საქართველოს მეცნიერებათა ეროვნული აკადემიის მოამბე, ტ. 13, №4, 2019
BULLETIN OF THE GEORGIAN NATIONAL ACADEMY OF SCIENCES, vol. 13, no. 4, 2019

History

Emperor Justinian's "Constitutions" on the Legal Protection of the Mother and Children

Cătălina Mititelu

Ovidius University of Constanţa, Romania

(Presented by Academy Member Roin Metreveli)

ABSTRACT. Through his Imperial Constitutions (Sacrae Constitutiones), Emperor Justinian (527-565) proved to be not just a reformer of "Jus vetus", that is of the old Roman law, but also a legislator on the institution of marriage and the legal protection of the mother and children. In our study, these Imperial Constitutions – which were, indeed, the object of a hermeneutical analysis of their text, such as Novel (Constitution) no. 74, from the year 538; Novel no. 97, from 539; Novel no. 117, from 542; Novel no. 134, from 556, etc. – are a testimony that Emperor Justinian initiated and implemented a real reform in the Roman legislative system regarding the institution of marriage and, ipso facto, the legal status of the wife and children. Finally, in our study, we have also referred explicitly to the works of famous Roman solicitors, such as Gaius, Tribonian, Theophilus and Dorotheus, so as to emphasize not just the pioneering contribution of Emperor Justinian towards creating "the new Roman law", in the spirit of the Christian Law of our Lord Jesus Christ, which the Roman Basile invoked in all of his works (Codex, Digestae, Institutiones and Novelae), but also that of "precursor" of international Matrimonial Law regarding both women's rights and those of the children. *© 2019 Bull. Georg. Natl. Acad. Sci.*

Key words: Imperial Constitutions, Roman law, constitutional law, institution of marriage, spouses

There is no shortage of "Sacrae Constitutiones" (Imperial Constitutions) – promulgated by Emperor Justinian (527-565) – in which he proved to be not only a reformer of Roman law, but also a protector of the mother and children, hence his numerous Constitutions regarding the institution of marriage, which had to be concluded not only in accordance with the provisions of "Jus vetus", i.e., of the old Roman law, but also with those of "Jus novum" (new law), which the emperor created – with help from his famous solicitors (Tribonian, Theophilus and Dorotheus) – "*In nomine Domini nostri Iesu Christi*" [1: 7] (In the name of our Lord Jesus Christ).

According to the provisions of some of Emperor Justinian's Constitutions – which in fact completed his reform in the Roman legislative system – a truly legitimate "marriage" was only the one that ended with a "wedding", that is, a "religious marriage" (according to Novel 74), provided that it is valid only after meeting the conditions provided by "Jus vetus", that is, the old Roman law, namely the mutual consent of future spouses and the conclusion of the marriage contract. These were,

indeed, the conditions laid down by the old Roman law for "legitimate marriages" (Gaius, *Institutiones*, lb. I, VIII, 57), or for a "lawful marriage" (iustas nuptiae) (*Justiniani Institutiones*, lb. I, IX).

Novel 97 [2: 646-656], promulgated in 539, attests without a doubt that Emperor Justinian was effectively and concretely involved in protecting the interests of married women. For the instrumentalization of this legal protection, he, indeed, triggered a real reform in the Roman legislative system, regarding the dowry or trousseau, which – according to the Roman Law – they had to bring to spouses upon marriage.

In the same Imperial Constitution, Justinian also sought to protect the children born outside of a "lawful" (legal) marriage. Thus the emperor also recognized on their behalf the "legal ownership (dominium) of their mother's dowry and the prenuptial gifts brought by their father, leaving the parents with a simple use (usus)" [2: 657].

"Jus romanum antiquum" (the old Roman law) had recognized "property rights only for the children from the first marriage". Thus, through his Imperial Constitution, Justinian granted this right of property (dominum) also to other children, "regardless of whether they came from remarriage and divorce" [2: 657].

In this regard, Emperor Justinian also brought another novelty, namely a conceptual one, by which he ruled equality in value between "donatio ante nuptias", i.e., the prenuptial gifts that the man gave his future wife, and "dos / us", i.e., the dowry or trousseau that the wife brought with her upon marriage.

Through Novel 74, Justinian introduced a "reformatio" (reform) also with regard to the old dotal system, which, in fact, prevailed not only in the Roman legislation, but also in the Roman-Byzantine legislation (4th-6th centuries) (cf. Codex Theodosianus).

In Novel 97, Emperor Justinian, however, introduced other changes and novelties in the Roman Matrimonial law. For example, he ruled that, following the death of a spouse, the spouse remaining alive should receive from the "dowry" the same „pars" (part), i.e., the husband or wife from the deceased spouse's "dowry". However, the wife had to also receive the prenuptial gifts.

When the two parties – from the dowry – were unequal, they had to be equalized by reducing the larger part to the same level, as otherwise provided in some Imperial Constitutions promulgated by his predecessors, such as Emperor Diocletian, who, in "Sacrae Constitutiones" (Imperial Constitution) of 294, "stipulated that, the dowry should be divided on the basis of the aequitatae" [3: 1203] (equity) principle, also explicitly referred to by famous legal experts (solicitors) during the classical Roman law era.

For instance, Gaius (2nd century AD) considered it to be "aequum" (equitable) that "women who came of age ... should no longer be kept under guardianship" (*Institutiones*, lb. I, 190) [4: 116], despite of the fact that "... our old (veteres) legislators decided that women, due to the inconsistency of their nature, no matter how old they are, should be under guardianship" (*Institutiones*, lb. I, 144) [4: 107].

The institution of agnatics' legitimate guardianship of women had, indeed, been stipulated since ancient times, hence the phrase used by Gaius, i.e. of "old (veteres) legislators". According to the XII Tables Law, "legitimate guardians" were only the agnatics, that is, only "those connected in the kinship established by male persons, in other words – Gaius stated – as relatives from the father's side ..." (*Institutiones*, lb. I, 155-156) [4: 108].

Through this legal guardianship institution, the old legislators, in fact, wanted "to turn the agnatics into guardians of the woman's patrimony sui iuris, and through lex Claudia (41-54 AD) they themselves were able to guard their right to succession" [4: 109].

This Roman legal institution, which "basically made the woman into a usufructuary" [4: 109], eventually fell into desuetude, so Emperor Septimius Severus (193-211) abolished it, and Gaius detested it, because he, in fact, perceived it as an act of overt discrimination against women.

The same Roman legal expert, Gaius, insisted to point out that, in his time, there was both a "jus agnationis" and a "jus cognationis", under which "those related by female persons are not agnatics, but cognatics", in other words, relatives only under natural law (jus naturale)" (*Institutiones*, lb. I, 156) [4: 108].

According to Gaius' statement, "... the agnation law is extinguished by *capitis deminutio*", that is, by changing the previous legal capacity, while "the cognation law ... does not extinguish in this way, because the civil reason can, indeed, suppress the civil rights, but not the natural rights" (*Institutiones*, lb. I, 158) [4: 109].

Thus, according to Gaius' statement, "quia civilis ratio naturalia iura corumpere non potest" (*Institutiones*, lb. I, 158), that is, "civil reason", i.e. the law, "cannot suppress natural rights", as they have their basis in "Jus naturale" (natural law), which the same famous Roman solicitor called "naturalis ratio" (natural reason).

Gaius also stated that this "Jus naturale" (natural law) was present – in illo tempore – "among all people (omnes homines)", and that it was "guarded equally by all people", hence the name "jus gentium, for all peoples are using it" (*Institutiones*, lb. I, 1).

It is a known fact that both in the international and in the national law, we rarely find references to "Jus naturale" [5: 4-9], hence the lack of any reference not only to the Natural moral law, but also to the ontological relation that must exist in "Law" and "Moral" [6, 7], at least a "public" one, i.e., a secular one, as the text of some Constitutions of today, such as the Constitution of Romania (according to Art. 53, para. 1) explicitly mention.

Finally, from Gaius' statements, knowledgeable commentators of his work "*Institutiones*" also noted that, in his time, "... a jus agnationis" and "a jus cognationis" coexisted, the former was "placed among the civilia iura", while the latter "among naturalia iura" [4: 109].

The "agnation" report – which, for the Romans, was "a civil concept" – was established between people found "... in the kinship established by male persons, in other words, as relatives from the father's side ..." (*Institutions*, lb. I, 156) [4: 108], and it "could be obsolete" [4: 109].

However, the agnatic kinship was lost both due to "capitis deminutio maxima", whereby "someone also lost their citizenship and freedom" (*Institutiones*, lb. I, 160) [4: 109], as well as due to "capitis deminutio minor", i.e., "when citizenship is lost, but freedom is preserved" (*Institutiones*, lb. I, 161) [4: 110].

Since, in the Romanian specialized literature there is still confusion between "capitis deminutio" and "relegatio" (relegation) also in the case of the great poet Ovid [8], we want to specify that the Roman poet was not punished with "capitis deminutio", maximum or minimum, but only with a "relegatio", i.e., a "removal from Rome, into a determined place" [9: 1047] – relegation being "an easier form of exile, that did not imply the loss of citizenship" [9: 1046].

Regarding "those related through female persons", they were related to each other in the kinship established "according to natural law (jus naturale)" [4: 108], and, therefore, the "cognation (cognationis)" had a "natural relation", and, ipso facto, "was indestructible" [4: 109], or in Gaius' terms – already mentioned in the lines above – "quia civilis ratio naturalia iura corumpere non potest" (civil reason ... cannot suppress natural rights) [4: 109], that is, the rights stipulated by "natural jus".

In the Romans' case, by asserting the old legal principle, according to which "feminae semper in tutela" (women are always under guardianship),

there was real sex discrimination, which led to the hatred for the guardianship institution even by some Roman legal experts, as was the case of Gaius, who considered the "guardianship" institution of a woman absolutely contrary to the principle of gender equity, stipulated by "jus naturale" (natural law).

According to Emperor Justinian's legal experts, the method "of acquiring property according to natural law (iure naturali)" was established "by tradition" (per traditionem), since "nothing corresponds better to natural equity (naturali aequitati)" (*Justiniani Institutiones*, lb. II, I, 40).

In his attempt to reform and renew the old Roman law, and regarding the legal guardianship institution, Emperor Justinian, in fact, demanded not only the assertion of the equality principle between the two sexes, male and female, but also stipulated – for the first time in the history of Roman law – as a rule, with the force of "Jus cogens", also the protection of women and children.

In the same 97 Novel, Justinian stated that, regarding marriage, "... we have organized the multitude of laws that preceded us, and made them clear, as, in many regards, including essential ones, they were not clear, so the judgments were in opposition to their text. In order to avoid misleading, we have also promulgated this Constitution", – which Justinian himself called "Imperial Constitution" – in order to "assist and protect a wife during her marriage, too ..." (Novel 97, 2) [2: 655].

Therefore, the reason for drafting and promulgating this Imperial Constitution was – according to its author – the assistance and protection of married women, that is, of a wife, and, at the same time, through this Constitutional law Justinian forced the judges not to continue to take decisions contrary to the provisions of the fundamental law of the Roman state, i.e. the "Sacrae Constitutione" (Imperial Constitution).

In the same year, 539, Justinian promulgated another Constitution, in which he said that he wanted to simplify the "old legislation" regarding "matrimonial gifts", that is, the dowry and prenuptial gifts, through a "sound moral law" (Novel 98, *Preamble*) [2: 657-658].

In this imperial law, alias Novel 98, Justinian, in fact, continued the reform of the Roman legislative and legal system in the spirit of a "moral law" of Christian origin, which the Emperor explicitly called a "sound moral law".

In the same Novel, number 98, Justinian forbade the appropriation of dishonest gain from the dowry, by the husband, and from the prenuptial gifts, by the wife, while stipulating the obligation for these to return to the property of the children, even when the two spouses conclude a second Marriage (Novel 98, 2) [2: 660].

Therefore, through this Constitution, Justinian sought "to protect the interests of the children, granting them legal ownership (dominium) over the mother's dowry and father's prenuptial gifts, giving the parents only the right of use (usus)" [2: 657].

However, this "dominium" was not granted solely to the children from the first marriage, but regardless of remarriage and divorce, hence the conclusion of some knowledgeable researchers that "this law proves the increase of Justinian's hostility against divorce, ..." [2: 657].

Indeed, in 542, Emperor Justinian forbade – through Novel 117 c. 8-9 – the "bona gratia" divorce [10: 440], that is, a divorce for which no partner could be held responsible, such as, long-term captivity, mental illness, lack of maturity etc.

In the same year, 539, Justinian limited the length of time a spouse or his / her descendants could sue a divorced woman for non-payment of the dowry; a complaint that she had received, in writing, through the Marriage Contract (according to Novel 100) [2: 663-666]. Moreover, Justinian ordered that, if "the husband did not make a complaint for two years, he was deprived of this right ..." (Novel 100, 1) [2: 664].

With this novel, too, Justinian actually increased not only the recognition of woman's

rights, as wife and mother of children, but also her legal protection, which – for that time – proved to be not just a precursor to human rights [11, 12], and, in particular, the protection of women and children, but also a precursor of the legislation in this field, reality about which was unfortunately mentioned in the legal landscape only in the 19th-20th centuries.

In another Imperial Constitution – promulgated in 542 – Emperor Justinian introduced new rules regarding the institution of marriage, and in particular, regarding its dissolution.

Among others, in this Imperial Constitution (Novel 117) [2: 751-765], Emperor Justinian introduced "... a major reform in Roman law regarding maternal property (bona materna), so that a mother, or anyone else, was allowed to leave an inheritance or to give away some property to those under paternal authority, thus excluding the father from any right of use (of the mother's property), and allowed the children the right to control or alienate it if they were of legal age. If a child was a minor, property management could be entrusted to the mother or grandmother. By such measures, Justinian thus proved – knowledgeable commentators of this Novel stated – that he limited the paternal power in favor of both women and children" [2: 753].

The same commentators pointed out that, in his Novel, Justinian stipulated that "... also the children of a concubine should enjoy the same rights as those of a free-born concubine (consequently, no one was disallowed to marry the concubine, or to retroactively recognize the children made with her)" [2: 753].

In fact, the same emperor already stipulated in Novel 74 – promulgated in 538 – that, "... for the recognition of a legal marriage, no written document was required ..." [2: 753], and according to Novel 117 – from the year 542 – the children resulting from "marriages without written testimony" were to be treated equally to those resulting "from a marriage with written testimonies" (Novel 117, 3) [2: 753-754].

Regarding the children, Emperor Justinian's legal experts also wanted to state that, when a child under 14, that is, an "impuber", "is adopted by imperial rescript, the adrogation is approved after a preliminary research on whether the adrogation (adrogatio) has a moral basis and if it is for the pupil's benefit (an honsta sit expediaque pupillo) (*Justinianis Institutiones*, lb. I, XI, 3).

These specifications of his famous legal experts also confirm that – through his Constitutions – Justinian also created a new attitude towards children, one whose main purpose was their legal protection.

However, in order to better understand the novelty of Justinian's contribution regarding the clarification of the legal status of Marriage, as well as of the relations between the spouses and their legal consequences, we will closely examine the text of this Novel (117), which – by its content – made an important contribution in its evolutive process to the Roman matrimonial law, and, ipso facto, the European one. In fact, its positive effects can be found even in the matrimonial law of today.

Among other things, through this new Constitution, alias Novel 117, Emperor Justinian ruled that "both a mother and a grandmother, as well as other ancestors, are entitled, after leaving the proper part of their property, to give away the rest of their possessions, as their heart desires, to their son and daughter, their grandson and granddaughter and so on, provided that they want their father, or the person under whose authority they are, not to have any "ususfructus" (the right of use) and not own any part of it" (Novel 117, 1) [2: 752].

However, this decision – expressed in the text of his Imperial Constitution – according to which a woman (mother, grandmother, or great-grandmother) could give the children under "sub patrias familias" (parental authority) some of their property, left over after what they had already left them by will, was revolutionary for that time.

In a way, this decision expressed not only the right of a woman to leave her property under a will,

but also the right of property and, ipso facto, the right to the use of her property by her children.

Moreover, in the same Imperial Constitution (Novel 117) it was stipulated that children resulting from a "marriage concluded only by mere intention", (that is, of the future spouses to marry), are equally entitled to a part "of the father's inheritance", as well as those who were born in a "contractual marriage", and with "dowry" (Novel 117, 3) [2: 753-754]; hence, the categorical statement of Emperor Justinian in the text of this Novel: "We rule that any marriage proved to have been concluded only by intention is valid (legal), and we order that the babies born therein be recognized as legitimate" (Novel 117, 4) [2: 754].

By applying this principle, according to which even a marriage "intentionally" concluded was considered to be legal, and the children resulting from it were also recognized as legitimate, Justinian actually laid the foundations for a new legal institution of marriage, whose benefits can be identified even today, both in the European and in the international matrimonial law.

In fact, Emperor Justinian had ruled, in his Codex, which incorporated "all the state laws, issued by the Roman emperors, starting with 117, ..., up to and including 533" [13: 100], that the woman taken as wife, by a man, "without dowry, but with matrimonial intention, even if banished, without any cause recognized by law, she must receive a quarter of his wealth" (according to Codex V, 17, 11). This provision was almost resumed *ad-litteram* both in the text of Novel 22 c. 18, and in that of Novel 117 c. 5 [2: 755].

In the same Novel (117), Justinian stated that the wife who married "without dowry, but with matrimonial intention, ..., only has the right of use" (of the wealth received from the man with whom she lived and had children), as "the right of property is reserved to the children she had from that marriage; but even if she did not have children with the respective man, we also rule for her to have the right of property ..." (Novel 117, 5) [2: 755].

Therefore, the woman (the wife) was granted the right of property both if she did not bring a dowry into the marriage and if, from her cohabitation with her husband, there were no children.

Also in this Novel, Justinian ruled that, in case of divorce, the innocent husband was entitled to receive the children in custody, but if one of the spouses was poor, and the other one rich, the children went in the care of the latter (according to Novel 117, 7) [2: 756].

As for the "repudium" divorce, i.e. unilateral divorce, usually on the man's part, Justinian decrees that "... the husband has no right to use repudium" if his wife "has not committed adultery ..." (Novel 117, 8) [2: 757-758].

By this provision Justinian made yet another pivotal contribution regarding the reform of the old Roman law on divorce, which "Jus romanum antiquum" perceived and defined as merely a "divortium facere aliqua" (Cicero) [9: 365], that is, a "divorce from a woman", since, initially, only the man had the right to repudiate his wife.

Indeed, "divortium" (divorce) was perceived and defined by the Romans this way, from the time of the XII Tables Law. Afterward, however, the provisions of law Julia (*Ad legem Juliam de adulteris*) were imposed, and being mentioned explicitly in a Constitution of Emperors Valerian and Gallienus from the year 18 AD.

The provisions of their imperial Constitutions were also reactivated by Emperor Alexander Severus, who – among others – in his Imperial Constitution, from 224, mentioned that "from ancient times (antiquitatis) it was admitted that marriages must be free (libera matrimonia), and, therefore, the pacts by which it was not appropriate to separate from wives are not valid; and the stipulations imposing (pecuniary) penalties on the spouse introducing the divorce, are constantly null" [14: 207].

Thus, the respective Imperial Constitution, from 224 AD, reaffirmed the right of the spouses to

divorce, and, as such, the monogamous character of the marriage was no longer affirmed, except if stipulated – in writing – in the marriage contract, which rarely happened.

Through his novel, number 117, Emperor Justinian "... changed this state of affairs", in the sense that not only the man had the right to repudiate his wife, if she proved to be "adultery", but also "the woman has the right to repudiate her husband if he commits adultery ..." [14: 211].

As Justinian tried at all costs to affirm the monogamous principle of Marriage – stated by the Founder of the Christian Religion, the Lord Jesus Christ, whose name he invoked in the Preface to all four of his works (*Codex, Digestae, Institutiones and Novelae*), which make up his famous *Corpus Juris Civilis*, – it was, therefore, natural for him to openly disapprove of any form of divorce, and even to punish those who separated "by mutual agreement", so that he forbade that "in the future such a thing to happen again, unless this was done out of a desire to live in chastity" (Novel 117, 10) [2: 759], at home or in a monastery.

According to Justinian's decisions, the divorce was only allowed in three cases, namely: a) the husband's impotence; b) choosing a "religious life" in monasteries; c) if a person was captive for "a long period of time" (Novel 117, 12) [2: 761].

However, also in these cases, Justinian simplified the divorce procedure, whose formalities imposed by the old Roman law had already become obsolete for his time.

In his last Constitution – promulgated in 556 "in the name of our Lord Jesus Christ, our God" (Novel 134) [2: 889] – Justinian stipulated that "the accusation of adultery must be well proven" and that "the punishment for it must be given by Emperor Constantine (the Great)" (Novel 134, 10) [2: 897], i.e. the death penalty.

The testimonies of Emperor Justinian's time confirm that "the standard of punishment was death and confiscation of property with prison", but, "in fact, judges were wise enough to find other ways to punish adultery ..." [2: 897].

According to his own confession, Emperor Justinian vehemently opposed unilateral divorce because he was always so overcome by "the care for the public good" (rerum communium utilitate) (*Codex Justinianus*, III) [3: 4], as well as the desire to "remove the injustices (iniquitates) of those who blame (calumniantium) others unfairly" (*Justiniani Institutiones*, Praefatio) [1: 7], since – Justinian confessed – it is "... for the benefit of the state (rei publicae) that the individual does not abuse his right" (*Justiniani Institutiones*, lb. I, VIII, 2) [1: 25].

The text of Emperor Justinian' last confession really includes "... in it the idea that the newer development of law will call "the theory of abuse of law", under which the exercise of subjective rights cannot exceed the purpose for which they were granted to the respective holder" [1: 328].

As such, being animated by these types of life principles, Emperor Justinian did not hesitate to accept the remarriage of divorced spouses, and, if they divorced "before being locked in a monastery, we give them – his Imperial Constitution stated – permission to do so, and we exempt them from … corporal punishment, being sent into exile", etc. (Novel 134, 11) [2: 899].

The same Emperor, who proved to have really – in his life – walked "on the lawful ways" [1: 7], predicted – as he testified in the "Preface" of the Institutions – in one of his Imperial Constitutions that, if "someone accused of adultery escaped the legal penalties due to the corruption of judges ..., and then returned to the woman with whom he had committed adultery, and "... married her, we rule such marriage to be worthless" (Novel 134, 12) [2: 899].

As can be seen, Emperor Justinian condemned – among other things – the "corruption of judges", that is the corruption of some magistrates, a crime which, unfortunately, has been perpetuated to this day both internationally and nationally.

It should also be emphasized that, regarding the vehement condemnation of adultery, for Justinian the divine law and the natural moral law always took precedence [15].

We also mention the fact that, in the same novel (134), Emperor Justinian stated that "we must take into account the weakness of the human being", and, therefore, "we have reduced, in part, corporal punishment: we forbid the amputation of both hands or legs ... Accordingly, we propose that, in the case of a crime, for which the law stipulates the death penalty, the criminal shall suffer the punishment imposed by the force of law, ... and they shall be punished by other means, or sent into exile; …" (Novel 134, 13) [2: 900].

By such a constitutional provision, Emperor Justinian, in fact, forbade the death penalty, thus being the first lawmaker in the world to do so. However, unfortunately, we had to wait for the twentieth century for this punishment to be banned, and, still, not in the whole world.

However, the decision taken by Emperor Justinian – which had the value of a constitutional law – thoroughly emphasizes not only the humanist – Christian character of his Constitutions, but also their "avant-la-lèttre" reformist content.

In one of Emperor Justinian's Novels, promulgated in 565, that is two years before his death – and which was subsequently attributed [2: 15] to Emperor Justinian II [2: 925-927], his nephew, – the penalties that he himself had stipulated in his previous Novels (according to Novel 7, 1) for the divorce through the consent of both spouses (according to Novel 148) were annulled.

In the Preamble of this Novel, Emperor Justinian wrote that "Mankind has nothing greater than marriage; from it result the children and subsequent generations, and the connections between people from villages, cities and human society" (Novel 140, Preamble), hence "our prayer that they (marriages) be successful for all those who conclude them, ..., and that married couples do not separate without a just cause" [2: 925-927].

Then, the Emperor mentioned that "in the past, spouses could separate by mutual consent and understanding, and that numerous laws were enacted with provisions in this regard, under which the dissolution of marriage took place by "*bona gratia*", the term used in the old language" [2: 925].

In some of his Novels (according to Novels 111 c. 10; 134 c. 11), Justinian also mentioned the fact that he had received "... numerous petitions from people who detested their marital relationship, and turned out to be real opponents, ..., requesting the dissolving of such a marriage ..." (Novel 140, Preamble) [2: 926], that is, concluded on the basis of the old legal principle of the mutual consent of the spouses, mentioned also – among others roman famous solicitors – by Modestinus.

Hence, his decision that "... the penalties stipulated in the constitutions of our parents for those who divorced by mutual consent could no longer have strength" (Novel 140 c.1) [2: 926]. In other words, the provisions of the imperial Constitutions of his predecessors – according to which, for a divorce, it was sufficient the consent of the spouses – were abrogated.

Finally, "taking into account that the mutual intention is, in fact, the one that gives consistency to marriages", – as it was in fact expressly mentioned by the "Jus romanum antiquum" – Justinian admitted that "it is also reasonable for the opposite party to also dissolve them by consensus (reciprocally), but with the mention that the divorce was made on its basis" (Novel 140 c. 1) [2: 926], and, ipso facto, by applying the old legal Roman principle, that is, by "bona gratia", i.e. on the basis of the good faith of the spouses, hence the abrogation of the punishments stipulated "in laws, and especially in the Constitutions of our parents, regarding the dissolution of marriages, ..." [2: 926].

By this constitutional provision, Emperor Justinian reaffirmed, therefore, the application of the principle regarding the obligation of mutual consent of the spouses, both at the conclusion of the marriage and at its dissolution [16: 117-135],

a principle stated to this day, both in international law and the national one, including that of Romania and the Republic of Moldova, both in their constitutional text (according to Art. 48 of both Constitutions), and in the Romanian Civil Code (according to Art. 271) or the Family Code of the Republic of Moldova (according to Art. 11, para. 1).

In Novel 143, Emperor Justinian reaffirmed the principle provisions set out in a previous Constitution (according to *Codex Justinianus* IX, 13, 1), by which he condemned the "... raptus (abduction) of a woman, regardless of whether the two were engaged or married, or if they were widows/widowers ...".

In the respective Imperial Constitution, Justinian postulated "the death penalty not only for the abductors, but also for those with them, ... We also punish – Justinian stated – the abducted women, who were married or engaged, because they committed adultery ... also specifying that no woman or girl who was abducted should be allowed to marry the abductor; she can marry any man her parents want, but not the abductor…; should the parents consent to a marriage with the abductor, we order them to be exiled" (Novel 143, *Preamble*) [2: 938].

Therefore, according to the provisions of the Imperial Legislation of Emperor Justinian, marriages between the "abductor" and the "abducted woman" were absolutely forbidden, and the parents consenting to such marriage were punished with exile.

Thus, Emperor Justinian wanted – through this Constitution also, attributed erroneously by some transcribers to his nephew, Justinian II (565 – 574), – not only to put an end to practices that had their traditional origin in the world of the people the ancient Greeks called pejoratively "barbarians" (according to can. 28 IV Ec. Synod), but, in fact, to reform the old Roman Law, regarding Marriage, in the light of the new Christian doctrine.

That his desire did not fully materialize it is clearly attested even by Byzantine Law, including by the Codes of Laws (Nomokanons / Pravila) [17] published in Romanian, in which the practice of abduction was still present [18,19], even though Justinian had managed to reform the system of the old Roman law, and, ipso facto, to create a "novum Jus romanum" (new Roman law).

Instead of Conclusions, we can, therefore, underline and retain the fact that in the Constitutions of the Roman and Roman-Byzantine emperors (IV-VI centuries) [20], and especially those of Emperor Justinian – the main object of our research – we actually find the essential content of the Roman Law regarding the legal institution of Marriage, to which this last Roman emperor tried to give a new legal basis, in accordance with the teaching left by the One whom he invoked at the beginning of his Constitutions, that is, "*Domini nostri, Jesu Christi*".

We are, of course, convinced that also from these considerations and assessments – however succinct – the content of the Imperial Constitutions regarding marriage, which has a pioneering status in the Romanian specialized literature, the knowledgeable reader can realize that we cannot talk about the sources of matrimonial law, and even less about those of the Constitutions of today, without examining and evaluating at least the text of the Imperial Constitutions of the Roman-Byzantine era, positively concluded in the Constitutions of Emperor Justinian, which we, in fact, did with the zealousness and diligence of the researcher wanting to go "ad fontes" (that is, to the sources), namely to the "Sacrae Constitutiones" (Imperial Constitutions) of this last Roman emperor and the first Byzantine emperor.

ისტორია

იმპერატორ იუსტინიანე I-ის „კონსტიტუციები“ დედისა და შვილების სამართლებრივი დაცვის შესახებ

კ. მიტიტელუ

კონსტანცას ოვიდიუსის უნივერსიტეტი, რუმინეთი

(წარმოდგენილია აკადემიის წევრის რ. მეტრეველის მიერ)

იმპერატორმა იუსტინიანე I-მა (527–565) თავისი საიმპერატორო კონსტიტუციებით (Constitutiones Principum) დაამტკიცა, რომ იგი იყო არა მარტო “ius antiquum”-ის („ძველი რომის სამართლის“) რეფორმატორი, არამედ ქორწინების ინსტიტუტის, დედისა და შვილების სამართლებრივი დაცვის კანონმდებელიც. ეს საიმპერატორო კონსტიტუციები, რომელთა ტექსტი (მაგ., 538 წელს გამოცემული 74-ე ნოველა (ახალი კონსტიტუცია), 539 წ. – 97-ე ნოველა, 542 წ. – 117-ე ნოველა, 556 წ. 134-ე გამოცემული ნოველა და ა. შ.), რასაკვირველია, ჰერმენევტიკული ანალიზის საგანი გახდა, ცხადყოფს, რომ იმპერატორმა იუსტინიანემ წამოიწყო და რომაულ კანონმდებლობაში დანერგა რეალური რეფორმა ქორწინების ინსტიტუტისა და, შესაბამისად, ცოლისა და შვილების სამართლებრივი სტატუსის შესახებ.
დასასრულ, ჩვენს კვლევაში ასევე დაწვრილებით მიმოვიხილავთ ისეთ გამოჩენილ რომაელ სამართალმცოდნეთა ნაშრომებს, როგორებიც იყვნენ: გაიუსი, ტრიბონიანუსი, თეოფილუსი და დოროთეუსი, რითაც ხაზს ვუსვამთ არა მხოლოდ იმპერატორ იუსტინიანეს თავდაპირველ წვლილს „ახალი რომაული სამართლის“ შექმნაში, არამედ მისი, როგორც ქალებისა და ბავშვების უფლებების შესახებ საერთაშორისო საოჯახო სამართლის „წინამორბედის“ როლს.

REFERENCES

1. Instituţiile lui Justinian [The Institutions of Justinian] (2002) trans. by V. Hanga, Lumina Lex, Bucureşti.
2. The Novels of Justinian. A Completed Annotated English Translation (2018) ed. D. J. D. Miller and P. Sarris, I-II, Cambridge University Press.
3. The Codex of Justinian. A New Annotated Translation, with parallel Latin and Greek texts (2016) I-II, ed. by B. W. Frier, Cambridge University Press.
4. Gaius (1982) Institutiones (Institutions), trans. by A. Popescu, Academiei RSR, Bucureşti.
5. Dură N. V. (2015) "Justitia" and "Aequitas" in the perception of Greek philosophers and of Roman jurists, In: *Teologia Młodych,* 4: 4-9.
6. Dură N. V. (2011) Law and morals. Prolegomena (I), In: *Acta Universitatis Danubius. Juridica,* 2: 158-173.
7. Dură N. V. (2011) Law and morals. Prolegomena (II), In: *Acta Universitatis Danubius. Juridica,* 3: 72-84.
8. Dură N. V. (2018) About "Publius Ovidius Naso" († 17 p. Chr. n.) and His Poems Written in the "Getae" Language, In: diversity in coastal marine sciences, ed. by C. Finkl, C. Makowski, 67-78. Springer.
9. Guţu G. (1983) Dicţionar latin-român [Latin-Romanian Dictionary], Ştiinţifică şi Enciclopedică, Bucureşti.
10. Berger A. (1953) Encyclopedic Dictionary of Roman Law, Philadelphia.
11. Dură N. V. (2006) Drepturile şi libertăţile omului în gândirea juridică europeană. De la „Justiniani Institutiones" la „Tratatul instituind o Constituţie pentru Europa" [Human rights and freedoms in European legal thinking. From "Justiniani Institutiones" to "The Treaty establishing a Constitution for Europe"], In: *Analele Universităţii Ovidius, Seria: Drept şi Ştiinţe Administrative,* 1: 129-151.
12. Dură N. V., Mititelu C. (2012) Human rights and their universality. From the rights of the „individual" and of the „citizen" to „human" rights, In: *exploration, education and progress in the third millennium,* I, 4: 103-127. Galati University Press, Galaţi.
13. Floca I. N. (1990) Drept canonic ortodox. Legislaţie şi administraţie bisericească [Orthodox Canon Law. Church legislation and administration], I.B.M.B.O.R.; I. Bucureşti.
14. Danielopolu G. (1911) Explicaţiunea Instituţiilor lui Justinian [Explanation of the Institutions of Justinian], I. Bucureşti.
15. Dură N. V. (2013) Loi morale, naturelle, source du Droit naturel et de la Morale chrétienne, In: La morale au crible des religions (Studia Arabica XXI), coord. M. Th. Urvoy, Éditions de Paris: 213-233.
16. Dură N. V., Kroczek P., Mititelu C. (2017) Marriage from the Roman Catholic and Orthodox points of view, Ed. Scriptum, Krakow.
17. Mititelu C., Chiriluţă B. (2014) The Christian family in the light of the Nomocanonical Legislation printed in Romanian Language in the XVIIth Century, In: *Ecumeny and Law,* 2: 247-268.
18. Mititelu C. (2012) Pravilele româneşti, tipărite, din secolul al XVII-lea. Infracţiuni şi pedepse [Romanian Codes of Laws (Nomokanons), printed, from the 17th century. Offenses and penalties], Didactică şi Pedagogică RA., Bucureşti.
19. Mititelu C. (2016) The legislation of emperor Justinian (527-565) and its reception in the Carpathian-Danubian-Pontic space, In: *Analecta Cracoviensia,* 48: 383-397.
20. Dură N. V. (2015) The Right and its Nature in the Perception of the Roman Jurisprudence and of the Great Religions of the Antiquity, In: Rethinking Social Action. Core Values, coord. A. Sandu et al., 517-524. Medimond, Bologna.

Received September, 2019