

BYZANZ
UND DAS ABENDLAND VII.
Studia
Byzantino-Occidentalia



BYZANZ UND DAS ABENDLAND VII.
STUDIA BYZANTINO-OCCIDENTALIA

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Pál Szabó

οὐ χρὴ πλέον τοῦ εἰκότος φιλανθρωπεύεσθαι
– Edict of Manuel Komnenos Concerning
the Right of Asylum (1166)

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.¹ After the numberless Novels of Justinian I in the 6th century, after 113 novels of Leo VI (or Wise) and the written corpus of the *Ta Basilika* (with its 60 Books!) in the 9th century, by the time of the Comnenian regime in the 12th 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 (βασιλικὴ νομοθεσία) acquired the predominant role again. Alexios Komnenos (1085–1095) and Manuel I issued over thirty novels in various fields of topics (contracts, marriage, jurisdiction, murder).² 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.³ For example, the so called “Conciliar” Edict that changed the imperial attitude to the Church. Another novel concerned matrimonial contracts.⁴ However now the most important one for our paper was novel concerning homicide and the sensible connection between the homicide and the privileged ecclesiastical right of asylum.

¹ MAGDALINO, P., *The Empire of Manuel I Komnenos*. Cambridge 1993, 263.

² MAGDALINO (n. 1) 264.

³ BRÉHIER, L., *A bizánci birodalom intézményei*. Budapest 2003, 232–233.

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

It is important to take consideration the antecedents. In the law history of the Roman Empire the right of asylum as a subject matter of legislation had appeared quite lately, in the 4th 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 theme in his Novel of 17th in 535 A. D. Justinian I had not provided the privilege of asylum for murderers, adulterers, rapers of virgins, burglars or robbers.⁵

This means that such offenders were not defended by this privilege. If they sought to apply this the protection of the chosen church by the right of asylum, they could be dragged out of the temple and they could 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 10th century of the Byzantine law history, especially in the age of '*Ta Basilika*' this distinction had become more specified 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 (φόνος). 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 of Manuel's Novel.

⁵ 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; MACRIDES, R. J., Killing, Asylum and the Law in Byzantium. *Speculum* 63 (1988) 509–538.

Neglectful murderer (ἀκούσιος φονεύς)		Premeditated murderer (έκούσιος φονεύς)	
Basilika, Novel of Constantine VII			
παντελῶς ἀκούσιος	έγγυς έκούσιος φονεύς	έκούσιος έκ προπετείας	έκούσιος έκ προβουλίου φονεύς
Neglectful murderer (ἀκούσιος φονεύς)		Premeditated murderer (έκούσιος φονεύς)	
Novel by Manuel I (1166)			
		<i>pre-intentional murder</i>	<i>premeditated murder</i>
		έκ μελέτης καὶ μετὰ διασκέψεως, μεμελετημένος φόνος	έκούσιος, βεβουλευμένος φόνος

Another important step in the regulation of asylum and homicide is the 10th Novel of Constantine VII Porphyrogennetos. Taking into consideration, Constantine VII enumerated the intentional, previsional (έκούσιος καὶ ἀπὸ προνοίας) perpetrations, and perpetration by rage (ἀπὸ θυμοῦ), unwitting (κατὰ τύχην), by error (έξ ἀγνοίας), by drunkenness (ἀπὸ 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 11th explains that hereafter the place of the penalty of eternal exile (ἀειφυγία) or περιορισμός (enclosure) will be a monastery! The perpetrator's hair must be trimmed and he has to be ranked among the monks.⁶

As it is to be expected, countless abuses took place and asylum was sought for murderers during the age of Comnenian dynasty. By the 12th century Hagia Sophia had become famous as a location of the asylum for murderers. Nicetas Choniates mentioned that there was a place inside the Church called 'Prosphygion'.⁷ Anna Komnene also mentioned "the ...precinct of Bishop

⁶ SZABÓ (n. 5) 207.

⁷ PΑΡΑΔΑΚΙΣ, Α – ΜΑCΡΙΔΕΣ, R. J., ODB. New York – Oxford 1991, 217. s.v. Asylum; VAN DIETEN,

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).⁸

The imperial intent was to show his superiority against the Church, too. There was a permanent and sensible question: from where does the protection of the Church start? The imperial novels almost blame the Church for misusing justice that is caused by the abuse of asylum accorded to murderers in the Church of Hagia Sophia.⁹ This was the main 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).¹⁰ After the edition of Zachariae von Lingenthal,¹¹ the text of this novel was published by Ruth Macrides in 1984.¹² At this point I am obliged to commemorate her valuable and authoritative research. I dedicated the research of this article in memory of her as she died in April 2019.

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 be trimmed off the hair (ἀποχείρεσθαι), to be ranked among the monks (τοῖς μοναχοῖς ἐγκαταλεγέντας) and to stay in a specified monastery during the whole of his lifetime (παρ’ ὅλην αὐτῶν τὴν ζωὴν τῷ μοναστηρίῳ προσμένειν).¹³

J. L. (ed.), *Nicetas Choniates: Historia*. (CFHB 11/2) Berlin 1975, 342,9–15.

⁸ DAWES, A. S. (ed. and transl.): *Anna Comnena: The Alexiad*. Cambridge – Ontario 2000, 38–39.

⁹ MAGDALINO (n. 1) 286.

¹⁰ IGR. III,476–477.

¹¹ LINGENTHAL, C. E. Z (n. 4).

¹² MACRIDES, R., Justice under Manuel I Komnenos: Four Novels on Court Business and Murder. In: SIMON, D. (ed.), *Fontes Minores VI*. Frankfurt am Main 1984, 156–162.

¹³ IGR III,478., SZABÓ (n. 5) 207.

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 judgement, the reason for this was probably the previous emperor wanted to maintain the secular law and to shelter the perpetrators from the revenge of the victim's relatives.¹⁴

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' Novel.

In 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 in front of the Emperor (in Constantinople). If the Emperor is absent, they should be presented to the *Eparchos* (πρός τὸν ἑπαρχὸν τῆς θεοφυλάκτου μεγαλοπόλεως). The *eparchos* was the prefect (*praefectus Urbi*) and governor and chief-judge of municipality of Constantinople.¹⁵ Such perpetrators were imprisoned in state jailhouses (εἰς δημοσίαν φυλακὴν) and condemned to corporal, pecuniary or other punishments (τὰς σωματικὰς καὶ οὐσιακὰς... καὶ 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.¹⁶

This Novel concerned the *asylum* of perpetrators accused of premeditated murder. If somebody hides himself/herself and seeks after 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 (εἰς τὸ θέμα) that is determined by the sentence. He/she has to remain there until the end of 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 finish remaining lifetime.¹⁷

The *second part* of disposition abolished the (monastic) trim of pre-intentional (ἐκούσιος ἐκ μελέτης) perpetrators within the group of perpetrators

¹⁴ IGR III,478.

¹⁵ BRÉHIER (n. 3) 190–192.

¹⁶ IGR III,480.

¹⁷ IGR III,480.

accused of premeditated murder. Emperor Manuel did not force them to wear the tonsure (ἀπόκασσις), because the strict canonical regulations do 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 of (human) reason (ἄλογον) and spiritual, mental or intellectual acts (τοῖς πνευματικοῖς νόμοις). Because a murderer does not choose an angel-like life (τὸν ἀγγελικὸν βίον), will apply force and perform deluded acts based on his/her awful behaviour. Such a valueless man (κουφότεροι) is expendable, who makes his hands filthy with human blood. Therefore, instead of tonsure, this perpetrator of an erroneous murder (τὸν πεμπλημμεληκότα φόνον) will have to be sentenced to lifelong (παρ' ὄλον τὸν τῆς ζωῆς αὐτοῦ χρόνον) prison in a jailhouse (ἐν φυλακῇ... διάγειν) and there is no hope for mercifulness or oblivion (λήθη) by any further imperial constitution.¹⁸

In the *third part* of the dispositions we can find the problem of seeking asylum by murderers. The Emperor's statement referred to fact that most of the murderers who committed premeditated or pre-intentionally (ἐκ μελέτης καὶ μετὰ διασκέψεως) 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 (πρὸς τὸ οἰκεῖον συμφέρον ποιοῦνται) and they concealed the confession of truth. The Emperor in this case gives a *charge* (γραφὴ... τοῦ ἀγιωτάτου πατριάρχου) against¹⁹ of 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* (ἀπὸ... ἀντιγραφῆς), he had to act against of 'such' *acquittal* (ποιεῖν... τὴν ἐπεξέλευσιν) lest the person accused of premeditated murder should evade retaliation or ecclesiastical punishments because of his falsehood.²⁰

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 separated from the *premeditated* crime as we can see in the text of this Novel.

¹⁸ IGR III,480–481.

¹⁹ I prefer here *genitive objective* meaning (charge against the patriarch) rather than *genitive subjective* meaning (charge of the patriarch) in my translation.

²⁰ IGR III,481.

Premeditated murderer (ἐκούσιος φονεύς)	
Novel by Manuel I (1166)	
<i>pre-intentional murder</i>	<i>premeditated murder</i>
ἐκ μελέτης καὶ μετὰ διασκέψεως, μεμελετημένος φόνος	ἐκούσιος, βεβουλευμένος 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.²¹

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 (οὐ χρὴ πλέον τοῦ εἰκότος φιλανθρωπέεσθαι). 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 in this Comnenian edict that people accused (ὑπογραφέντα) by the prefect of courts will be sent away into the territorial concerned church.²²

In the *final part* we can find some disposition about people who committed pre-intentional murder (τὸν μεμελετημένον 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

²¹ IGR. III,481.

²² IGR. III,482.

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”.²³

²³ IGR. III,482. ουκ ἐν ἐκείνῃ τῇ γῆ ἢ τὸ τοῦ θανόντος αἷμα χανοῦσα κακῶς ὑπεδέξατο.

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