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MARRIAGE, FAMILY VALUES AND "ECUMENICAL VISION" IN THE LEGISLATION OF JUSTINIAN THE GREAT (525-565)*

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I. Prolegomena

Undoubtedly, the SIXTH century is the century of JUSTINIANIC Byzantium and the New Christian World!

Justinian was born in the northern part of Hellenic Macedonia (*Justiniana Prima*), in 527, and at the age of 45, became Byzantine Emperor in Constantinople. He reigned to the great age of 83, dying in November 565.

His dream and ecumenical vision was to achieve greatness in unifying the eastern and western Empire by christianizing all countries and peoples. "Justinian liked his labours to be noticed. He worked long hours and, presumably suffering from insomnia, often at night. Sleepless so that his subjects might sleep, he took on himself their cares that they might live without care. The aristocratic ideals of leisure and elegance he did not share. Himself austere, he expected others to work hard, produce results and abstain from enriching themselves. Not suffering fools gladly, Justinian hurried and chivvied his associates".[1]

Indeed, Justinian had achieved real immortality and universal greatness by his magnificent legislation and *CODEX* and his reconquest of the collapsed western empire, his renowned buildings and churches, in

* This was a paper given by the author to the FIRST Global JUSTINIANUM Sc/or 15th Intern.Patristic-Byzantine Symposium in Newport,RI (Nov. 29-30, 1995).

1. T. Honoré, *Tribonian*, London 1978, p. 22.

particular the great and unique Cathedral of *SANTA SOPHIA*, and not least by his love for Theodora the Athenean!

Once an actress, even a prostitute, about whom Procopius[2] could say nothing bad enough, the Empress Theodora became a pillar of respectability and of power too. But very little is known and almost nothing serious is published (in English) about Justinian's irenic theology, ingenuity, his challenging thought and "ecumenism", or his struggle to reconcile the Monophysites of the East with the Chalcedonians of Constantinople.[3]

Justinian' s *Institutes* (or "Basic Principles of Law") has been the primary vehicle of the Roman learning since the sixth century. It is the key or map to the whole surviving body of Roman law. It has some claim to be the most important law book ever written.

The *Institutes* was written in Latin, in Constantinople, and published in 533 AD. It is rightly stated that the knowledge included in the *Institutes* of Justinian "is a corner-stone of European civilization".[4]

Likewise, Justinian' s *Digest* remains the finest monument of any legal culture. Surprisingly, while there may have been a continuous, if sparse, acquaintance with the *Institutes*, *Code* and *Novels* of Justinian from the sixth century onwards, there is no trace of the most important of the Justinianic tetralogy, the *Digest*, until the llth century, when two copies come to light: the *Littera Pisana* or Fiorentina and the *Codex Secundus* (so known since Mommsen).[5]

The *Novels* are the new pronouncements of the Emperor Justinian, those which he made after the work of his commissions was complete.

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2. Procopius, *Anecdota* or *Secret History*, New York, NY: Penguin Books, 1983, pp. 125-127. For the original see *Tusculum Bks.*, 1961, 78-80.
3. Rev. Asterios Gerostergios is perhaps the only one in the USA, who published (in English) a comprehensive treatise on Justinian' s religious policy towards Monophysites and other Christian heretics and on his "Aphthartodocetism" in his challenging book *Justinian the Great: The Emperor and Saint*, Belmont, MA: Institute for Byzantine and Modern Greek Studies, 1982, pp. 97-154.
4. Peter Birks and Grant McLeod, transl., *Justinian's Institutes*, Ithaca, NY: Cornell University Press, 1987, p. 28.
5. For more information on these two copies and the influence of Byzantine law, in general, upon the eleventh and twelfth centuries-Europe, and on the Western political theory see, now, D. Ibbetson and A. Lewis, "The Roman law tradition", in *The Roman Law Tradition* ed. by A.D.E. Lewis and D.J. Ibbetson. New York, NY: Cambridge University Press, 1994, pp. 1-14, especially p. 2.

Most of them are in Greek. Some represent major innovations, departing from the law of the *Digest* (Πανδέκτης) and *Codex*. For instance the law of marriage is thoroughly Christianized and codified.

The best and only complete English translation of the *Novels* is still today the one published in 1932 by S.P. Scott.[6] And the only available edition and translation of the *Institutes* now is the one published ten years ago (1987) by Cornell University Press, with an introduction by Peter Birks and Grant McLeod. We have used both of them, for this article.

II. *The Institutes*

Concerning the language of the *Institutes*, of course we know that it was Latin, but according to source - evidence[7] Greek was the commonly spoken language in Justinian' s times. Hence, several "pronouncements" or legal decisions, resolutions and reforms of Justinian himself were written and published in Greek "so as to be accessible to all."[8]

Interestingly enough, book one of the *Institutes* opens with the following statements: "1. Learning in the law entails knowledge of God and man.... 3. The commandments of the law are these: *live honourably; harm nobody; give everyone his due*". (p. 37).

These commandments are the essence of the law of nature or the law of all peoples which is common to all mankind.[9] And this is so, precisely because by the law of nature all men were "initially" born free. Hence slavery, that is, the misuse or abuse of those slaves captured in wars, is contrary to the law of nature, which in the *Institutes* is identifiable with man' s birth-rights (of personhood, equality, freedom, justice and love) as God' s creation (p. 37). Thus, even the Emperor's "pronouncements" or legal decisions and judgement have legislative force precisely because the people conferred on him its whole sovereignty and authority.[10]

Now, this universal law or the law of nature "is sanctioned by divine providence and lasts for ever, strong and unchangeable", since it derives

6. S.P. Scott, *The Civil Law*, volumes 16 and 17. Cincinnati: The Central Trust Co., 1932.
7. See the *Institutes*, Book III, 3.7,101.
8. Ibid. Cf. Book III, 3.9,103; 3.20,113. 3.25,115; 3.29,119. Book IV, 4.1,121; 4.4,127; 4.11,139.
9. Cf. Book II, 2.1,55.
10. Ibid.

from man' s *personhood as God's creation*. And in the very words of the *Institutes* "there is little point in knowing the law if one knows nothing about the persons for whom it exists".[11]

The essential feature of *personhood* is man' s spiritual freedom, that is "man's natural ability to do what he wants as long as the law (of the nature) or some other force (reason) does not prevent him".[12] Therefore, slavery that "makes a man the property of another", is contrary to the law of nature. It should be pointed out, here, that the real meaning of "slaves", in Latin "*servi*" is connected with the practice of army commanders to order captives to be sold and thus saved - "save" in Latin is "*servare*" - instead of "killed".[13]

The strong trend in the *Institutes'* thought is to stress the *birth-right* of man's freedom: "under the law of nature all men were born free."[14] However, to avoid the "worse evil" (murder), in the case especially of war - captives a sort of slavery was allowed, as just mentioned, but with the condition of rational, legal, and humane treatment of slaves. Explicitly in the *Institutes* it is stated: "But *nowadays no one in our empire* may be cruel to his slaves except on legally recognized grounds, and then only within reason".[15]

Unquestionably, Justinian's Christian values and theological anthropology had considerably influenced not only his own legal enactments and edicts (the *Novellae*), but also his *Institutes*[16], a very little known or at least depreciated and neglected aspect of Justinian's thought and world. In fact, Justinian himself was a self-made competent theologian and a deep thinker, religious poet, but a bold christologist towards the end of his life (564, *Aphtharto-docetism*).[17]

It is in the same line and trend of thought that also marriage and *family authority* were understood in Justinian's times and legislation. According to

11. Book I, 1.2., p. 39.
12. Book I, 1.3., p. 39.
13. Ibid.
14. Ibid., 1.5, p. 39; cf. book II, 2.14,75.
15. Book I, 1.8, p. 41; cf. Book II, 2,14,75.
16. Book II, 2.14,75; 2.18,79; 2.20,85.
17. For a challenging survey of Justinian' s theological thought and religious policy see Asterios Gerostergios, *Justinian the Great: The Emperor and Saint*. Belmont, MA: Institute For Byzantine and Modern Greek Studies, 1982. Also the study of Prof. Evangelos Chryssos of Yannena University.

the *Institutes* "marriage, or matrimony, is the union of a man and a woman, *committing them to a single path through life*".[18] Marriage, that is, does not solely mean "intercourse between male and female "for the purpose of procreation merely.[19] Marriage and family is a personal committment of both, husband and wife, to a "life-time single path " of mutual growth, recognition, respect, perfection-struggle and loving unity. Hence the "extreme control over children" or the "family authority" over children, is a right which only Christian ("Roman" in the *Institutes*) citizens have.[20]

Absolute respect for blood-relationship (even among slaves) as a bar to marriage, is also strongly emphasized throughout the legislation of Justinian.[21] Further, marriage to a mother-in-law or step-mother, is strictly forbidden and condemned as bigamy;[22] likewise is forbidden the marriage between parent and child, whose relationship is based on adoption or even granddaughter and grandson.[23]

Of course there is no family authority, nor a dowry[24] in illegal relationships or among those"conceived casually", or in "forbidden unions".[25] The same principle was applicable to those who castrated themselves, or the self-mutilated ones, the *castrati*, who could not adopt children. Also women could not adopt, but in the sixth century, by imperial favour, they were allowed to adopt in order to make up for the loss of their own children.[26]

There is a strong trend in Justinian's legislation (in the *Codex* as well as in the *Institutes* and the *Novellae*, especially) to improve the woman's and especially the mother' s position taking into consideration her natural love, the "female weakness", her labour in child-birth, and the danger often of death.[27] Therefore, Justinian granted all mothers "the full statutory right of succession to their children", that is "the mother should take priority over every other member of the statutory class and should receive her son's or daughter' s estate without any deduction".[28]

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18. Book I, 1.9,43. Cf. Book II, 2.20,85.
19. Cf. Book I, 1.2,37.
20. Book I, 1.9,43; cf. 1.12,47
21. *Ibid.*
22. *Ibid.*
23. *Ibid.*
24. Book II, 2.7,65.
25. Book I, 1.10, p.43. Book III, 3.5,99.
26. Book I, 1.11, 45.
27. Book II, 2.8, 67. Cf. Book III, 3.1, 93, 95; 3.2, 95. Book III, 3.3, 97. Book IV, 4.6, 133, 135.
28. Book III, 3.3, p. 97.

It seems that the institution of legal adoption was very strongly operative and socially decisive policy in Justinian's time and legislation. Even slaves as soon as they were adopted-by their owner, by that alone, attained their freedom, but not necessarily the full status of a son.[29]

Justinian's Christian humanism and enlightened reign are further reflected upon his own "pronouncement" or resolution that churches and gifts solemnly dedicated to the service of God must not be alienated or charged except for redeeming prisoners;[30] also in regard to "cognatic or blood-relationship" through slaves and the rights of their children and of patrons;[31] to unification of "the law of succession in relation to freedmen and persons born free", the abolition of "Latinity", that is, and to give every freedman the benefit of citizenship; in regard to Justinian' s resolution on the intent of wrongdoer , and on "freedom must be put before finance" in relation to slaves' restoration to freedom, personal fund, and to succession to estate;[34] to his abolition of the old resolution of the senate that "a free woman led astray by love for a slave should lose her freedom and with it her property";[35] in regard to stolen property and theft[36].

III. Marriage and Divorce in the Digest and Novels

Marriage has been defined by Justinian as follows:

"Nuptiae sunt coniunctio maris et feminae, et consortium omnis Vitae, divini et humani juris communicatio" (Dig.23.2.1).

The last words remind us that in the earliest days of Rome marriage was a holy relation. In whatever form it took place, and not only in that of confarreatio, it founded a religious communion between husband and wife, and therefore received at its commencement a religious sanction.

The general conditions of marriage were as follow.

1) Certain persons were absolutely incapable of contracting marriage, viz. slaves, castrati, lunatics and idiots, persons below the age of puberty,

29. Book 1,1.11, p: 45. Cf.Book III, 3.6, p. 99. Book IV, 4.8,137.
30. Book II, 2.1, p. 55. Cf. Book III, 3.23,115; 3.27,119. Book IV, 4.6,131.
31. Book III, 3.6, p. 99. Cf. Book IV, 4.8,137.
32. Book III, 3.7,101. Cf. Book IV, 4.4,127; 4.8,137.
33. Book IV, 4.3,125. Cf. Book IV, 4.4,127; 4.6,133.
34. Book III, 3.11,105; cf. 3.23,115; Book IV,4.7,135; 4.11,139.
35. Ibid. Cf. Book IV, 4,6,131.
36. Book IV, 4.1,123.

those already married, and women whose husbands had not yet been dead a certain time fixed by law.

2) The parties must not stand within certain degrees of relationship to one another, and 3) themselves consent to the marriage (*Dig.* 50. 17.30). 4) They must, if alieni juris, have the consent of the persons in whose power they are: cf. with this paragraph *Dig.* 23.2.2, "nuptiae consistere non possunt, nisi consentiant omnes, id est, qui coeunt, quorumque in potestate sunt". There were exceptional cases, in which the parents' consent was required for the marriage even of emancipated daughters, see Cod. 5.4.1,18.20, and Livy 4.9. 5) Marriage was forbidden by positive law between the members of certain ranks or orders of society: e.g. between inqenuus and infamis, between senators and libertae, members of the dramatic profession,etc. On the religious ground marriage was forbidden between Jew and Christian, and on account of official relation between the paeses and his provincial subjects, between the tutor and his female ward.etc, 6) Persons convicted of adultery with one another might not subsequen-tly marry (*Nov.* 134. 14), and the same rule applied in cases of abduction (*Cod.* 9.13.1, *Nov.* 143.150).

Marriage was contracted merely by consent, and no form was prescribed by law. True, in the earlier period marriage was usually accompanied by manus, which was not completely obsolete even in the time of Gaius; but the former was independent of the latter, which was superimposed on it by some additional ceremony or fact - confarreatio, coemptio, or usus. The agreement to many was usually entered into by mutual promises (sponsalia), originally made by sponsio and restipulatio (*Dig.* 23.1.2), a form which would always support an action, so that we may believe that (in an indirect way) the action for breach of promise of marriage was not unknown to the early Romans; i.e. though they never allowed a direct action on the promise to marry, they allowed the stipulation of a penalty in case of breach, and this could be recovered. Finally, however, even this indirect form of compulsion came to be deemed contra bonos mores, and by the introduction of an exceptio doli even the exaction of the penalty was prevented (*Dig.* 45.1. 134); and from this time onward the betrothal by stipulation seems to have been discontinued in favor of an informal engagement, and the principle was established, sufficit nudus consensus ad constifcuenda sponsalia. In earnest of the engagement mutual gifts (arrha sponsalicia. *Cod.* 5.1) were usual, which were forfeited by a defaulting party, who had also to restore

those given by the other side; and this forfeiture seems, with the exception of some social disapprobation, to have been the only penalty incurred for breach in the time of the classical jurists.

The transition from the state of betrothal to that of actual marriage was not effected by any necessary form, religious or otherwise, but by actual cohabitation, as evidenced by the wife going to live with the husband, accompanied by maritalis affectio, of which the deductio in donum, or taking home of the woman by the man, was. regarded only as a proof. By Nov. 74.4.5 Justinian prescribed certain conditions for the marriage of imperial officials, but for the rest of the Roman world the old rule was left standing.

From iustae nuptiae one has to distinguish nuptiae simply. Originally the former was the only kind of marriage known at Rome. Even, however, in the time of the Republic there had grown into almost

equal recognition a matrimonium juris gentium, a lawful wedlock of persons between whom there was not connubium, which, inferior to iustae nuptiae only in not creating patria potestas, was held in great favour under the empire. In Justinian' s time every free subject of the empire practically had connubium, so that the distin-ction between nuptiae and iustae nuptiae, important before the edict of Caracalla, had ceased to have any significance.

DIVORCE

The marriage state was terminated 1) by either party dying or becoming a slave. When the slavery resulted from captivity, postliminium had not originally the effect of restoring the married condition, but a fresh consensus was required if the parties still wished to be husband and wife (*Dig.* 49.15.14.1). This rule, however, underwent a gradual change, and eventually captivity was regarded as in no way different from ordinary absence, proof being required of the absent party' s death before the other could contract another marriage (*Nov.* 117.11). 2) By "incestus superveniens"; e.g. if a man adopts his daughter' s husband, the latter thereby becomes his own wife' s brother (*Dig.* 23.2.67.3). Ξ 3) By divorce. Upon this the Romans held that as the essence of marriage lay in the maritalis affectio, it could be terminated by the mere mind of either party no longer to live in wedlock with the other; the continuance of the marriage depended on that of the affectio. Either party was thus free to terminate the connection at pleasure, and agreements surrendering this

privilege were void (*Cod.* 8.39.2). If the separation was effected by mutual arrangement, it was usually called divortium, if by the act of one party only, repudium (*Dig.* 24.2.2.1).

Persons who had been married by confarreatio could originally not be divorced at all. But from the time probably of Domitian they could be separated by a religious form of divorce called diffarreatio.

The recklessness with which the right of divorce was exercised in the darker days of the Empire is well known. For centuries the only attempts made to check the evil consisted in imposing certain proprietary disadvantages on persons who unjustifiably divorced their consorts, or who occasioned a divorce by their own infidelity. The acceptance of Christianity as the State religion brought with it a large amount of imperial legislation on this subject. On divorce by mutual consent no restraint was imposed until Justinian (*Novels*, 117.10, and 134.11), as a penalty forced the parties into the retirement of a religious house. Constantine enumerated the grounds on which repudiation should be deemed justifiable, and additions to the list were made by his successors. The penalties inflicted on the guilty parties, as fixed by Honorius, were loss of dos and donatio propter nuptias respectively. Repudiation without any such good reason was still more severely punished with enforced retirement to a cloister, and forfeiture of the whole property in favour partly of the cloister, partly of the guilty person' s statutory heirs (*Nov.* 134.11).

IV. Concluding Remarks

In conclusion, a few words are necessary concerning the influence of Byzantine legal thought and humanism on Western legal history.

Unquestionably, Byzantine ideas profoundly influenced - one might say determined - the course of European legal history. This is most visible in the writings of legal commentators; in England, for example, the debt of Glanvill in the twelfth century (also of the Magna Carta, 1214), and that of Bracton in the thirteenth to Byzantine-Roman law are strikingly obvious: whole sections from the latter are copied directly from Justinian's Institutes or the commentaries of Azo, and even those sections apparently most English can be shown to have close connection with the classical Roman texts preserved by the Byzantine law. Later Middle Ages experienced more intensive efforts and pulses of infiltration of Byzantine-Roman law into Common law. Most obviously there was a revival of the

study of Bracton and of the use of his text in Common law contexts in the wake of its printing in 1560; since Bracton had been a judge, the work attributed to him could be cited freely without any fear of being accused of trying to import Romanism or Byzantinism into England. Less obviously, but more importantly, English lawyers seem to have had an increasing familiarity with the Byzantine texts and law. It was not merely that humanists like Thomas More were closely in touch with the principal currents in contemporary European culture, or even that scholarly lawyers at the end of the century - Thomas Egerton and Francis Bacon, for instance - are known to have studied the *Digest* of Justinian; the dearth of easily comprehensible texts on English law meant that reliance was increasingly placed on the basic literature of Byzantine-Roman law. Justinian' s Institutes were widely recommended as an introductory legal text, and John Cowell transparently based his Institutiones luris Anglican! on them.

Besides England, Germany (the Carolingian court system, for example), Italy (the Italian city-states & their pro-imperial ideology), the Norwegian code, the Spanish cortes, the French Etablissements of Louis IX, for example, the llth century Investiture controversy, were influenced by the Byzantine supranational body of legal principles arid political humanism.

The influence of Byzantine law has not been confined to purely legal contexts and legal humanism; it has had a profound influence on the development of western political theory. Hellenic-Byzantine ideas lie at the basis of the mediaeval theory of the state. Already in the twelfth - century, as has been mentioned, one significant reason for the revival of study of the Digest was its political utility in the hands of imperial apologists like Peter Crassus who was thoroughly impressed by the Byzantine theocracy, but not imperial absolutism (the Justinianic principle of NÓMOS ÉMPSYCHOS, for example). The same impression and approach is to be found in Thomas Aquinas, who drew from the fact that the prince was said to be above the law the conclusion that, this was because he could not in fact be brought before a court, but went on to argue that this in no way relieved him from the duty of voluntary obedience to its demands, citing in support a rescript of Theodosius from the Code: "It is a saying worthy of the majesty of the ruler, if the prince professes himself bound by the laws; for even our own authority depends on that of the law". These ideas, coupled with ideas drawn from the JUSTINIANIC (especially *DIGEST*) civil law, formed the base of the social contractarianism that came to dominate political thinking in the

seventeenth century, and whose influence is still strongly felt in twentieth - century political theory.

A second feature of modern thought whose source can be traced back into the sixth and ninth - century BYZANTIUM is the idea of the Law of Nations (from the Latin jus gentium) which is usually identified with International Law, since both derive from the Helleno-Byzantine theory of natural law as rational law (Stoics) out of which the late mediaeval theories of natural, or fundamental, rights (Ockham and Grotius especially) grew and developed together with Hobbes' and Locke' s ideas of private property and individual civic rights. Likewise, the basic moral values which form the classical principles of natural justice, the maxims audi alteram partem and nemo iudex in causa sua, form a part of this HELLENO-BYZANTINE legal tradition, mediated through the Natural law writings of Grotius and his successors.

Lastly, the HELLENO-BYZANTINE-Roman law tradition has produced many and varied effects on the legal and intellectual map of the world. And according to the consensus of modern scholarship, "codification and the influence of subsequent legal orders has modified but not fundamentally altered the importance of this living cultural tradition, so that it remains to the present day the most widely flung and all-pervasive legal tradition, challenged only by the economic competitiveness of the Anglo-American Common law"[37].

37. A.D.E. Lewis and D.J. Ibbetson (eds.). *The Roman Law Tradition.* New York, NY: Cambridge University Press, 1994, p. 14.