiers. Leo and Constantine, the third and the fifth of the Roman Emperors known to us by those names, were father and son. From Theophanes, our principal authority for the events of this obscure period, we learn that they were colonial Romans from the Taurus Mountains in Eastern Asia Minor, and that their family migrated, or was transplanted by the Emperor Justinian II, Rhinotmetos, from their !saurian home to Mesymbria in Thrace. It is there that we first hear of Leo as a soldier, and, having won favourable notice, Justinian II raised him to the rank of aidedecamp. We may, I think, infer that he was about forty years old at his accession in 717.

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The effigy on his coin F I 2 INTRODUCTION reproduced in the frontispiece is no doubt a portrait. Constantine, his son, was born in the following year, and two years later was raised to the rank of Augustus and received the Diadem. The Emperors are termed Basileis. Some interest attaches to the use of this word to describe their title. Upon the coins they are invariably called Dominus noster, or, as in the case of Leo III, merely Dominus. But their official title in Latin was Imperator. The Greek word used was Autokrator. An alternative title in Latin was Princeps and the colloquial Greek word was Basileus. This title was conceded to the kings of Persia and Abyssinia. But after the conquest of Persia by Heraclius, when the Persian king became a Roman vassal, Basileus was substituted for Autokrator, and in an Edict Heraclius so describes himself for the first time. Basileus does not appear on the coins till the reign of Constantine V, and his son Leo IV, and then only concurrently with the Latin, which continued to be used, as we use it conventionally in England, for the ensuing four centuries. The sources used by the authors are, I imagine, described in this title merely in general terms; nothing is said about the intervening legislation, or the Greek paraphrase of the Institutes made by Theophilus in Justinians reign, nor of the decrees of the Quinisext Council, which were certainly consulted and incorporated in cases where general law was affected by them. The Emperors purpose is stated explicitly and at INTRODUCTION 3 considerable length in the preamble or Edict, which begins with an invocation to the Holy Trinity. There is one, and that only a passing, reference to the Emperors constitutional authority for legislating by an Edict of this description. It will be found at the conclusion of the Ecloga where the provisions in Justinians Institutes upon the subject of laws in general are quoted almost textually.

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No one would have dreamt of questioning the Emperors authority to alter the law, or initiate legislation, without the assent of the Synkletos, or Privy Council, which, to a limited extent, stood in the place of the Sovran Senate of Old Rome. In point of fact the powers of this Senate or Synkletos at New Rome, except as a consultative body, were limited to sovran action only in case of an interregnum. So long as there was an Emperor he alone, or with his recognized colleague if he had one, was the monarch in the full sense of the term. Quodcumque igitur imperator per epistulam constituit vel cognoscens decrevit vel Edicto pracepit legem esse constat. This fundamental law proclaims the authority of the prince who was chosen by the populus. It was on these occasions that the famous, socalled, factions, the Blues and the Greens, played an official part. There were, the Emperors say, man books in which the laws of previous Emperors wer written, the sense thereof is to some people diffi cult to understand, and, especially to those who d not live in our Imperial and Godprotected city, absolutely unintelligible. We can quite believe it, for in the Eastern and Greekspeaking parts of the Empire of the seventh century and the eighth, these legal works,

compiled by the order of Justinian, were only known by Greek paraphrases, or abridgments. The most important of these paraphrases, which may have been and probably was composed by Justinian's orders or with his consent, is attributed to Theophilus, the professor of law at New Rome, the colleague of Tribonian. It is known as *Instituta Theophili Antecessoris*<sup>1</sup>. This book became the text for the Institutes of Justinian, and was the only form in which they were known in the Eastern provinces when Latin became unintelligible to all but a few scholars in the capital and the chief provincial centres. It is quoted textually in the *Ecloga*.

The Emperors then address these magistrates in the words of the fifty-eighth Psalm: Do ye indeed speak righteousness, do ye judge rightly ye sons of men and then they proceed to criticize the administration of justice in very plain language. But it is no often the Edict of the Emperor Majorian is the only other example which I can call to mind that the Emperors speak as plainly as Leo and Constantine did in their preamble to the *Ecloga*. We may be sure that during the twenty years of anarchy which preceded the accession of Leo, the study of law was neglected and the administration of justice became uncertain and corrupt. The *Ecloga* proper occupies forty-five pages, the Appendix twenty-two pages, and the Mosaic laws twenty pages. The *Ecloga* proper is divided into eighteen chapters, each subdivided into short sections or paragraphs. The mosaic over the chancel of St Eirene at Constantinople, rebuilt by Leo III, is from Amos ix, 6. The eighth to freemen and those who being free men lapse again to slavery. The ninth to purchase and sale. The tenth to loan and security. The eleventh to deposits *fidei commissa*. The twelfth to emphyteusis. The thirteenth to contract of hiring. The fourteenth to witnesses and testimony. The fifteenth to releases or the dissolution of contracts *dialysis*. The sixteenth to soldiers' personal property. The seventeenth to punishment. The eighteenth to the division of the spoils of war. The Appendix, which may have been annexed to the *Ecloga* at a later date in the eighth century, consists of eight chapters. The first relates to principal and surety. The second relating to land, contains six miscellaneous paragraphs. The third to punishments applicable to soldiers, divided into two long subsections with a considerable collection of short paragraphs. The fourth to punishments of heretics, sorcerers and poisoners. The fifth to relations with profane women and some paragraphs on marriage. The sixth to magicians and astrologers.

The seventh to the prohibited degrees of marriage. The eighth to law and jurisprudence generally. In dealing with the last part of the *Ecloga*, which relates to the Mosaic law and is so entitled, I have merely noted the chapters and verses of the books of the Old Testament quoted. It appears then, from this short recital of the contents, that the *Ecloga* treats of elementary law, that is to say the kind of law that might affect the everyday life of the humblest of the Emperor's subjects. The phraseology is simple and concise, so concise indeed that it is sometimes difficult to convey the meaning in English without paraphrasing. I may take two examples at random. First the application of the Aquilian law, and next the peculiar position of an unborn child in relation to an inheritance. These subjects are referred to in the penal clauses which prescribe punishments for offences. And besides, there are numerous references and occasionally textual reproductions of the original laws in Latin. These certainly would be unintelligible to the ordinary layman of the eighth century who lived in the Greek-speaking parts of the Empire. These references are no doubt given for the convenience of the magistrates in cases where the elementary knowledge of these subjects was assumed. The references, such as they are, are interesting enough. Cases of high treason or lese-majesty were to be referred to the Emperor personally, who for that purpose is treated as chief magistrate of the Empire. We know that in the earlier Empire the Emperors frequently sat on the judicial bench. Justinian probably did so. But as a rule the later Roman Emperors were professional soldiers, who were either not qualified, or too busy, to sit as judges in person. It would be quite beyond my present purpose to consider the difficult question of the composition of the Roman judiciary or of legal procedure.

Nor, fortunately, need I do so here except in so far as they are referred to in the text. The Akroati, who are referred to by that name, more than once, were assessors, or referees. The officials designated in the preamble as recipients of the stipends from the Imperial Civil List are merely described as, the Qurestor, the antigrafoi, or comptrollers, and all those who were employed in the administration of justice. And in reference to the administration of justice it is provided in one section relative to land that soldiers and the officials in the public service should try to decide cases arising in. From an incidental reference we learn that suitors had a right of appeal, and in another that *juramentum delatum* or *relatum*, the serment de cisoire of the French Code Civil, was permitted. To the text Monferratus has added a glossary. In considering the words used, especially in regard to military matters, the student must remember that the authors of the *Ecloga* were adapting the provisions of a text of Roman law composed in Latin. Moreover, in so far as the law of Justinian is translated or paraphrased, the Greek text as we have it, is not so much a Greek composition, as a Greek rendering of a Latin text. The preamble is an original composition expressed in the kind of official Greek used in the Imperial Chancery for edicts or decrees of this description. In spite of pompous phrases and longdrawn sentences, it is not lacking in simple dignity. If I follow Professor Bury in calling the *Ecloga* the first Christian law book. It is also the first book of the kind, published by a Roman Emperor on general law, in which Greek only was used as the official language. In these two respects the *Ecloga* differs from all publications on Imperial law which preceded it, and resembles all those that came after it.

The use of a Greek text, and the fact that Leo and Constantine speak of their subjects, their territory, their Army, and the secrets of the War Office, as *Romaioi* and *Romaic*, must not mislead us into giving to the law of the *Ecloga* any name but Roman. There is no break in the continuity of the Roman law of Justinian, either in the *Ecloga* or in the later Code, known to us as the *Basilika*, which superseded it in the tenth century. Indeed the title of the *Ecloga* proclaims the fact, and the *Basilika* professed to revert to the law of Justinian. To us the age we are now concerned with that is to say the last half of the seventh century and the first half of the eighth, is dark and confused because we hardly know anything about the domestic history, and nothing at all about the legislation, of the successors of Heraclius. But our meagre sources of information on the general history suffice to show that it was not wanting in intellectual attainments and that religious sentiments in particular continued to acquire an increasing hold on Roman society. For these attainments, and in promoting these sentiments, the Princes of the House of Heraclius played a leading part; our evidence is distinct and conclusive as witness the *Ecthesis* of Heraclius, the *Type of Constans*, the proceedings of the Fifth Ecumenical Council which Constantine IV summoned and presided over in person, and the Trullan or Quinisext Council, which was a sequel to the Fifth, held under the auspices of Justinian II. In tracing a connexion between the eighth century and the seventh we are more directly concerned with the Trullan Council, for some of the Acts passed by it are reflected or quoted in the *Ecloga*. He appears to have inherited in full measure the selfwill and obstinacy of his distinguished grandfather, Constans II, and combined with those qualities an ambition to emulate his great namesake Justinian in despotism and extravagance 1.

But there was another and a religious side to his character, inherited from his father, which is revealed to us by his personal interest in this Council, and by an innovation in his coinage. In his reign and for the first time in Roman history, we find our Lords effigy in the *nomismata*, and the conventional legend *Victoria Augustorum* is replaced by *Deus adjuta Romanis*, or *Jesus Christus Rex Regnantium*. It is in close relation with a prince of this character that we first meet Leo III and, in a sense, Justinian II was his immediate predecessor. It appears that the family of Leo was transplanted by Justinian II from Isauria to Thrace; and while at Mesymbria Leo found favour with Justinian II and received the honour of *Spatharios*, that is the post of an Imperial aidedecamp, from his friend and patron. In a work like the *Ecloga*, which professes to aim purpose. It was intended to be a sequel to the Fifth Ecumenical Council and dealt with matters of discipline applicable to laity as well as

clergy. It contains no less than 102 Acts and, being one of the only extant documents of the times, is of historical interest and importance as indicating manners and customs and the trend of thought in the seventh century. 1 The reign of Justinian II is one of the stormiest in Roman history. His obstinacy brought him into conflict with the Roman aristocracy; they deposed him, slit his nose, and sent him into an exile which lasted for ten years. In 705 he regained his throne which he held for six years more when he, and his infant son, were murdered. The barbarous punishment inflicted on him is recorded in his nickname, Rhinotmetos. He was the last prince of the house of Heraclius, and after his death, a period of six years anarchy ensued and lasted till Leo was called to the Imperial throne by the Senate. But the Appendix to the Ecloga contains much more than mere quotations of Scriptural texts.

In it are reproduced textually the Ten Commandments and a number of the austere precepts of the Jewish law taken from the Pentateuch. These are grouped together under the title Synopsis of the law given by God through Moses to the Israelites. If the prominence thus given to the Mosaic law, coupled with the fact that the Isaurian family came from Eastern Asia Minor, are the base of the charge, made against Leo and his successors by their contemporaries and some modern historians, that they inclined to Semitic Monotheism, Jewish or Moslem, and that at heart they were apostates, I can find no other evidence of it in this legal work. There is no trace of anything of the kind in the Ecloga. The Moslems, who at that time were called Hagar enes, are not referred to by name. They are included in the military sections of the Ecloga as barbarians and referred to as enemies. The Jews and Samaritans are not referred to as enemies but treated as such. The synagogues of the latter were to be pulled down and they were punished if they attempted to rebuild them. The Jews were ineligible for any rank, honour, or public office. A Christian who became a Jew had his property confiscated. Jews who perverted Christians from their faith were to have their heads cut off, and so on. Heretics were not treated much more leniently. There is a long list of them; the penalties against them were severe and some, like Manichreans, Montanists and Donatists, were to be put to death. Orthodox Christians who consorted with them were severely punished., I may add that on their coins Leo and Constantine INTRODUCTION 15 are represented as holding a plain cross in their right hands; the same kind of cross which Leo reproduced in mosaic in the apse of the church dedicated to our Lord under the invocation of the peace Eirene of God at Constantinople. The religious reforms associated with Leo III and Constantine V are not mentioned in the Ecloga.

The monasteries are referred to in a section which commanded them, and other religious houses and churches in Constantinople and the provinces, to undertake a new duty of acting as guardians of orphans and trustees of their property. There is no reference to Leo's Edict against the abuses of symbolism. These reforms in religion came, like the reform in the law, long before their due time in history; they made a great stir in Christendom and were vigorously opposed by an influential party in the Church. As they are not mentioned in the Ecloga I am relieved of the difficult task of explaining them, their purpose, and their consequences. All that need be said is that when the successors of the opposition party came into their own at the accession of Basil I, a century and a half later, no pains were spared to obliterate all traces of the Isaurian reforms both in the Church and in the law. In the preamble to the Epanogoge, which was the summary of their textbook, the Basilian Sovrans contemptuously refer to the Ecloga as *tas ektetheisas para ton Isauron phlenaphias*. Accordingly Basil I and his son Leo VI, the philosopher, prepared a new code of law known as the Basilika. It professed to be founded on, or rather to revert to, the law of Justinian and ignored the civil law of the Ecloga. But the penal sections of the Ecloga were retained almost textually, including the barbarous punishments by maiming, which Leo III had formally sanctioned for the first time. These 16 INTRODUCTION punishments included cutting out the tongue, cutting off the hand, and so on. It may seem difficult to reconcile these with the humane professions of Leo I,II, but it must be remembered that they replaced capital punishment, and were apparently adopted through a too literal rendering of such passages in the Bible as the twentieth verse of the fifth

chapter of the Gospel according to St Matthew.

Capital punishment was only retained in the Ecloga for treason, homicide, for the more serious class of offences which we term felonies, and to punish slaves or nonChristians. There is some evidence that capital punishment was abandoned in practice in the twelfth century; and that certainly was the tendency of the Later Roman administration. It must not be assumed from what has been said that the Ecloga, and the spirit in which it was compiled, had no influence on the later legislation regulating civil rights and obligations 1. But as a book or exposition of the law it was not acknowledged by the Emperor Basil and his successors, except in disparagement of its !saurian authors, and it is not referred to as an authoritative exposition of law in the Basilika. The Basilika was the Code in use in the Later Empire till the fall of Constantinople in the fifteenth century; and it remains the basis of the laws which pertain in all SouthEastern European countries which once formed part of the Ottoman Empire. Indeed until the Capitulations were abolished by the recent treaty of Lausanne, it was the Code applied to all the subjects of the Sultans who belonged to the great Orthodox Church, in matters of personal law and the devolution of personal property. The analogy to this extraordinary system, which in a sense created a kind 1 This subject is referred to presently in the notes on the text. INTRODUCTION of imperium in imperio, and permitted a conquered race to preserve its religion, law, and language, will be found in the province of Quebec, in Canada.

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