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Emperor Justinian's Novel 74 and its Importance for European Marriage Law

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Abstract
A careful examination of the text of the Imperial Constitution promulgated by Emperor Justinian in 530 has given us the possibility of finding out that the last roman Emperor was constantly concerned with protecting the vulnerable interests of women and children, whom he recognized, in fact, as "legitimate" even if they were born within a marriage with a "concubine".
Justinian stipulated, in this Imperial Constitution, that a "marriage" (matrimonium) is "iusta" (legal) only if it is concluded in accordance with the constitutional provisions of that time, that is, with the consent of "pater familias", except if he suffers from "madness", the consent of the future spouses, the existence of a dowry, the conclusion of a marriage contract, and, finally, the performance of the Holy Sacrament of Marriage. This confirms to us, in a peremptory way obviously, the fact that, "in illo tempore", the religious, Christian marriage had already a well-defined legal status.

Keywords
Emperor Justinian, Christian marriage, Imperial Constitution, Roman marriage law

I. Introduction

Emperor Justinian's constant preoccupation with reforming, and, ipso facto, renewing "in eadem substantia" the old Roman law - especially regarding marriage law - is also attested by one of his Imperial Constitutions, which was promulgated in 530, and in which one can specifically notice "... the general tendency of Justinian's legislation to protect the vulnerable interests of women and children ..."[1].

Among other things, Emperor Justinian firstly facilitated the "legitimization of children born from a marriage with a concubine, and protected their interests as regards inheritance. Secondly, the emperor did not request the conclusion of a written contract, although the Roman tradition had foreseen it", being, in fact, based on an old legal custom.

Emperor Justinian was furthermore the one who imposed the obligation that also those belonging to the "senatorial" category and to the "upper social class", "... have their (civil) marriages confessed and registered with the Church"[2].

Indeed, since the time of Emperor Justinian, the marriages of those belonging to the "upper social class" had to be registered with the Church, otherwise their civil marriages were not in legality. Anyhow, it has to be taken also in consideration the fact that, after Justinian' s time (527-565), the religious marriage become in fact compulsory, as the state legislation of the Byzantine Empire essentially attests.

II. The main condition for a valid Marriage, the consent of the parents and of the future spouses

In this Novel, Emperor Justinian stated that "the old laws cover explicitly the matter of marriages", and that they "are entirely valid only by virtue of consent, without the marriage contract. However, the result of this practice was that our society has become full of false transactions ..., and that is why we thought about regulating this matter in accordance with the Natural Law. Although we are morality lovers, and we legislate according to the

[1] D. J. D. Miller, P. Sarris (trans.), *The Novels of Justinian. A Completed Annotated English Translation*, Cambridge University Press, 2018, vol. I, p. 523, no. 1.
[2] D. J. D. Miller, P. Sarris, *The Novels of Justinian…,* p. 523, no. 1.

realities of our subjects, yet we know that nothing is stronger than sexual passion, … Therefore, we do not tolerate such (matrimonial) relations", that is, established only on the basis of the consent given under the impact of this passion, "but - Justinian alleged - the dowry and prenuptial gifts also must exist ..." (Novel 74, 4)[3].

From this statement, we can therefore note that Emperor Justinian reaffirmed, in fact, the necessity of the existence of two basic conditions for marriage, that is the "consent" of the parents and the "dowry", conditions essentially stipulated by "Jus romanum antiquum" (the old Roman law).

On this reality precise testimony was given to us also by Emperor Justinian's legal experts, according to whom the Roman "Vetus jus" (Old Law) stipulated that a "lawful marriage" (iustas nuptia) implies the observance of these conditions, that is of "family children (filii familias) to also have the consent of the parents (consensum parentum) in whose power they are (in potestate sunt) (*Justiniani Institutiones*, lb. I, X), and for a "dowry" to exist (*Justiniani Institutiones*, lb. I, X, 12). Without the fulfillment of these conditions, namely the consent of the parents, of the future spouses and of the existence of a dowry, there is no valid marriage, hence the specification that "those who contract a prohibited marriage (prohibitas nuptias) also suffer other punishments, included in the imperial constitutions" (*Justiniani Institutiones*, lb. I, X, 12).

Another condition for the conclusion of a "legitimate marriage" was, of course, the conclusion of a marriage contract, which would become absolutely obligatory in the classical era of the old Roman law, that is, in the 2nd-4th centuries AD. In his Imperial Constitutions, Emperor Justinian also explicitly provided for the obligation to conclude this contract, and in quite precise terms.

III. A marriage is "iusta" (legal) only after the future spouses were united by the Holy Sacrament of Marriage in the Church

According to his constitutional provisions, "no high-ranking man ... should enter into a legal marriage without entering into a marriage contract. At the same time, he must bring three or four of the high prelates of a church, to issue him a Certificate, stating that, on the day and month of the

[3] D. J. D. Miller, P. Sarris, *The Novels of Justinian…,* p. 527.

respective indiction, the man (Name) and the woman (Name) - were united in Marriage", that is, by the Holy Sacrament of Marriage in the Church. "And if one, or both spouses, wish to be issued a Certificate, the priest of the Holy Church, together with three other clergymen, must sign the Certificate. If the Certificate (Papyrus) is not issued, it must be deposited in the Church's Archive, with their signatures ... Thus, the act of concluding their Marriage is attested in writing, the respective spouses will no longer be regarded as united in the matrimonial relation only by a matrimonial consent; and if everything is done this way, both the Marriage, and its implications must be considered legal" (Novel 74, 4)[4].

Therefore, according to the provisions of Emperor Justinian, only on the basis of a marriage certificate - issued by the priests of the Church after the performance of the Holy Sacrament of Marriage - could a marriage be concluded according to the conditions stipulated by the "Sacrae Constitutiones", and therefore be a legitimate marriage, which was not limited only to the "matrimonial consent" of the parents and future spouses.

IV. A marriage can be concluded without the consent of the parents who suffered from a mental disability

From the text of the same "Imperial Constitution" (Sacra Constitution), that is Novel 74, one can also note that Emperor Justinian also provided for the obligatory "consent of the parents" (*Justiniani Institutiones*, lb. I, X), and, in particular, the consent of "pater familias", under whose authority were the children conceived during a "legitimate marriage" (iustae nuptiae) (Gaius, *Institutiones*, lb. I, 55), which had to be given "before the marriage" (*Justiniani Institutiones*, lb. I, X).

Nonetheless, as he himself had confessed in a previous Constitution[5], Justinian "allowed" for "the son of a madman (furiosi filii)" or "the daughter of a madman (furiosi filia)" to conclude "a marriage (matrimonium sibi copulare), according to the procedure recommended in this constitution, even without the consent of the father (sine patris interventu)" (*Justiniani Institutiones*, lb. I, X).

[4] D. J. D. Miller, P. Sarris, *The Novels of Justinian…,* pp. 527-528.

[5] *Codex Justiniani,* V, 4, 25 (https://droitromain.univ-grenoble-alpes.fr/Corpus/CJ5.htm#4) (accessed: 3/08/2019).

It was the first time in the history of Roman law when such a marriage could be concluded, that is, without the permission or consent of the father (pater familias) who suffered from a mental disability, especially if the children of the respective parents - called "angry" (mad) - "were of noble lineage (nobiliores)" (*Codex Justiniani*, lb. V, 25, 4).

As his legal experts also affirmed, Justinian allowed - through his Imperial Constitution promulgated on October 1, 530 - such a marriage, and even stipulated the procedure to be followed. Among other things, in his Constitution Justinian mentioned that "among the old (veteres) legal authorities it used to be debated whether children, or grandchildren, on the male part under the power (potestate) of an ascendant", that is, of "pater familias" who was "mad" (furiosus), may or may not conclude a marriage (nuptias contrahere)[6]. However, Justinian stipulated that "... not only children (boys), but children of both sexes (sexus) can conclude a legitimate marriage (legitimas contrahere nuptias), with both dowry (dote) and prenuptial gifts (ante nuptias donatione) ..." (*Codex Justiniani*, lb. V, 25, 3).

The "dowry" and the "prenuptial gifts" - which precede the marriage, that is, for the engagement, - had to be given in the presence of the "curator" (a curatore) or of the prefect of the Citadel (praefecti urbis), in this "Imperial citadel", i.e. in Constantinople, and, "in the provinces (in provinciis)", in the presence of "the governors or bishops of the place (locorum autoritatum) and of the family members" (*Codex Justiniani*, lb. V, 25, 4).

Emperor Justinian and his legal experts had noticed that, as regards marriage, the legal norms stipulated by the "old laws" (Roman) had also led to ignoring the obligation of a contractual agreement, a "sine qua non" condition - in the age of the old Roman law - for a marriage to be "legitimate", i.e., concluded "under the conditions of the law" (according to Gaius, *Institutiones*, lb. I, I, 56-69).

However, precisely these entitled findings determined Emperor Justinian - through his famous legal experts, led by professor Tribonian at the Faculty of Law of the Christian University of Constantinople (founded in 435), - to take the following decisions regarding marriage, namely:

a) For a marriage to be "iusta" (lawful) or "legitima" (legitimate), it is necessary for both the marriage consent and the marriage contract to

[6] B. W. Frier (ed.), *The Codex of Justinian. A New Annotated Translation*, *with parallel latin and greek text*, Cambridge University Press, 2016, vol. II, p. 1123.

be concluded in accordance with the principles set out in "Jus naturale"[7] (natural law), referred expressly in "Jus romanum antiquum", since "natural reason has regulated all people" and "is guarded similarly by all people", and therefore this right is called "jus gentium, as it is used by all peoples"[8].

b) Regarding marriage, "moral law"[9], namely both natural moral law and Christian moral law, must be taken into account.

c) A marriage cannot be concluded without the "dos" (dowry or trousseau) brought by the future wife - from her family – and the "prenuptial gifts" (dona ante nuptias).

d) The conclusion of the contract cannot take place without the presence of 3-4 clergymen, who would issue a Marriage Certificate, either to be handed to the spouses – following the religious marriage – or deposited in the Church's Archives where the Holy Sacrament of Marriage is held.

Therefore, according to the decision made by Emperor Justinian, through his Imperial Constitution (Novel 74), a marriage is not concluded according to the "provisions of the law" (praecepta legum) (*Justiniani Institutiones*, lb. I, X) if it lacks the consent of the spouses by the marriage contract, signed by the two, and if the procedure stipulated in his Constitution was not followed. But Justinian wanted to add that, in order for a marriage to be "iusta" and "legitima", this procedure must be followed by the performance of the Holy Sacrament of Marriage[10].

[7] See Nicolae V. Dură, "«De jura personarum». Consideraţii şi evaluări ale unor texte juridice şi filosofice", in: *Revista de Teologie Sfântul Apostol Andrei*, XVII (2013) 1, pp. 28-47; Nicolae V. Dură, "Despre «Jus naturale». Contribuţii filosofico-juridice", in: *Revista de Teologie Sfântul Apostol Andrei*, XVIII (2014) 1, pp. 39-52; Nicolae V. Dură, "Justitia" and "Aequitas" in the perception of the Greek philosophers and of the Roman legal experts", in: *Teologia Młodych*, (2015) 4, pp. 4-9.

[8] Gaius, *Institutiones (Instituţiile*), tranl. A. Popescu, Editura Academiei R.S.R., Bucureşti, 1982, p. 64.

[9] See Nicolae V. Dură, "Law and Religion. Legal norms and religious-moral norms", in: *Analele Universităţii Ovidius, Seria Drept şi Ştiinţe administrative*, (2003) 1, pp. 15-24; Nicolae V. Dură, "Law and Morals. Prolegomena (I)", in: *Acta Universitatis Danubius. Juridica, (2011) 2, pp. 158-173;* Nicolae V. Dură, "Law and Morals. Prolegomena (II)", in: *Acta Universitatis Danubius. Juridica, (2011) 3, pp. 72-84*.

[10] On the character of this marriage, see Nicolae V. Dură, Piotr Kroczek, Cătălina Mititelu, *Marriage from the Roman Catholic and Orthodox points of view,* Scriptum, Krakow, 2017, pp. 89-266; Cătălina Mititelu, Bogdan Chiriluţă, "The Christian Family in the Light of the Nomocanonical Legislation Printed in Romanian Language in the XVII-th Century", in: *Ecumeny and Law*, (2014) 2, pp. 247-268.

According to Justinian, a "marriage" could therefore be concluded according to the provisions of the law only after the fulfillment of all the preconditions, namely the mutual consent of the future spouses, the drafting of the marriage agreement and the fulfillment of the procedure to be followed, culminating with the performance of the Holy Sacrament of Marriage.

e) A civil marriage was validated only after performing the liturgical ritual at the Altar of the Orthodox Church, since - for Justinian - only in this case a marriage could be considered "legal" (iusta), even if it was not preceded by a "contract", either for "dowry" or for "prenuptial gifts" (Novel 74, 4, 2).

Or, as confirmed by the history of the old Romanian law[11], the provisions of this Imperial Constitution (Novel 74) were a kind of "norma normans" for the Byzantine, state and ecclesiastical law (canonical and nomocanonical), as well as for the old Romanian law, not only regarding the obligation of religious marriage, but of its precedence over civil marriage.

In the secular life of the European states, this legal norm had the force of "Jus cogens" until the eighteenth and nineteenth centuries, and in the Church - both Western and Eastern, - it continues to be applied as a mandatory norm. An exception is the Roman Catholic Church, where the obligation to conclude a "contractum matrimonium", that is a "matrimonial contract", is explicitly stipulated in its Canonical Code (according to can. 1055 § 1 and can. 1097 § 2 of *The Latin Canonical Code*).

The ignorance or concealment of this reality, however, generated the entrance, in the specialized literature, from the Roman era to the present day, of some statements according to which the obligation of religious marriage was not stipulated by the Roman legislation, but only by "Jus canonicum" (canonical law) of the two Churches, Eastern and Western. However, through these brief clarifications and amendments we would like to bring a pioneering contribution both to the Romanian specialized literature and the European one.

[11] See Nicolae V. Dură, Cătălina Mititelu, *Istoria Dreptului românesc. Contribuţii şi evaluări cu conţinut istorico-juridico-canonic,* Editura Universitară, Bucureşti, 2014, pp. 33-34 sq.

V. After the religious marriage, a wife and her children could no longer be driven out of the matrimonial house

The same Roman emperor, namely Justinian, stated that he had received numerous "petitions" on the part of "women", denouncing "men" who, "after promising them that they would become legitimate spouses, under oath, and taking them before the Holy Altar", that is, after they had also concluded a religious marriage, as soon as " ... they consumed their (carnal) desire, they threw them out of their houses, with or without children" (Novel 74, 5)[12], hence his determination to find "a remedy" (Novel 74, 5) in this regard, too.

In the same Novel, Emperor Justinian had indeed stipulated that the woman who was brought home by the potential husband, with the intention of being a "legitimate wife and mother of legitimate children", could no longer be "driven out of the house, but he should accept her as a legitimate wife, and her children should be considered legitimate children. And even if she had no (matrimonial) dowry, she should enjoy the benefits of our Constitution, and receive a quarter of her husband's assets, even if she had been expelled from the house by "*repudium*", or had lost her first husband..." (Novel 74, 5)[13].

As a result, the respective woman must, therefore, be considered a legitimate wife, including the children resulting from their marriage, even against the will of their father, and in the case of divorce by "repudium" she must receive "a quarter" of her husband's wealth.

In the same Novel (74), Justinian added that, "a man who has married, and has children, ..., cannot send the children resulting from such a marriage into a state of illegitimacy; and even if he contracts a second marriage after the death of his wife, or after "repudium", he cannot recognize as legitimate only the children from this marriage, and not from the previous one. The first marriage must be united with the second marriage; he will be the father of all children equally, having God as a testimony for the first marriage, and the law for the second one" (Novel 74, c)[14].

Justinian, therefore, invoked God, as testimony of the first religious marriage, since, - for him, as for the Byzantine emperors who succeeded

[12] D. J. D. Miller, P. Sarris, *The Novels of Justinian...*, p. 529.
[13] D. J. D. Miller, P. Sarris, *The Novels of Justinian...*, p. 528.
[14] D. J. D. Miller, P. Sarris, *The Novels of Justinian...*, pp. 529-530.

him -, only this was, in fact, a "legitimate" marriage. Moreover, for this reason, Emperor Justinian considered that, for the second marriage, only "the law" could stand as testimony.

For his legislative construction, Justinian was based on the Divinity, as he was also based for his legal reform materialized both in the text of his legislation and in the concrete measures.

Indeed, Justinian promulgated on behalf of "*Domini nostri Iesu Christi*" (Our Lord, Jesus Christ), all his laws, including the imperial law, which had a "lex fundamentalis" character, i.e. "Sacred Constitution" for his entire empire. Hence, the priority of the "divine law" over "human law", which Justinian explicitly mentioned in all four of his works, i.e. Codex, Digestae, Institutiones and Novelae.

VI. Juridical protection of the spouses (man and women) and of the children

Justinian wanted also to specify that "our law is to be promulgated for the protection of those who conclude (contract) Marriages" (Novel 74 c)[15]. By this Novel, i.e. a new imperial Constitution - promulgated in 538 - Emperor Justinian stipulated for the first time - in the history of Roman law - both the right of the spouses to legal protection, and the status of equality between woman and man, even if this was still not perceived and expressed in the legal or sociological terms of the language of the modern era.

By asserting the rights of the woman – as wife and mother – and those of her children, conceived with a man she had married, but who, after a while, no longer wanting her and her children's presence, chased her away, and challenged her offspring as illegitimate sons and daughters, in order to take another woman, Justinian actually brought the necessary corrections to the provisions of the old Roman Law, which did not know the precepts of Christian doctrine brought by "Jesus Christi", on whose behalf the last Roman Basile drafted and promulgated his entire legislation, which remained first-hand testimony for the legislation of the Eastern and Western Church, "ab illo tempore" until "hinc et nunc", that is "from then" until "here and now".

[15] D. J. D. Miller, P. Sarris, *The Novels of Justinian...*, p. 530.

It should also be emphasized that by such a legislation, which was truly revolutionary at that time in the field of Marriage law, Justinian not only did not take into account whether or not the respective woman had entered the marriage with a dowry, but effectively forced the respective man - with whom she had cohabited and had given birth to children - to recognize them as legitimate children, and the woman to also benefit from a quarter of her former husband's wealth, even if she was not married to him.

Through these constitutional provisions - expressed in the text of Novel 74 - Justinian has indeed proved to be also a precursor of European marriage law, hence the obligation of any legal expert of our day to know this heritage of legal thinking and legislation left to us by this great legislator of those times.

However, from the same Imperial Constitution (according to Novel 74) it can also be noted that Second Marriage was admitted, but only in the case of the death of his children's mother, hence, therefore, the reaffirmation of the monogamous character of marriage. Indeed, remarriage was perceived and admitted - by Emperor Justinian - only as an exception from the obligatory nature of the monogamous character of marriage, including the civil one, which was valid only after its registration in the Church, where it was validated or legalized, in fact, only through the performance of the Holy Sacrament of Marriage.

VII. Instead of Conclusions

These provisions of the Imperial Constitution - by means of which Justinian actually laid the foundations for a "new" Roman marriage law - were also known and applied in the Carpathian-Danube-Pontic area[16], where Justinian - who had recaptured part of the southwest of the Country - brought with him and imposed the application of his imperial legislation, which was indeed accepted and applied[17], as attested by the old legal and

[16] See Nicolae V. Dură, "Les relations canoniques de l'Église roumaine nord-danubienne avec les principaux Sièges épiscopaux du Sud du Danube", in: *Revue Roumaine d'Histoire*, XL-XLI (2001-2002), pp. 5-20.

[17] See Cătălina Mititelu, "«Corpus Juris Civilis» and «Corpus Juris Canonici». Legal and Canonical Considerations", in: *Teologia*, XVIII (2014) 4 (61), pp. 127-137; Cătălina Mititelu, "The legislation of emperor Justinian (527-565) and its reception

canonical customs - enshrined in the "Law of the Country"[18] - as well as by the old Code of Laws[19], about which we have written testimony not only in the documents of the Romanian Principalities, starting from the XIV-XV centuries[20], but also in the studies of different scholars (historians, jurists, canonists etc.) of our days.

For example, in one of these studies - whose author has an interdisciplinary training - it was recognized that, in the text of the Code of Laws published in Romanian, in the seventeenth century, "… we find very old laws, of Roman-Byzantine origin, promulgated by Emperor Constantine (the Great) and taken over by Justinian ..."[21], in which legal norms were stipulated regarding the institution of marriage, divorce, impediments to marriage, etc.

And yet, the authors of some studies – published in the specialized literature (legal, canonical, historical, sociological, theological, etc.), published in Romanian, French, etc. – prove to still pay tribute to obsolete and stereotypical statements, so that despite obvious historical-legal-canonical realities, they continue to ignore or hide the heritage of the Vlach legal culture[22], to which two theologians, with a strong philosophical and legal

in the Carpathian-Danubian-Pontic space", in: *Analecta Cracoviensia*, 2016 (48), pp. 383-397.

[18] See Nicolae V. Dură, "«Lex terrae» în percepţia unor juriști și istorici ai vechiului Drept românesc. Evaluări și precizări", in: *Revista de Teologie Sfântul Apostol Andrei*, XIV (2010) 1, pp. 18-42; Cătălina Mititelu, "Legea Țării. Câteva consideraţii istorico-canonice", in: *Analele Universităţii Ovidius Constanţa / Seria Teologie*, (2009) 1, pp. 380-388.

[19] See Liviu Stan, "Vechile noastre Pravile", in: I. Marga (ed.) *Biserica și Dreptul. II. Izvoarele Dreptului canonic ortodox*, Editura Andreiană, Sibiu, 2012, pp. 172-203.

[20] Cătălina Mititelu, "Începuturile Dreptului scris la români", in: *Dionysiana*, (2009) 1, pp. 417-426.

[21] Ecaterina Lung, "L'État, l'Églis et le contrôle du mariage dans les Principautés roumains (XVI^{e} - XVII^{e} siècles)", in: *Chrétiens et Sociétés (XVI^{e} – XXI^{e} siècles),* (2003) 10 (apud https://journals.openedition.org/chretienssocietes/3797) (accessed: 27/08/2019).

[22] See Nicolae V. Dură, "Denis Exiguus (Le Petit) (465-545). Précisions et correctifs concernant sa vie et son oeuvre", in: R. Coppola (ed.) *Atti del Congresso Internazionale: Incontro fra canoni d'Oriente e d'Occidente*, Cacucci Editore, Bari, 1994, pp. 85-101; Nicolae V. Dură, "The 'Scythian Monks' (Daco-Roman) and their Contribution to the European Christian Humanist Culture", in: D. Muskhelishvili (ed.) *Dialogue of Civilizations*, New York, Nova Science Publishers, 2010, pp. 33-42; Cătălina Mititelu, "Dacian-Roman Cultural Personalities from Scythia Minor (4th-6th

background, namely the Vlachs Dionisie Exiguus († 546) and Martin de Braga († 580), had a considerable and decisive, pioneering contribution to the European legal culture, including European marriage law, whose origins we find in the old Roman law, reformed "in eadem substantia" by the "new" Roman law, due to Emperor Justinian.

Centuries) and their Contribution to the Affirmation and Promotion of a Humanistic-Christian Culture at European Level", in: V. Manolachi, C. Rus, S. Rusnac (ed.) *New Approaches in Social and Humanistic Sciences*, 2018, Iasi & London, pp. 316-331.