

KONFERENZ

*CENTENARIA*

Ende des langen 19. Jahrhunderts

The End of the Long 19<sup>th</sup> Century

5–7. Dezember  
2018

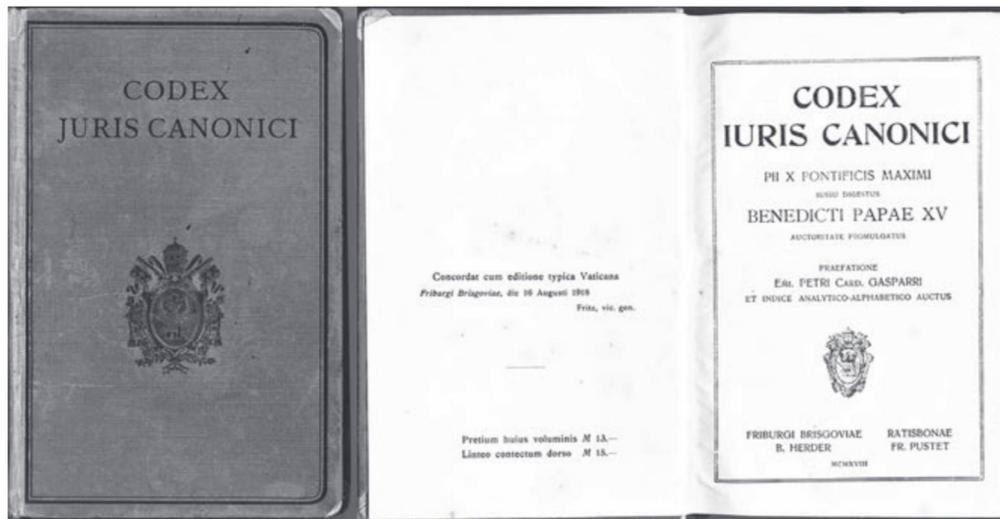


Pólay Elemér  
Alapítvány

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Lectiones Iuridicae

27



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## Lectiones Iuridicae

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**THE RIGHT OF ASYLUM FOR PERPETRATORS GUILTY  
OF PREMEDITATED MURDERS  
IN THE EDICT OF MANUEL I. KOMNENOS (1166)**

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*To the memory of Dr. Ruth Macrides (1949–2019)*



The statement of Paul Magdalino, in his book (*The Empire of Manuel I. Komnenos*) after the Macedonian dynasty, establishes that Manuel I. Komnenos (1143-1180) was a prolific legislator.<sup>1</sup> (Additionally, we should not forget his activity in foreign policy to restore the former territory of the Byzantine Empire.) After the countless Novels of Justinian I in the 6<sup>th</sup> century, after 113 novels of Leo VI (or Wise) and the written corpus of the 'Ta Basilika' (with its 60 Books!) in the 9<sup>th</sup> century, by the time of the Comnenian regime in the 12<sup>th</sup> century there was a deep juridical void or distance between written Byzantine law and everyday practice. In this social and legislative standing the imperial legislation (*βασιλική νομοθεσία*) acquired the predominant role again. Alexios Komnenos (1085-1095) and Manuel I issued over thirty novels in various fields (contracts, marriage, jurisdiction, murder).<sup>2</sup> It can be seen that for the Comnenian emperors the legislative tradition was very important.

We also know that in 1166 Manuel carried out a principal juridical reform, which included some decree or novel issued by the emperor.<sup>3</sup> For example, the so called 'Conciliar' Edict that changed the imperial attitude to the Church. Another novel concerned matrimonial contracts.<sup>4</sup> However, the most important one for our paper was a novel concerning homicide and the connection between homicide and the privileged ecclesiastical right of asylum.

It is important to take into consideration the antecedents. In the legal history of the Roman Empire the right of asylum as a subject matter of legislation first appeared, in

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<sup>1</sup> P. MAGDALINO: *The empire of Manuel I. Komnenos*. Cambridge 1993, 263.

<sup>2</sup> MAGDALINO 1993, 264.

<sup>3</sup> L. BRÉHIER: *A bizánci birodalom intézményei*. Budapest 2003, 232–233.

<sup>4</sup> C. E. Z. LINGENTHAL (ed.): *Jus Graeco-Romanum. Pars III. Novellae constitutiones, (IGR III.)*. Lipsiae 1857, 460–468., 485–492., 476–482., 483–485.

the 4<sup>th</sup> century. After many fragmented regulations of emperors (Arcadius, Valentinianus, Honorius, Theodosius II, Valentinianus III) Justinian I was the first imperial legislator who entirely re-regulated this area in his Novel of 17<sup>th</sup> in 535 A. D. Justinian I had not provided the privilege of asylum for murderers, adulterers, rapers of virgins, burglars or robbers.<sup>5</sup>

This means that such offenders were not defended by this privilege. If they sought to apply this protection of the chosen church by the right of asylum, they could be dragged out of the temple and be sentenced to death. As I stressed in my earlier study, Justinian I sentenced all kinds of murderers in the same way and he did not classify homicides by intention. In the 10<sup>th</sup> century of the Byzantine law history, especially in the age of 'Ta Basilika' this distinction had become more specificated and elaborated by Byzantine scholars.

At this point we find ourselves face to face with an important juridical dogmatical question. The 'Basilica' (in Book 60. 3) separates two basic groups of homicide (φονεύς). It is also based on Byzantine canonical law, especially on canonical letters of Basil of Caesarea too. However, the following table shows the basic *jurisprudential* distinctions and I added the terminology used in Manuel's Novel.

Neglectful murder (ἀκούσιος φονεύς)		Premeditated murder (έκούσιος φονεύς)	
<b>Basilika, Novel of Constantine VII</b>			
παντελῶς ἀκούσιος	ἐγγὺς έκούσιος φονεύς	έκούσιος έκ προπετείας	έκούσιος έκ προβουλίου φονεύς
Neglectful murder (ἀκούσιος φονεύς)		Premeditated murder (έκούσιος φονεύς)	
<b>Novel by Manuel I (1166)</b>			
		<i>pre-intentional murder</i>	<i>premeditated murder</i>
		έκ μελέτης και μετά διασκέψεως, μεμελετημένος φόνος	έκούσιος, βεβουλευμένως φόνος

Another important step in the regulation of asylum and homicide is the 10<sup>th</sup> Novel of Constantine VII Porphyrogenetos. Taking into consideration, Constantine VII enumerated the intentional, previsional (έκούσιος και από προνοίας) perpetrations, and perpetration by rage (από θυμοῦ), unwitting (κατά τύχη), by error (έξ άγνοίας), by drunkenness (από μέθης). If a person accused of premeditated murder, like a Christian monk, regrets his deed and later laments over the weightiness of his crime and if he makes the deed of homicide public, he/she will gain the right of asylum. His Novel 11<sup>th</sup> explains that hereafter the place of the penalty of eternal exile (άειφυγία) or περιορισμός (enclosure) will be a monastery. The perpetrator's hair must be trimmed and he has to be ranked among the monks.

As it is to be expected, countless abuses took place and asylum was sought for murderers during the age of the Comnenian dynasty. By the 12<sup>th</sup> century Hagia Sophia had become famous as a location of asylum for murderers. Nicetas Choniates mentioned that there was

<sup>5</sup> SZABÓ P.: *Exile into the Church? Two Edicts by Constantine VII Porphyrogenetos Concerning the Right of Asylum for Perpetrators Guilty of Premeditated Murders*. In: Juhász, E. (ed.): *Byzanz und das Abendland VI*. Budapest 2019, 201–209.; R. J. MACRIDES: *Killing, Asylum and the Law in Byzantium*. *Speculum* 63 (1988) 509–538.

a place inside the Church called 'Prospyrgion'. Anna Komnene also mentioned "the ... precinct of Bishop Nicolas (which has retained its name of 'The Sanctuary' to this day), this stands near the large Church and was founded long ago for the protection of those being taken for crimes, as being a part of the large precinct... if anyone who had been convicted of a crime, managed to take refuge there, he was released from penalty of the law." (Alexiad 2. 5.).

The imperial intent was to show his superiority against the Church. There was a constant question: Where does the protection of the Church start? The imperial novels almost blame the Church for misusing justice and that it is a cause of the abuse of asylum accorded to murderers in the Church of Hagia Sophia. This was the starting point of his re-regulation of Emperor Manuel I.

In April of 1166 Emperor Manuel issued a new Novel concerning the premeditated homicide (Νεαρά τοῦ πανευσεβεστάτου καὶ φιλοχρίστου κραταιοῦ καὶ ἀγίου... βασιλέως τοῦ πορφυρογεννήτου κυροῦ Μανουὴλ τοῦ Κομνηνοῦ περὶ τῶν ἐκουσίως φονευόντων). After the edition of Zachariae von Lingenthal, the text of this novel was published by Ruth Macrides in 1984 (Fontes Minores VI). I dedicate the research of this article in memory of her as she died in April 2019. Her work formed a valuable contribution to this area of legal research.

In the *preface* of this Novel, after a brief overview of the earlier regulation, Manuel evoked Constantine's Christian 'forgiveness' and demonstrated the abuses. Constantine, though imposed on perpetrators of the premeditated murders eternal exile (ἀειφυγία) in order that they could not roam around the territory where the homicide had been committed. Simultaneously, the pre-intentional and premeditated perpetrator (ἐκ μελέτης καὶ βεβουλεμένως καὶ μετὰ σκέψεως) was allowed to cut their hair (ἀποχείρεσθαι), to be ranked among the monks (τοῖς μοναχοῖς ἐγκαταλεγέντας) and to stay in a specified monastery for the rest of his life (παρ' ὅλην αὐτῶν τὴν ζωὴν τῷ μοναστηρίῳ προσμένειν).

Manuel emphasized the deficiency of this earlier regulation and said that Constantine VII ordered nothing about the murderers who were seeking after asylum in the holiest Great Church in Constantinople (Hagia Sophia or Divine Wisdom). In his opinion, the reason for this was probably that the previous emperor wanted to maintain the secular law and to shelter the perpetrators from the revenge of the victim's relatives.

The new imperial regulations on premeditated homicide in connection with the right of asylum accounts for a significant proportion of the main part of Manuel's Novel.

The *first part* of the disposition of the Novel, the Emperor orders that all judges or arbiters (τοῖς ἐν θέμασι διαιτηταῖς) and all the commanders (στρατηγοῖς) of the local military troops (στρατιωτικαῖς δυνάμεσι) in Byzantine provinces (ἐν θέμασι) have to arrest murderers if they hear any fact about the committed perpetration of a homicide and they have to tie up the murderers and to escort them in chains and present them to the Emperor (in Constantinople). If the Emperor is absent, they should be presented to the *Eparchos* (πρὸς τὸν ἑπαρχὸν τῆς θεοφυλάκτου μεγαλοπόλεως). The eparchos was the prefect (*praefectus Urbi*) and governor and chief-judge of municipality of Constantinople.

Such perpetrators were imprisoned in state jailhouses (εἰς δημοσίαν φυλακὴν) and condemned to corporal, pecuniary or other punishments (τὰς σωματικὰς καὶ οὐσιακὰς... αἰ ἑτέρας κολάσεις). Another new regulation is that if anyone could have prevented the perpetration of homicide, but did not prevent it, then the person could be sentenced by the Emperor's intent.

This Novel concerned the *asylum* of perpetrators accused of premeditated murder. If somebody hides himself/herself and seeks asylum in the Holiest Great Church, he/she will be under observation according to the canon law, but from here he/she will be sent to a province that is determined by the sentence. He/she has to remain there until the end of their life and from there he/she could not escape. If the Emperor is absent, the eparchos sends and banishes him to the farthest province of the Empire to stay there for the rest of his/her life to die.

The *second part* of disposition abolished the (monastic) trim of pre-intentional (έκούσιος έκ μελέτης) perpetrators within the group of perpetrators accused of premeditated murder. Emperor Manuel did not force them to wear the tonsure (άπόκασις), because the strict canonical regulations did not concern the perpetrators. Only after determination and intention of his own accord and free will can a murderer enter among the monks. The reasoning of the emperor was clear. It is against (human) reason (άλογον) and spiritual, mental or intellectual acts (τοις πνευματικοις νόμοις). Because a murderer does not choose an angel-like life (τον άγγελικόν βίον), will apply force and perform deluded acts based on his/her awful behavior. Such a valueless man (κουφότεροι) is expendable, who makes his hands unclean with human blood. Therefore, instead of tonsure, this perpetrator of an *erroneous* murder (τον πεμπλημμεληκότα φόνον) will have to be sentenced to life (παρ' όλον τον τής ζωής αυτού χρόνον) imprisonment (έν φυλακῆ... διάγειν) and there is no hope for mercifulness or oblivion (λήθη) by any further imperial constitution.

In the *third part* of the dispositions we can find the problem of seeking asylum by murderers. The Emperor's statement referred to the fact that most of the murderers who committed premeditated or pre-intentionally (e)k mele/thj kaiÜ diaske/yewj) homicide and after it, they entered the Holiest and Great Church (Hagia Sophia) as if they had not perpetrated any homicide. Misusing the right of asylum, they made it for profit-making (proÜj toÜ oi)keion sumfe/ron poiou=ntai) and they concealed the confession of truth. The Emperor in this case gives a *charge* (grafh/... tou= a(giwta/tou patri/axou) against the Holiest Patriarch with punishments by measure and against the subordinated clergy, too. If the chief-arbiter of a province obtained knowledge of a committed homicide from the *counter-claim* (a)po... a)ntigrafh=j), he had to act against of 'such' *acquittal* (poiei=n... thÜn e)pece/leusin) lest the person accused of premeditated murder should evade retaliation or ecclesiastical punishments because of his falsehood.

More elaborated categories of dogmatical terminology appear in this part of the Novel. This usage of terms sketches another subdivision of homicide in the dogmatical group of premeditated murder. Probably the Byzantine scholars developed the category of *pre-intentional perpetration* which was distinguished from the *premeditated* crime as we can see in the text of this Novel.

Premeditated murder (έκούσιος φονεύς)	
<b>Novel by Manuel I (1166)</b>	
<i>pre-intentional murder</i>	<i>premeditated murder</i>
έκούσιος, βεβουλευμένως φόνος	έκ μελέτης και μετά διασκέψεως, μεμελετημένος φόνος

*The fourth part* of the dispositions explicate the lack of enforcement of imposed punishments of misused asylum. If any of the murderers entered the church and were sentenced to eternal exile, was tied or was condemned to life imprisonment and yet he was moving about the place of perpetration with impunity, such a murder is escorted in front of the Emperor by local executors or tax collectors (παρὰ τοῦ κατὰ χώραν πράκτορος). As many as evil deeds were discovered as much reward was divided equally among the executor and the other informers.<sup>6</sup>

Similarly, the chief-judges of the Holiest Great Church will curb the accusations of homicide (τὰ φονικά... ἐγκλήματα) with strict, canonical observations in order not to shorten the period of trials as it often happened. In this case, one did not have to care as much about humanity as they usually did (οὐδὲν πλέον τοῦ εἰκότος φιλανθρωπεύεσθαι). It seems to me this is a principal sentence of this Novel and it perfectly reflects the philanthropic character of Constantine VII and his earlier decree. We can read the Comnenian edict that people accused (ὑπογραφέντα) by the prefect of courts will be exiled to the territory of the relevant church.<sup>7</sup>

In the *final part* we can find some dispositions about people who committed pre-intentional murder (τὸν πεμελετημένον φόνον) and after they choose tonsure in a monastery. This perpetrator should not be ranked (οὐκ... ἐγκαταλεγήσεται) among the monks without a required observation and particular diligence during the necessary time period. Against his will, he has to remain in that monastery until the end of his life without any hope for escape. However, the place of this monastery will not be situated on the same eparchial region where the aforementioned murder was committed. Or "not on that ground where the viciously spilled blood of dying person was absorbed".<sup>8</sup>

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<sup>6</sup> IGR. III. 481.

<sup>7</sup> IGR. III. 482.

<sup>8</sup> IGR. III. 482. οὐκ ἐν ἐκείνῃ τῇ γῆ ἢ τὸ τοῦ θανόντος αἷμα χανοῦσα κακῶς ὑπεδέξατο.