

Sexual Criminal Law in the Ecloga

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Introduction

- Ecloga (726/741)
- The 17th section devoted approximately one-third of its incriminations to sexual offences.
- It represented a synthesis of Roman and Judeo-Christian legal traditions.
 - Roman tradition: adultery, rape, abduction, incest, homosexuality.
 - Judeo-Christian tradition: fornication, incest between spiritual relatives, and bestiality.
- The catalogue of sexual delicts remained largely unchanged in subsequent Byzantine legal sources.

2

Fornication (πορνεία)

- 17.19. A **married man** who fornicates shall be beaten with **twelve blows** as a chastisement, **whether he is rich or poor**.
- 17.20. An **unmarried man** who fornicates shall be beaten with **six blows**.
- Innovation: all extra-marital sexual relations were criminalised; disapproval of dual penalty system ...
 - Emperor Basil I decreed that no one should keep a concubine (παλλακή) in his house but should either marry her or send her away. Later, Leo VI stated that there was no permissible middle way between celibacy and strictly monogamous marriage ...
- Comparison with Roman *stuprum*: D. 48.5.6.1: ... *proprie adulterium in nupta committitur, propter partum ex altero conceptum composito nomine: stuprum vero in virginem viduamve committitur, quod Graeci φθοράν appellant.*
- Did the Ecloga imply the impunity of single women in cases of fornication?
 - Roman rules on *stuprum* were probably still applicable (they did not apply to prostitutes!).

3

Prostitution

- AE 5, 5: Anyone who commits adultery with someone who has debauched herself for profit with many men shall not be condemned for the crime of adultery, **since you cannot commit adultery with someone who works in a brothel**.
- Compare:
 - Const. CTh. 9.7.1: „If any woman should commit adultery, it must be inquired whether she was the mistress of a tavern or a servant girl [...] in consideration of the mean status of the woman who is brought to trial, the accusation shall be excluded and the men who are accused shall go free, **since chastity is required only of those women who are held by the bonds of law, but those who because of their mean status in life are not deemed worthy of the consideration of the laws shall be immune from judicial severity.**“

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Sex with Slaves

- 17.21. If a **married man** has sex with **his slave** ... **the girl** shall be seized by the local magistrate and sold by him beyond the province, the proceeds of which sale shall go to the Treasury.
- AE 4.4: If a **woman** through lust has intercourse with her **own slave**, she shall be decapitated, and the slave burnt ...
- Innovation: departure from classical Roman practice, where masters often demanded sexual services from slaves.
- Established principles regarding women:
 - *Senatus consultum Claudianum* (52 AD): a free woman cohabiting with another's slave could become a slave herself; their children also became slaves.
 - Constantine (326): death penalty for a free woman engaging in sexual relations with her own slave, and burning for the slave (CTh. 9.9.1).

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Defloration

- 17.29. Anyone who has **sex with a virgin girl**, with her consent but without the knowledge of her parents, and afterwards they discover this, if he wishes to marry her and her parents are willing, the marriage contract shall happen. However, if one of the parties is not willing, then if the seducer is **wealthy** he shall give one pound of gold to the corrupted girl; but if he has less means then he shall give her half of his property. But if he is **utterly destitute and without means**, then he shall be beaten, have his head shaved and then be exiled. (cf. *Inst.* 4.18.4)
- The penalties draw heavily from the provisions of Justinian's Institutes, where the seducer of a virgin or widow faced fines amounting to half of his property, if he belonged to the *honestiores*, or, corporal punishment and exile were prescribed if he belonged to *the humiliores* (I. 4.18.4).

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Abortion as a Consequence of Fornication

- 17.36. If a woman has had **illicit sex**, become pregnant and contrived against her own womb to produce an abortion, she shall be beaten and **exiled**.
- Ulp. D. 48.8.8: If it is proved that a woman has done violence to her womb to bring about an abortion, the provincial governor shall send her into exile.

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Adultery

- 17.27. Any **man** who commits adultery with a **married woman** shall have his nose cut off; and **likewise the adulteress**, who henceforth is **divorced** and **lost to her children**, since she has not kept the words of our Lord, who teaches that **God had joined them together as 'one flesh'**. And after their noses have been cut off, the adulteress shall **receive her own property**, which she had brought to her husband, and nothing else. **But the adulterer shall not be separated from his wife, even though his nose is cut.**

- Comparison with classical law: adultery was punished by exile and a monetary fine (I. 4.18.4)
- Later development (Constantius & Constans, CTh. 11.36.4): proven adultery was punished by *poena cullei*.



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Procuring (*lenocinium*)



- 17.28. Anyone who pardons and allows his wife her adultery shall be beaten and exiled; the adulteress and adulterer shall have their noses cut off.
- Cf.: C. 9, 9, 2: *Crimen lenocinii* is committed by those who, having caught their wife in adultery, nevertheless keep her in marriage. It does not apply to those who merely suspect their wife of adultery.

9

Incest



- 17.33: Those who commit incest, whether parents with children, children with parents, or brothers with sisters, shall be punished with the sword. Those who corrupt themselves with other kin, ... shall have their noses cut off, ...
- 17.25. Anyone who intends to take in marriage their godparent in holy and salvation-bringing baptism, or has carnal intercourse with them without marrying, the perpetrators shall be separated from each other and suffer the penalty for adultery, namely both shall have their noses cut off.
- Incest comprised sexual intercourse between spiritual kins:
 - Iust. C. 5.4.26.2: ... Clearly that person, whether she is his foster-child or not, shall be utterly prevented from marrying a man who received her (as a godchild) from Holy Baptism, since nothing else can so generate fatherly affection and a just prohibition of marriage as a tie of this kind, through which their souls are joined together through God's mediation.

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Non-consensual sexual acts



Rape

- 17.30. „Anyone who **overpowers a girl and corrupts her** shall have his nose cut off.“

„Statutory“ rape

- 17.31. „Anyone who corrupts a girl before puberty, that is before she is thirteen, shall have his nose cut off, and half of his property shall be given to the seduced girl.“

Abduction

- 17.24. „Anyone who carries off a nun or any secular virgin **from whatever place, if he corrupts her**, shall have his nose cut off; those who aid in this rape shall be exiled.“

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Male Homosexuality



- 17.38. The ἀσέλγεις, **whether they are active (immissive, ποιων) or submissive (ὑπομένων)**, shall be punished with the sword. But if the submissive partner is found to be under the **age of twelve**, he shall be **forgiven** as due to his age he did not know what he was doing.

- The Romans regarded the role of the receptive partner in sexual activity as a humiliation of masculinity, tolerated only among slaves, freedmen, male prostitutes, and women!
- Basilica omits provision on lasciviousness.
- The absence of case law on homosexual offences (e.g. in Peira) has led Laiou (1992, 78) to suggest that, despite the normative zeal to prohibit homosexual acts, in practice Byzantine society tolerated them, provided they did not provoke public outrage. According to this narrative, Byzantium became one of the first 'closet society'...

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Bestiality



- 17.39: Οἱ ἄλογεῦόμενοι ἤγουν κτηνοβάται καυλοκοπεῖσθωσαν.
- Those who become irrational, that is, those who commit bestiality, shall have their penis cut off.
- Innovation in Greek-Roman legal tradition!

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Origins of Incrimination of Bestiality?

Hittite Law ...

§ 187: If a man [si]ns with a cow: abomination. He shall be killed. They shall conduct (him) to the king's gate. The king may kill him, [the kin]g may spare [him], but he shall not approach the king.

§ 188: If a man s[in]s with a sheep: abomination. He shall be killed. They shall conduct (him) [to the king's gate]. The king may kill him, [the kin]g may sp[are] h[im], but he shall not approach the king.

§ 199: If a man s[in]s with a pig (or) a dog: he shall be killed. He shall be conducted to the palace gate. The king may kill them, the k[in]g may spare them, but he (= the human culprit) shall not approach the king. If a bull leaps [on] a m[an]: the bull shall be killed, and the man shall not be k[illed]. They addu[ce] one sheep instead of the man, and they shall kill it. If a pig leaps on a man, there is no offense.

§ 200a: If a man sins with a horse or a mule: there is no offense.
But he shall not approach the king and shall not become a priest.

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Old Testament?

Exod 22:19: “Anyone who has sexual relations with an animal is to be put to death.”

Deut 27:21: “Cursed is anyone who has sexual relations with any animal.” Then all the people shall say, “Amen!”

Lev 18:23: “Do not have sexual relations with an animal and defile yourself with it. A woman must not present herself to an animal to have sexual relations with it; that is a perversion.”

Lev 20:15–16: “If **a man** has sexual relations with an animal, he is to be put to death, and you must kill the animal. If **a woman** approaches an animal to have sexual relations with it, kill both the woman and the animal. They are to be put to death; their blood will be on their own heads.”

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Council of Ancyra (314)

Can. 16: Those who **have done the irrational** (Περὶ τῶν ἀλογευσσάμενων) or who even still do the irrational, as many as sinned before becoming twenty years old, after having been bowers down for fifteen years let them receive the communion of the prayers, then having fulfilled five years in that communion let them touch also the offering; Let the life also be tested which they are leading while they are bowers down and thus let them receive humanity. And if some have become insatiable in their sins, let them have a long period of bowing down. But as many as have passed this age and have wives and have become involved in these sins, let them be bowers down for twenty-five years and let them receive the communion of the prayers, then having fulfilled five years in the communion of prayers let them receive the offering. And if some both having wives and having passed the fifty-year term sinned, let them receive communion at the end of their lives.

Canon 17: Those who have **done the irrational and being leprous** (Τοὺς ἀλογευσσάμενους καὶ λεπροὺς ὄντας) **have made others leprous** the holy synod commanded to pray with the disturbed (χειμαζομένους).

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Justinian

Nov. Iust. 77. 1: *Igitur quoniam quidam diabolica instigatione comprehensi et gravissimis luxuriis semetipsos inseruerunt et ipsi naturae contraria agunt ... ex huiusmodi impiis actibus et civitates cum hominibus pariter perierunt ...*

Therefore, since certain individuals, driven by diabolical instigation, have given themselves over to the most grievous acts of lust and commit deeds contrary to nature... as a result of such impious acts, entire cities along with their inhabitants have perished.

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Innovations of Byzantine Sexual Criminal Law

- Criminal provisions were primarily directed at male offenders (fornication, homosexuality, bestiality), while women's social role remained largely marginalized.
- The legislation reflected an effort to bring criminal justice into proportion with the gravity of offences.
- Mutilation was introduced as a "healing" alternative to capital punishment, representing a more humanising tendency in penal policy.
 - Biblical justification: "If your right hand makes you stumble, cut it off and throw it from you..." (Matthew 5:30).
- The punishments in the Poinalios reflected a hierarchy of crimes:
 - Least serious: fornication
 - Violent sexual offences and adultery
 - Most serious: homosexual intercourse, incest with parents or siblings, and bestiality
- The law aimed — though not always consistently — to ensure "true Justice" by neither discriminating against the poor nor allowing powerful offenders to escape punishment.
 - This represented a reaction against the late Roman dual penalty system based on social status (honestiores vs. humiliores).

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Reference

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