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About the Religious Marriage From the Marriage by *Confarreatio* to the Marriage as Sacrament (μυστήριον/*sacramentum*)

Abstract: The marriage, one of the ancient institutions of mankind, was initially regulated by divine law (both natural and positive), hence its religious character, that also can be found in the Roman marriage known as the *confarreatio* marriage.

According to the provisions of the *ius civile*, a man and a woman enter into a marriage through a contract. But, by an imperial constitution promulgated by the Emperor Justinian, only the civil marriage contracted by a written contract in a Church is a *iustas nuptias* ('legal marriage') (cf. Novel 74).

The marriage as institution — provided by *ius civile* — has evolved into the sacramental act of marriage when it was raised to the rank of a Holy Sacrament of the Church by our Savior, Jesus Christ, at Cana of Galilee (cf. John 2:1—11). And, from apostolic age, the Holy Sacrament (*Mistyrion*) of Marriage has been accompanied by the administration and reception of the Holy Eucharist by the groom and the bride, that is, by the man and the woman. And, this sacramental act of marriage was regulated by church law, that is the canon law of the Eastern and Western Churches (cf. can. 3 Trullan Council).

From the year 893 the subjects of the Byzantine emperor had to receive the Sacrament of Marriage after they were contracted the civil marriage (cf. Novel 89 of Emperor Leo the Wise). Only in this way a marriage could be bearer of legal effects.

Keywords: religious and civil marriage, Roman law, Byzantine law, canon law, Christian theology of marriage

Introduction

In the Twelve Tables (written down around 450 BC), "the first codification of Roman law,"[1] we also find provisions regarding the religious marriage. In fact, the Twelve Tables were "the basis of the *ius civile* centuries after the law code had ceased to be of any practical use,"[2] as proves also *à l'évidence* the great Roman jurists from the 2nd and 3th centuries AD, such as Gaius and Pomponius, who considered the Twelve Tables as the basis of the *ius civile*, in which the institution of marriage found a special place.

About this reality, we find numerous testimonies both in the *Justiniani Institutiones*, that help us "to look back on over fourteen hundred years of legal history,"[3] and in *Justiniani Digestae*, which "preserves the writings of the classical jurists."[4]

Based on the writings of the famous jurists that lived between the late 1st century BC and the mid-3rd century AD, "only one book (in the modern sense) has come down to us which is an original work of the classical period and, moreover, has not been revised by the compilers of the *Corpus Juris Civilis*, and that book is the *Institutes of Gaius*,"[5] "that lived from about AD 110 to at least 179."[6]

In his book, Gaius underlined the juridical status of the *iustas nuptias*, that is, of the marriage contracted between Roman citizens, with a view to having "children […] not only do they become Roman citizens [*cives Romani*] but are also subject to their father's power [*potestatem parentum fiunt*]."[7]

The same famous Roman jurist also spoke about the prohibitions to the marriage, hence the assertion that the "marriage cannot be contracted between people in the relations of parent and child,"[8] or in their relationship "as parent and child is based on adoption."[9]

Until the epoch of the Emperor Constantine the Great, all the problems of the Christians, concerning the marriage, were discussed, and

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[1] Z. Chitwood: *Byzantine Legal Culture and the Roman Legal Tradition, 867—1056*. Cambridge 2017, p. 16.

[2] Ibidem.

[3] *Justinian's Institutes*. Trans. P. Birks, G. McLeod. London 1987, p. 7.

[4] Ibidem, p. 10.

[5] *The Institutes of Gaius*. Trans. W. M. Gordon, O. F. Robinson. London 2001, p. 8.

[6] Ibidem, p. 9.

[7] Ibidem, p. 49.

[8] Ibidem.

[9] Ibidem.

resolved by the bishop (cf. Matt 18:18—17; 1 Cor 6:1—3). And then, this episcopal attribution was transformed into a legal mode of procedure and, consequently, all the cases concerning the marriage between Christians entered into the jurisdiction of the episcopal courts, about which we find references in the Theodosian Code.

Among others, in the Theodosian Code we find "two edicts by which Constantine gave the episcopal courts a place in the judicial system of the empire."[10] Moreover, by his imperial legislation, "the episcopal arbitration was transformed into a legal mode of procedure."[11]

Hence also the prohibition of the complaint of bishops, before civil courts, for matters which are within the competence of ecclesiastical courts (cf. can. 6 Sin. II ec.; 15 Carthage).

About the legal effects of the Christian religious marriage, we find special provisions in the legislation of the Emperor Justinian (527—565), who preserved the Roman law by his Code, Digest, *Institutiones*, and Novels.[12] All these works were inserted later on into a *Corpus Iuris Civilis*, that remains "the major source of our knowledge of Roman law,"[13] including about the marriage law.

At the end of the 9th century, when the collection of laws entitled *Epanagoghi* (*Epanagoge*) was published and, more precisely, when the *Novels* of Emperor Leo the Wise (886—912) were enforced, in their texts we find special references to the legal effects of religious marriage as well as references regarding the legitimacy and validity of civil marriage only after the officiating the religious marriage when accompanied by the administration of the Sacrament of Marriage.

1. The religious character of the pre-Christian marriage

The religious character of marriage was stipulated expressly from "the dawn of human civilization" by *ius sacrum*,[14] that is, by divine law, both

[10] W. K. Boyd: *The ecclesiastical edicts of the Theodosian code*. New York 1905, p. 90.

[11] Ibidem, p. 91.

[12] See C. Mititelu: "Emperor Justinian's *Constitutions* on the Legal Protection of the Mother and Children." *Bulletin of the Georgian National Academy of Sciences* 4 (2019), pp. 165—175; C. Mititelu, B. Chiriluță: "The Christian Family in the Light of the Nomocanonical Legislation Printed in Romanian Language in the 17th Century." *Ecumeny and Law* 2 (2014), pp. 247—268.

[13] *The Institutes of Gaius* …, p. 7.

[14] Cf. G. Danielopolu: *Explicațiunea instituțiilor lui Justinian* [The explanation of Justinian's institutions], vol. I, pt. 1. Bucharest 1899, p. 174.

natural and positive, and it was confirmed by the ceremonies performed in the temples of different peoples (e.g. Babylonians, Indians, Thracians, Greeks, Romans etc.).

For example, for the ancient Greeks — who made a clear distinction between 'divine laws' (αἱ ὅσια) and 'human laws' (τά δίκαια) (Plato, *Politics*, 301 AD) — sacred rites, including those concerning marriage, were regulated by 'divine law' (τὴν ὅσιαν) (Euripides, I T. 1461).[15]

That at the Romans,[16] the religious marriage was a reality before the elaboration of the Twelve Tables,[17] is proved both by the ancient Roman legal tradition, about which give us an indisputable testimony the Twelve Tables, and the Roman jurisprudence from its classical epoch (the late 1st century BC and the mid-3rd century AD).

Among other things, the text of the Twelve Tables, an exponential monument of ancient Roman law (*ius romanum antiquum*), was and still is a source of reference and inspiration not only for the European jurists and theologians, but also for those in China. One of them is Professor Xu Guodong from the Xiamen University (People's Republic of China), who, among other things, in a conference held on February 7, 2005, spoke about "the permanence of the normative substance of Roman law."[18]

Before the Twelve Tables, the Roman marriage had three modes or forms of manifestation, namely by *traditio*, *deductio in domum*, and *confarreatio*.[19] Marriage "by tradition" was the marriage act concluded according to the *traditio*, that is, according to the ingrained legal custom. The second way of marriage, *deductio in domum*, consisted in taking the bride to her husband's house in the wedding procession (cf. Tacitus, Cicero, etc.); and the third way of marriage was concluded by *confarreatio*,

[15] Apud A. Bailly: *Dictionnaire grec-français*. 26th edn. Paris 1963, p. 1411.

[16] See C. Mititelu: "Matrimonium (Marriage) in Roman Law. The Impact of the Provisions of *Ius Romanum* on International and National Matrimonial Law." *Bulletin of the Georgian National Academy of Sciences* 4 (2020), pp. 120—130; C. Mititelu: "Reglementări ale dreptului roman, privind instituția căsătoriei, exprimate şi comentate în *Decretum Gratiani* [Regulations of Roman Law, on the Institution of Marriage, expressed and commented in *Decretum Gratiani*]." *Jurnalul juridic național: teorie şi practică* 2 (2019), pp. 32—35.

[17] According to the testimony of the Roman tradition, of legal origin, the Twelve Tables were drafted by several *decemviri*, i.e. by about ten Roman magistrates, between 451 and 450 BC. *Dreptul Roman 12 Tabele: O prezentare generală şi istoricul* [Roman Law, Twelve Tables: An Overview and History], https://ro.atomiyme.com/dreptul-roman-12-tabele-o-prezentare-generala-si-istoricul/ [accessed 17.08.2022]).

[18] G. Xu: *Legea celor XII table în China* [The Law of the Twelve Tables in China], https://drept.ucv.ro/RSJ/images/articole/2005/RSJ34/0101XuGoudong.pdf [accessed 1.11.2022].

[19] D. Fustel De Coulanges: *La Cité antique*. Paris 1900, pp. 56ff.

that is, by the religious ritual of the marriage performed by the priests of the Temples (cf. Gaius, *Institutiones*, lb. I, 112).

According to the provisions of some imperial constitutions of Roman emperors, the temple priests had also the legal attribution to conclude the adoption (*adoptio/-onis*). For example, Emperor Antoninus Pius (86—161) was one of those who ordered that the adoption of an *impuber* was to be performed by the *pontifex*, namely by the temple servant, who was not only entrusted with overseeing and officiating public and private religious worship, but also with the conclusion of legal acts (cf. Cicero).

In ancient Rome, there was both *Collegium Pontificum*, presided over by the *Pontifex Maximus* ('high priest'), and *pontifices minores* ('ordinary priests'), who usually helped those who held the office of pontiff (*pontificium/-i*). This college of pontiffs exercised "authority, law, and power"[20] to legislate (cf. Aulus Gellius, 2nd century AD), hence the fact that these pontiffs were said to have been "the first law scholars."[21]

This reality is attested also by the philological testimonies: for instance, both the adjective *sanctus* ('holy', 'sacred', 'inviolable', 'revered', 'pure', 'honest') and the noun *sanctio/-onis* ('sanctification', 'holiness', 'sacredness', 'inviolability', 'moral purity') derive from the verb *sancio/-ire, sanxi, sanctum*[22] ('to approve', 'to promulgate', 'to forbid', 'to punish').

It was these first scholars of *ius romanum*, that is, the *pontiffs* or the clerics of Roman temples, who made it possible to speak both of *sanctitas templi* ('the sanctity of temples') and of *sanctitas tribunatus* ('court inviolability') (Cicero), hence the notion of *sanctio* in the sense of 'sanction, punishment provided by law'.

The adjective *sanctum* is also used in phrases such as *sanctum ius* ('sacred law') and *sanctum templum* ('holy temple'), because these first *scholars* of Roman law, the pontiffs, were the ones who initially created *ius romanum antiquum* (Old Roman law) and held the status of *magistrates* in *sanctum templum* ('holy temple') and in *templum magistratuum* ('temple or platform of magistrates') (cf. Tit Liviu). The fact that the law was born in the vestibule of temples is confirmed even by the clothing of both ancient and contemporary magistrates, that proves *à l'évidence* this reality.

In accordance with the provisions of the Code of Laws of the Twelve Tables, it was "a crime to neglect the rituals prescribed by religion."[23] And,

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[20] G. Guțu: *Dicționar latin-român* [Latin-Romanian dictionary]. Bucharest 1983, p. 931.

[21] Ibidem.

[22] Ibidem, pp. 1087—1088, p. 1211.

[23] *Dreptul Roman 12 Tabele: O prezentare generală și istoricul…*

among the religious rituals prescribed by the religion of the Romans we also find those of the marriage.

At the same time, according to the rules set out in the Twelve Tables, as far as *pater familias* is concerned, it was mentioned that "a child born after ten months since the father's death will not be admitted into a legal inheritance" (Table IV, 5).[24]

In the Twelve Tables there was also provided that "marriages should not take place between plebeians and patricians" (Table XI, 1),[25] that "whatever the people had last ordained should be held as binding by law [*lex*]" (Table XII, 5)[26] and that it was forbidden "[…] to bury or burn a corpse in the city" (Table X, 1).[27]

In accordance with the provisions of the old Roman law, and more specifically with the provisions of *ius sacrum romanum*, religious marriage — concluded by *confarreatio cum manus* — could be abolished by *diffareatio*, that is, by the act of dissolution of such a marriage, which was also accompanied by a religious ritual. Therefore, both the institutional act of marriage and that of its dissolution were accompanied by a religious ritual performed by the ministers or the priests of temples (cf. Gaius, *Institutiones*, lb. I, 112).

Regarding the legal status of persons, including those who marry, Gaius, the famous Roman jurist of the 2nd century AD — recognized by the Law of Citations of Emperor Theodosius II in 426 AD "as an authoritative juristic source"[28] — wrote that "[…] some persons are their own masters, and some are subject to the authority of others" (Gaius, *Institutiones*, lb. I, 48),[29] hence his conclusion that there are "[…] persons who are subject to the authority of another, some are in his power, others are in his hand, and others are considered his property (*in mancipium*)" (Gaius, *Institutiones*, lb. I, 49).[30]

At the Romans, *potestas pater familias*, that is, the power held by the head of the family, was exercised over children, and in general over his descendants, his wife (*manus*), his slaves (*dominica potestas*) and people *in mancipium*. The people *in mancipium* were in someone's temporary property.

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[24] *Law in Ancient Rome*, https://www.crystalinks.com/romelaw.html [accessed 6.10.2022].

[25] Ibidem.

[26] Ibidem.

[27] Ibidem.

[28] *The Institutes of Gaius*..., p. 10.

[29] *The Institutes of Gaius*, https://thelatinlibrary.com/law/gaius1.html [accessed 29.08.2022].

[30] Ibidem.

Women married by *usus* ('use'), by confarreation (religious marriage with *manus*) and by *coemptio mulieris* (symbolic purchase of a woman), were all *mancipabile*, that is, owned by their husbands during their marriage.

2. The marriage as a great Sacrament under the New Law

Under the New Law, the Law of our Lord Jesus Christ, the marriage was elevated to the rank of *Sacrament* by the very presence of the Son of God at the Wedding in Cana of Galilee (cf. John 2:1—2), hence the term 'godfather' (ὁ ἀρχιτρίκλινος) found in verses 8 and 9 of the second chapter of the Gospel of John, which tells of the Wedding in Cana of Galilee,[31] or the syntagms from the New Testament, such as "wedding garment" (Matt 22:11—12) and "honor of the wedding" (Heb 13:4). In addition, the New Testament — which speaks of "[…] the bridegroom from Cana of Galilee, at whose wedding the Mother of God and Jesus were invited together with the first six disciples," and where our Lord Jesus Christ "performed the first miracle,"[32] turning water into wine (John 2:9) — mentions that the one who has a bride (νύμφη) is a bridegroom (νυμφίος) (John 2:9 and 3:29).

Therefore, in Christ's Church, marriage was conceived of and defined — from the beginning of its existence — as a "great Sacrament" (Eph 5:32), because the ancient institution of the mankind, the marriage — regulated by the divine law (both natural and positive) and Roman law — was raised to the rank of Sacrament by our Savior Jesus Christ himself when he participated in the Wedding at Cana of Galilee, where he also performed his first miracle, turning water into wine (John 2:1—11).

In the Christian Church, any benediction (ἐυλογία) given by a priest, according to the liturgical rite (cf. can. 27 St. Basile the Great), gives to it a sacramental character. Therefore, any religious marriage concluded without the observance of canonical impediments, it loses its sacred character (cf. can. 7 Neoc., 52 Laod., 66 the Trullan Council etc.).

The Emperor Justinian and his famous jurists (Tribonianus, Dorotheus, Theophilus etc.) also made some clarifications of legal doctrine regarding sacredness of things. Hence, their statements that only "those things are

[31] I. Mircea: *Dicționar al Noului Testament* [New Testament Dictionary]. Bucharest 1995, p. 360.

[32] Ibidem, p. 317.

sacred which have been duly consecrated to God by His ministers [*Deo consacrata sunt*], such as churches and votive offerings which have been properly dedicated to His service" (*Justiniani Institutiones*, lb. II, I, 8).[33]

These sacred things, destined to the Church, are different from *res religiosae* ('religious things') and *res sanctae* ('holy things'), since the latter (*res sacrae*) "belong to no one, for what is subject to divine law is no one's property [*nullius in bonis est*]" (*Justiniani Institutiones*, lb. II, I, 7).[34] And, moreover, "if anyone attempts to consecrate a thing for himself and by his own authority, its character is unaltered, and it does not become sacred" (*Justiniani Institutiones*, lb. II, I, 8).[35]

In the Ecumenical Orthodox Church from the first millennium, "[…] the issue of marriage sacralization was never raised,"[36] but what was developed was not only a biblical, dogmatical, canonical, and liturgical theology on the Sacrament of Marriage, but also a Christian Law on it.

Until the reign of the Emperor Justinian, the Roman law did not require from its citizens a written contract for the marriage, let alone for them to have their marriage witnessed and registered at the Church.[37] Therefore, the provisions of the *Ius Romanum Novum* that a marriage must be witnessed and registered at the Church remain an evident testimony that the dispositions of principle announced by the New Law were peremptory asserted by the Byzantine law (6th—14th centuries).

Indeed, in the year 538 Emperor Justinian decided in Novel 74 of his imperial Constitution that the Roman citizens, including "the men of Illustrious rank, at the level of our senators and Most Magnificent illustres,"[38] that thy could not "enter into legal marriage without making marriage contracts"[39] and to present themselves "[…] at a house of worship and inform the defender of the most holy church. He, in turn, is to assemble three or four of the church's most revered clergy, and make out a certificate to the effect that on this date in this month of this indiction, in such a regnal year and such a consulship, in his presence in this house of worship, the man N. and the woman N. were joined together in matrimony. If either or both of the couple wish to take the said certificate away

[33] *The Institutes of Justinian*, https://www.gutenberg.org/files/5983/5983-h/5983-h.htm#link2H_4_0011 [accessed 18.10.2022].

[34] Ibidem.

[35] Ibidem.

[36] A. Kalligeris: *Căsătoria de la Taină la Instituție* [Marriage from Sacrament to Institution]. Trans. I. Țârlescu. Bucharest 2016, p. 106.

[37] See the Novel 74 of Justinian, in: *The Novels of Justinian. A Complete Annotated English Translation*, vol. I. Eds. D. J. D. Miller, P. Sarris. Cambridge 2018, p. 523, no. 1.

[38] Ibidem, p. 528.

[39] Ibidem.

with them, they are to do that as well, and the defender of the most holy church, and the other three — or however many he may have decided, but no fewer than three — are to sign it, to that effect."[40]

In accordance with the provisions of the Novel 74 (chap. 4, 1, 2, a) of the Emperor Justinian,[41] the respective written testimony, "was delivered to the parties and to the clerics."[42] A copy remained, however, in the Archive of the Church, as a proof that the respective Marriage was witnessed and registered at the Church. And a such marriage "[…] had the same importance as if it had taken place in front of the civil authority."[43] In other words, a marriage concluded in the Church by a written contract had the same legal effect as a marriage that had been taken place in front of the civil authority, hence, therefore, the recognition of religious marriage as bearer of legal effects.

Moreover, according to the provisions of Justinian's legislation, "those who concluded an interdicted marriage [*prohibitas nuptias*] had to suffer other sanctions [*alias poenas*], contained in the imperial constitutions [*sacris constitutionibus*]" (*Justiniani Institutiones*, lb. I, 12).

In their collection of laws entitled *Ecloga* (Ἐκλογή τῶν Νομῶν),[44] which was in fact the result of a selection of texts from the Roman-Byzantine law adapted to the realities of those times, the Emperor Leo III Isaurus (716—740) and, later on, his son, the Emperor Constantine V, also provided some legal norms concerning the contraction of betrothal.

According to the provisions of *Ecloga*, "betrothal of Christian can be contracted for minors from the age of seven upwards based on the desire of the betrothed and the consent of their parents and kin, if the parties enter into the contract legally — and they do not fall into the category of those prevented from marrying — that is through a betrothal gift, that is to say a *hypobolon* [ὑπόβολον], or through a written contract" (*Ecloga*, I, 1,1).[45]

Concerning the dissolution of the contraction of betrothal, *Ecloga* provided that "if a man makes a written agreement and wishes to renegue, then he shall compensate the girl according to the contract. However, if it is on the part of the girl that the agreement to the contract. However,

[40] Ibidem.

[41] C. Mititelu: "Emperor Justinian's Novel 74 and its Importance for European Marriage Law." *Teologia* 4 (2019), pp. 26—37.

[42] N. Milaş: *Dreptul bisericesc oriental* [Eastern Ecclesiastical Law]. Trans. D. N. Cornilescu, V. Radu, I. Mihălcescu. Bucharest 1915, p. 475.

[43] Ibidem, p. 476.

[44] See K. E. Zachariae Von Lingenthal, K. Eduard: *Collectio librorum iuris graeco-romani ineditorum: Ecloga Leonis et Constantini, Epanagoge Basilii Leonis et Alexandri*. Lipsiae, 1852, pp. 1—52.

[45] *The Ecloga and Its Appendices*. Trans. M. Humphreys. Liverpool 2017, p. 45.

if it is on the part of the girl that the agreement is broken, without known accepted legal grounds, then the same sum which the man promised in the contract shall be given to him, along with anything else undertaken by him in the contract, and he shall be released from it" (*Ecloga*, I, 1,1).[46]

About the provisions of *Ecloga* regarding the contraction of betrothal an its dissolution, we could say that its authors are more explicit than Justinian's jurists, but they followed the principles asserted in the legislation of Justinian, as prove *à l'èvidence* even the text of the *Ecloga*'s appendices,[47] where we find texts reproduced from *Codex*, *Digestae*, *Institutions* and *Constitutiones* (Novels) of Justinian.

Regarding the marriage, from *Ecloga* we find out that "marriage of Christians, whether written or unwritten, can be contracted between man and woman of marriageable age, that is fifteen for a man, and thirteen for a woman, both desiring it, and with the consent of their parents" (*Ecloga*, II, 2,1).[48]

The same collection of Byzantine legislation — published in 740 AC[49] — provided that "a written marriage is contracted through a written dowry contract, […] and a nuptial gift from the man equal to the wife's dowry shall neither be stipulated" (*Ecloga*, II, 2, 3).[50] In fact, in the Isaurian era, only this kind of a written marriage contract continued to be — from a legal point of view — a 'lawfully marriage' (νόμιμον γάμον), called by Roman law a *iusta nuptia*.

According to the provisions of *Ecloga*, the indissolubility of marriage was ordained by our "God the Maker and Creator of all things,"[51] who "teaches that marriage is an indissoluble union of those living together in the Lord. For He who brought mankind from nothingness into being did not form man and woman in the same fashion, although able to, but created her from the man in order that He might wisely ordain the indissolubility of marriage" (*Ecloga*, II, 2, 9, 1).[52]

But, although the Christian jurists who compiled this collection of Byzantine legislation underlined the indissoluble nature of religious marriage, however, they admitted a second marriage. Indeed, in accordance with the text of *Ecloga*, "a second marriage [δευτερογαμία] can be con-

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[46] Ibidem.

[47] Ibidem, pp. 89—112.

[48] Ibidem, p. 46.

[49] K. E. Zachariae Von Lingenthal, K. Eduard: *Collectio librorum iuris graeco-romani ineditorum…*, p. 3.

[50] *The Ecloga and Its Appendices…*, pp. 46—47.

[51] Ibidem, p. 50.

[52] Ibidem.

tracted, either in writing or orally, between people who are not prohibited from marriage" (*Ecloga*, II, 2, 8, 1).[53]

In the text of *Ecloga*, it is also mentioned that its authors decide — in the name of their emperor — that "it is necessary to expressly place in the present legislation the grounds by which marriage can be dissolved" (*Ecloga*, II, 2, 9, 1).[54]

Concerning those who contract the third or subsequent marriages, the Empress Irene asserted — in one of her imperial constitutions — that she confirmed, "what was previously said in the second title [of the *Ecloga*], following the divine Apostle Paul about those contracting lawful marriage, quoting him about doing so up to a second union and under no circumstance a subsequent one (as such are unlawful and bestial) […] Wherefore we order that all third marriage and subsequent union shall not, take place, as they are alien to the commandment of the divine Apostle and foreign to Christian kinship" (Novel II).[55]

By her decision, Empress Irene in fact reaffirmed the decision taken by the Eastern Fathers meeting at the Synod of Laodicea in 343/348, who, among other things, stated in the first canon that, "in accordance with the provision of the ecclesiastical canon [κατὰ τὸν ἐκκλησιαστικὸν κανόνα],"[56] that is, the apostolic canon 17th, they admitted the second marriage, but they did not allow those who married twice *after baptism*, or those who, although legally married, had concubines, to be promoted "to the hierarchical catalogue [τοῦ καταλόγου τοῦ ἱερατικοῦ]" (can. 1st of Laodicea).[57] But, despite this decision of the Church, the practice to have concubines continued in the Roman Empire "until the 5th and 6th centuries."[58]

From the text of the 1st canon of Laodicea, we can also see that the decision of the Fathers of this Synod was taken primarily based on the teaching of "the divine Apostle Paul," according to which a second marriage was permitted, but only after the death of one of the spouses (cf. Rom. 7: 3; 1 Cor. 7: 39).

The neo-testamentary texts of the divine Apostle Paul, invoked as testimony both by the 1st canon of the Synod of Laodicea and by Empress

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[53] Ibidem, p. 49.

[54] Ibidem, p. 51.

[55] Ibidem, p. 168.

[56] Canon 1 of the Council of Laodicea, in: G. A. Rhali, M. Potli: *The Syntagma of the Holy and Divine Canons* [The Athenian Syntagma], vol. III. Athens 1853, p. 171.

[57] G. A. Rhali, M. Potli: *The Syntagma…*, vol. III, p. 23.

[58] L. Stan: "Commentary on Apostolic Canon 17." In: *Canoanele Bisericii Ortodoxe. Note şi comentarii* (*Canons of the Orthodox Church. Notes and Commentaries*). Ed. I. N. Floca. Sibiu 1991, p. 17, no. 7.

Irene in her Imperial Constitution (Novel 2), show us that the Church also allowed remarriage, that is, the second marriage.

In the 3rd century, two schismatic presbyters, the Novatus of Carthage and the Novatian of Rome, founded a sectarian group known as the Novatians or Cathars (Κάταρους), that is the 'pure ones'. For reasons of excessive rigorism, the Cathars or Novatians also refused — among other things — any relationship with "those married a second time [διγάμοις]" (can. 8 Sin. I ec.).[59]

For this reason, the Fathers of the First Ecumenical Council decided that members of this schismatic group who wished to return "to the Catholic and Apostolic Church [καδολικῆ καὶ ἀποστολικῆ ἐκκλησία], […] should confess in writing that they will follow her teaching, and that they will also have communion with those who are married a second time" (can. 8 Sin. I ec.).[60]

From the text of Canon 8 of the First Ecumenical Council it is clear, therefore, that, following the Apostolic teaching (cf. Rom. 7:3; I Cor. 7:39), the early Church admitted — by *oikonomia* second marriage, which was to be recognized not only by the Fathers of the Synod of Laodicea and the Byzantine legislation, but also by the Constantinopolitan Council of 920 and the Pan-Orthodox Council of Crete[61] of 2016.

Known as "Holy and Great Council" (Ἁγίας και Μεγάλης Συνόδου), this Pan-Orthodox Council decreed among other things that "a marriage that is not completely dissolved or annulled and a third marriage constitute absolute impediments to entering into marriage, according to Orthodox canonical tradition [Ὀρθοδόξον κανονικήν παράδοσιν], which categorically condemns bigamy and a fourth marriage" (II, 2).[62]

Thus, with regard to second and third marriages, the 2016 Pan-Orthodox Council in fact reaffirmed the decisions of the Constantinopolitan Council of 920, and it condemned only a *fourth marriage*, and as was only natural, it also specified that a *pre-existing third marriage* constitutes an absolute impediment to entering into another marriage.

We also have to underline the fact that, according to the text of the decisions of this Holy and Great Council, "a civil marriage between a man and a woman registered in accordance with the law lacks sacramental character, since it is a simple legalized cohabitation recognized

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[59] G. A. Rhali, M. Potli: *The Syntagma…*, vol. II. Athens 1852, p. 133.

[60] Ibidem.

[61] About this Council and its decisions, see N. V. Dură: "Decisions of the 'Holy and Great Council', Held in Crete (Greece, June 16—26, 2016), on Marriage." *Teologia* 3 (2019), pp. 39—55.

[62] *Holy and Great Council Pentecost 2016, The Sacrament of Marriage and its Impediments*, https://www.holycouncil.org/marriage [accessed 14.01.2023].

by the State, different from a marriage blessed by God and the Church" (I, 9).[63] Hence the exhortation of the Synod of Crete (Greece) that "the members of the Church who contract a civil marriage ought to […] understand the value of the sacrament of marriage and the blessings connected with it" (I, 9).[64]

Until the epoch of Emperor Leo VI the Wise (866—912), the Roman civil marriage continued to take place in three ways, namely, by verbal consent, by written contract, and by religious marriage. But only a civil marriage contracted in a Church in front of the lawyer of the Church (*ekdikos*) and in the presence of witnesses (cf. Novel 74 of Emperor Justinian), was recognized both by the Church and by the Byzantine State as *iustas nuptias* ('legal marriage') (*Justiniani Institutiones*, lb. I, 10).

The procedure for concluding the marriage according to the provisions of the *ius civile romanum* continued until 893, when Emperor Leo VI the Macedonian ordered "the obligation to consecrate marriage for all citizens of the state,"[65] and imposed the obligation of receiving the Sacrament of Marriage with the Holy Eucharist,[66] without which the civil marriage was not valid.

It is also known that "until the ninth century, the Church did not know any rite of marriage separate from the eucharistic Liturgy."[67] However, the Emperor Leo VI the Wise was the one who decreed that "a marriage is not valid without the holy blessing (ἄνευ τῆς ἱερὰς Εὐλογίας)" (Novel 89).[68] And, in the Church, his decision has still the force of a *ius cogens*.

In the same imperial constitution, the Emperor Leo VI the Wise (ὁ σοφός) mentioned that, over the centuries, "[…] marriage was per-

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[63] Ibidem.

[64] Ibidem.

[65] A. Kalligeris: *Căsătoria de la Taină…*, p. 116.

[66] For more information, see N. V. Dură: "Rânduieli şi norme canonice privind administrarea Sfintei Euharistii [Canonical ordinances and norms regarding the administration of the Holy Eucharist]." *Ortodoxia* 1 (1981), pp. 73—94; N. V. Dură: "Dispoziţii şi norme canonice privind săvârşirea Sfintei Liturghii [Provisions and canonical norms regarding the celebration of the Holy Mass]." *Ortodoxia* 1 (1981), pp. 73—94; C. Mititelu: "Rânduieli şi norme canonice privind Sfânta Euharistie. Consideraţii de doctrină canonică [Canonical rules and regulations regarding the Holy Eucharist. Considerations of canonical doctrine]." In: *Dimensiunea penitenţială şi euharistică a vieţii creştine* [The penitential and eucharistic dimension of Christian life]. Ed. G. Petraru, L. Petcu. Iaşi 2014, pp. 271—293; C. Mititelu: "The celebrant of the Holy Sacrament of the Eucharist. Rules and canonical norms of the Orthodox Church." *Annales Canonici* 10 (2014), pp. 135—148.

[67] J. Meyendorff: *Marriage an Orthodox Perspective*. 3rd edn. New York 2000, p. 24.

[68] C. A. Spulber: *Les Novelles de Léon le Sage: Traduction — Histoire*. Cernăuţi 1934, p. 279.

formed without prayers and Holy Gifts,"[69] that is, without the administration of the Holy Sacrament of the Eucharist, hence his order that any civil marriage "had to be confirmed by the intervention of the holy blessing,"[70] because, "where to the marriage candidates this institution seemed inappropriate,"[71] that is without the administration of the Holy Sacrament of Marriage, "their marriage is not valid…" (Novel 89).[72]

Therefore, according to this provision of the Imperial Constitution of Leo the Wise, *alias* Novel 89, a civil marriage would not be valid unless it was followed by a religious marriage, accompanied by the Holy Sacrament of Marriage.

In another imperial constitution the said emperor provided that "those who marry for the third time [τούς εἰς τριγαμίαν] are liable to the punishment provided by the holy canon [τοῦ ἱεροῦ κανόνος]" (Novel 90).[73]

The prohibition of the third marriage had also been provided by the Empress Irene (797—802) in one of her imperial constitutions, namely Novel 28.[74] But, as it is known, even Empress Irene, "the first female ruler of the Byzantine Empire,"[75] had to accept the second marriage of his son, Constantine VI. But, in the eyes of the Byzantines, this second marriage was an "adulterous marriage,"[76] that determined the people to proclaim him "illegitimate."[77]

In Byzantium, this rigorist attitude towards second and third marriages, cultivated by the monastic milieu of the time, prevailed during the pontificate of the Patriarch Nikephoros the Confessor (ca. 758—828), whose canons — made up of the decisions of the Constantinopolitan Synods presided over by him — stipulated that "he who marries a second time [ὁ δίγαμος] is not crowned, but is also given the *epitimia* of not receiving the Holy Eucharist for two years; and he who marries a third time, five years" (can. 2 St. Nikephoros the Confessor).[78]

Therefore, according to the decision of a synod presided over by Patriarch Nikephoros of Constantinople, second and third marriages were allowed only by *oikonomia*, since those who entered into them

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[69] Ibidem, p. 280.
[70] Ibidem.
[71] Ibidem.
[72] Ibidem.
[73] Ibidem, p. 281.
[74] See P. Zepos, J. Zepi: *Ius graecoromanum*, vol. I. Athenis 1931, p. 49.
[75] *Empress Irene of Athens — The first female ruler of the Byzantine Empire*, https://www.historyofroyalwomen.com/byzantine-empire/empress-irene-athens-first-female-ruler-byzantine-empire [accessed 4.12.2022].
[76] Ibidem.
[77] Ibidem.
[78] G. A. Rhali, M. Potli: *The Syntagma…*, vol. IV. Athens 1854, p. 427.

were subject to the *epitimia* of not receiving the Holy Eucharist for a period of time.

This rigorous synodal decision was reaffirmed in 996 by Patriarch Sisinnius II of Constantinople (996—998),[79] although a synod/council held in Constantinople in 920 had allowed both second and third marriages under the well-known *Tomos of Union* (Ο Τομος τῆς Εηωςεῶς),[80] but categorically forbade the fourth marriage.

Concerning the remarriage, the Emperor Leo the Wise stated that he "did not want to agree with the canon law, because he did not punish the one who concluded the second marriage,"[81] but "those who get married for the third time must undergo the punishment of the holy canon" (Novel 90),[82] or, according to the statement in the Latin manuscripts of this Novel (90), *qui testium matrimonium contrahunt, sacri canoni poenae obnoxii sunt*,[83] that is, those who get married for the third time will be punished by the holy canons.

Undoubtedly, this express reference to the canonical legislation of the Ecumenical Church of the first millennium, by the Emperor Leo the Wise, confirms the fact that, *in illo tempore*, the "holy canons" were "another source of law that Emperor Leo VI used in order to draft his legislation."[84]

One of the Holy Canons which provided for the punishment of one who entered into a second marriage was Canon 7 of the Synod of Neocaesarea, which assembled in 315. Indeed, according to the provisions of this canon, "a second marriage requires repentance [μετάνοιαν]"[85] (can. 7 Neocaesarea), or in the terms of the Byzantine canonists, "bigamy entails punishment [ἐπιτίμίον]."[86]

In the spirit of the provision of principle enunciated by this Synod in 315, other Fathers of the Church also provided *epitimias* accompanied by acts of repentance for those who marry a second time (cf. can. 4 St. Basil the Great; can. 19 St. John the Faster, etc.).

The Emperor Leo VI declared also that he did not know the reason why "the civil law did not seek to agree with the judgment of the Holy

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[79] "The Tomos of the Patriarch Sisinnius II (996)." In G. A. Rhali, M. Potli: *The Syntagma…*, vol. V. Athens 1855, pp. 11—19.

[80] "Tomos of the Union." In: G. A. Rhali, M. Potli: *The Syntagma…*, vol. V, pp. 4—10.

[81] C. A. Spulber: *Les Novelles de Léon…*, p. 281.

[82] Ibidem.

[83] Ibidem, p. 280, note 1.

[84] Ibidem, p. 78.

[85] G. A. Rhali, M. Potli: *The Syntagma…*, vol. III, p. 80.

[86] J. Zonara: "The comment to the canon 7 of the Neocaesarea Council." In: G. A. Rhali, M. Potli: *The Syntagma…*, vol. III, p. 80.

Ghost,"[87] that is with the canons enacted under the assistance of the Holy Ghost as regards the canonical impediments to marriage, and, therefore, he "gave up punishing those who were not satisfied with the second marriage,"[88] but he admitted that they "had to undergo the punishment provided by the holy canon [τοῦ ἱεροῦ κανόνος] in this regard."[89]

Although Leo the Wise condemned the third marriage, however, he admitted it by *oikonomia* (κὰτα οικονομίαν). Moreover, the emperor's decision regarding the remarriage was reaffirmed by the famous *Tomos Unionis* of 920, and then by the novels on polygamy of Emperor Constantine VII Porphyrogenitus (913—959).

But, as it is known, just the Emperor Leo VI transgressed the provisions of the holy canons of the Church, since he himself married for the fourth time in order to legitimize his son and heir made with Zoe Karbonopsina. But, for this transgression of the Church laws (canons), he was *aposteriori* condemned by the Fathers of the Holy Synod held in Constantinople in the year 920, under the presidency of the ecumenical patriarch Nicholas. And, by the famous "Ὁ Τομος της Ἑνωσεων"[90] of this Synod, the second and the third marriage were admitted by the Church *κατα οἰκονομίαν* (by *oikonomia*,[91] accompanied by the acts of repentance, but it was categorically interdicted the fourth marriage (tethragamy).

According to the text of this synodical edict of 920, that was considered "not only a Church canon, but also a law of the state regarding successive marriages,"[92] all the penitential measures were taken in order to be observed "the Church tradition [τὴν ἐκκλησιασωκὴν παράδοσις] and the teaching of the Holy Fathers [τὴν διδασκαλίαν τὼν Ἁγίων Πατέρων]."[93]

Also in the 10th century were held other Constantinopolitan synods, like the one held in the year 996 under the presidency of patriarch Sisinnius II,[94] that took also important decisions regarding the second and third marriage.

A Byzantine monk of the 10th century — who placed his Collection of penitential canons under the name of the Constantinopolitan Patriarch John the Faster (582—595) — stated that, according to the 'custom' (συνήθειαν) held by the Church, those who "are married three times

[87] P. Noailles, A. Dain: *Les Novelles de Léon VI le Sage*. Paris 1944, p. 298.

[88] Ibidem.

[89] Ibidem.

[90] G. A. Rhali, M. Potli: *The Syntagma*..., vol. IV, pp. 4—10.

[91] See C. Mititelu: "The Oikonomia and its application in the See of the Confession." *Analecta Cracoviensia* 51 (2019), pp. 313—341.

[92] K. Nikolaou: *The Byzantines between Civil and Sacramental Marriage*, https://journals.openedition.org/bchmc/285 [accessed 14.09.2022].

[93] G. A. Rhali, M. Potli: *The Syntagma*..., vol. V, pp. 9—10.

[94] Ibidem, pp. 11—19.

[τρίγάμων] must be excommunicated five years…,"[95] but the third marriage is not to be dissolved if the spouses "have not had children from the previous marriages [τῶν προτέρων γάμων]" (can. 19 St. John the Faster).[96]

Therefore, even a monk of that epoch (10th century) considered that the third marriage did not have to be dissolved if the spouses have no children from the previsions marriages, but the spouses have to incur spiritual punishment (excommunication) for five years.

Concerning the remarriage of the woman, Leo the Wise alluded — in his imperial constitution (Novel 90) — to a provision found in the Emperor Justinian's law (cf. *Codex* lb. V, 9, 9), which had been repealed by the Emperor Basil the Macedonian in his *Prohiron* published in 870 (lb. IV, 25). It is in fact about the remarriage of the woman, and according to the Code of Justinian, which contains laws enacted by the Roman emperors between the years 117—553 AD, and that it had two editions (in 529 and 533), "[…] all the property which the woman has received from her husband as well as that which has acquired (in addition) or shall acquire, shall be placed under a lien to the children (of that marriage),"[97] and, in the case that this mother "[…] enter into any contract [*contractum aliquem*]"[98] of marriage, the "[…] said woman, who remarries,"[99] shall not claim her right for the party to the property "[…] as that of the children born [*liberis geniti*] from said marriage or that of the grandsons and granddaughters born of these children" (*Codex Justinian* lb. V, 9, 9).[100]

Therefore, according to the text of the imperial constitution enacted at Constantinople in the year 439 by the Emperors Gratian, Valentinian, and Theodosius, a remarried woman had to a lesser extent the right to the property than the children born from the former marriage.

The Emperor Leo VI the Wise's attitude regarding the compulsory nature of religious marriage was perceived by some Eastern theologians of our days as an approach "[…] to the secularization of the Sacrament of Marriage,"[101] because the Church would have had to "create another sacralization of marriage, independent of the Sacrament of the Holy Eucharist, depending on the future spouses, if they were worthy to receive it. This was a real need — said an Orthodox theologian — because, before

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[95] G. A. Rhali, M. Potli: *The Syntagma*…, vol. IV, p. 438.

[96] Ibidem.

[97] *The Codex of Justinian, A New Annotated Translation, with Parallel Latin and Greek Text*, vol. II. Ed. B. W. Frier. Trans. F. H. Blume. Cambridge 2016, p. 1155.

[98] Ibidem.

[99] Ibidem.

[100] Ibidem.

[101] A. Kalligeris: *Căsătoria de la Taină*…, p. 126.

Leo's decision, a citizen could marry the second or third time,"[102] because although "these marriages were not acknowledged by the Church, they were legal."[103]

According to the same theologians, the so-called secularization of the Sacrament of Marriage was the one that created "the need to break the Sacrament of Marriage from that of the Holy Eucharist, a situation that was consolidated in the 16th century."[104]

But even though the Emperor Leo VI married four times, no one could say that the secularization of the Sacrament of Marriage was initiated or cultivated by this emperor. On the contrary, the emperor Leo VI proved to be a person who respected the priests of the Church, and "the prayers of the priest."[105]

Moreover, we have also to take into consideration the fact that, among other things, both the famous Byzantine canonists, Theodore Balsamon (12th century) and Constantine Harmenopoulos (1320—circa 1385), have invoked the authority of the imperial Constitutions (Novels) promulgated by Leo VI the Wise.[106] And last but not least, we must bear in our minds that, even in the Occident, "some scholars did not hesitate to give force of law to the Novels of the Emperor Leo."[107]

I would also like to mention the fact that the Byzantine Emperor Alexios I was the one who — by Imperial Decree no. 22 of 1084 AD — acknowledged the same legal status of the marriage for slaves, who had in *ius divinum*, both natural and positive, the legal basis for their liberty.[108]

Certainly, this imperial decree was another clear acknowledgement not only about the right of the slaves to Christian marriage, but also about the 'gift of liberty' (*libertatis dationem*) determined by "the modern spirit of humanity [*nova humanitatis ratione*],"[109] which was

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[102] Ibidem, pp. 126—127.

[103] Ibidem, p. 127.

[104] Ibidem.

[105] *Roman law in the later Roman Empire: Byzantine guilds, professional and commercial; ordinances of Leo VI, c. 895 from the Book of the Eparch*. Ed. and trans. E. H. Freshfield. Cambridge 1938, p. 4.

[106] J. A. B. Mortreuil: *Histoire du droit byzantin ou du droit romain dans l'empire d'Orient, depuis la mort de Justinien jusqu'à la prise de Constantinople en 1453*, vol. II. Paris 1844, p. 324.

[107] Ibidem, p. 328.

[108] C. Mititelu: "Dreptul natural, ca temei al libertății sclavilor, în concepția lui Epifanie din Moirans (1644—1689) [Natural law, as legal basis for liberty of slaves, in the conception of Epiphanius of Moirans (1644—1689)]." *Revista de Teologie Sfântul Apostol Andrei* 1 (2012), pp. 282—293.

[109] *Justiniani Institutiones*, lb. I, VI, 2.

expressly referred to by the great Christian legislator, Emperor Justinian, in his legislation[110] concerning the human rights and their universality.[111]

Among other things, in one of his imperial Constitutions (cf. *Codex Justininanus*, 7, 7, 1) the Emperor Justinian asserted that "cheating the slave of his freedom [*libertate servum defraudari*]"[112] is "a shocking situation" (*Justiniani Institutiones*, lb. II, 7, 4).[113] Therefore, he decided to remedy that situation by his "pronouncement [*Constitutionem*]" (*Justiniani Institutiones*, lb. II, 7, 4).[114]

3. Marriage as the Sacrament of the Church and its ontological relationship with the Holy Eucharist

It was said that "a sacrament is a *passage* to true life; it is man's salvation. It is an open door into true, unadulterated humanity."[115] And one of these Holy Sacraments of the Church is the Holy Sacrament of Marriage, that, in our Lord Jesus Christ's times, has been perceived only as a contract or as a legal commitment. But he was the One who elevated that kind of marriage to the status of Sacrament of the Church (cf. Eph 5:32), or — as stated by the Theology of the Orthodox Church — at the rank of Sacrament of the Kingdom of God, which the Gospel compares to "a wedding feast, which fulfills the Old Testament prophetic visions of a wedding between God and Israel, the elected people."[116]

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[110] C. Mititelu: "The legislation of emperor Justinian (527—565) and its reception in the Carpathian-Danubian-Pontic space." *Analecta Cracoviensia* 48 (2016), pp. 383—397.

[111] N. V. Dură, C. Mititelu: "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*, vol. I, no. 4. Galați 2012, pp. 103—127; N. V. Dură: "Drepturile şi libertățile omului în gândirea juridică europeană. De la *Justiniani Institutiones* la *Tratatul instituind o Constituție pentru Europa* [Human rights and freedoms in European legal thinking. From *Justiniani Institutiones* to *The Treaty establishing a Constitution for Europe*]." *Analele Universității Ovidius*. Series: *Drept şi Ştiințe Administrative* 1 (2006), pp. 129—151.

[112] *Justinian's Institutes*, pp. 64—65.

[113] Ibidem, p. 65.

[114] Ibidem, pp. 54—65.

[115] J. Meyendorff: *Marriage…*, p. 20.

[116] Ibidem, p. 19.

Over the centuries, in the theological literature there has been a debate on whether there is an ontological (existential) relationship between the Sacrament of Marriage and the Holy Eucharist, through which the bride and groom become "members of the Body of Christ."[117]

If we go back to the testimonies left by the first Christian writers and by the Church Fathers, we notice that they stated that the Sacrament of Marriage, *ordained by the Church*, was "confirmed by the Eucharist" (*confirmat oblatio*),[118] where all the Sacraments of the Church are fulfilled because — as St. Nicholas Cabasilas stated — only in this Sacrament "we become *flesh of His flesh and bones of His bones*" (Gen 2:23).[119] Hence the justified assertion that "many confusions and misunderstandings concerning marriage in our contemporary Orthodox practice would be easily eliminated if the original connection between marriage and the Eucharist were restored."[120]

Nevertheless, in order to better understand wherefore the Byzantine law — prior to Leo the Wise — did not observe and apply the provisions of canon law on religious marriage, we have to go *ad fontes*, that is to the collections of Byzantine law. For example, in *Ecloga* — a collection of compilations of 'summarily' (ἐν σῦντομοι) selected legislation from Emperor Justinian's body of laws (*Code*, *Institutions*, *Digests*, and *Novels*) — its authors, namely Emperor Leo III Isaurus's jurists, wanted to specify that "they have changed them in a more human sense [φιλανθρωπότερον],"[121] that is, in the spirit of a humanism of Christian origin.

Indeed, in the *Proimion* (Introduction) of this Code of Byzantine Laws, called by Byzantines Ἐκλογὴ τῶν νομῶν (Collection of laws), hence its denomination of *Ecloga*, it is stated that "Our God [Θεός ἡμων], the Master and Creator of all things, created man and adorned him with absolute freedom [τῇ αὐτεξουσίοτητι] and gave him the law [νόμον] as a help,"[122] which was seen also as an "instrument for our salvation [σωτηρίας]."[123] Therefore, according with the Byzantine approach, the laws (*nomoi*) enacted in the name of the Holy Trinity are instruments for the salvation of the man, and not only a sum of the legal norms which regulate —

[117] Ibidem, p. 21.

[118] Tertullian: *Ad Uxorem Libri Duo* [To his wife], II, 8, 6 https://www.tertullian.org/latin/ad_uxorem_2.htm [accessed 24.03.2023].

[119] N. Cabasilas: *Despre via a în Hristos* [On the Life in Christ]. Trans. T. Bodogae. Bucharest 2001, pp. 117—118.

[120] J. Meyendorff: *Marriage*..., pp. 22—23.

[121] This statement was included in the title of the Eclogue, see K. E. Zachariae Von Lingenthal, K. Eduard: *Collectio librorum iuris graeco-romani ineditorum*..., p. 10; C. A. Spulber: *L'Éclogue des Isauriens: texte-traduction, histoire*. Cernăuți 1929, p. 1.

[122] C. A. Spulber: *L'Éclogue des Isauriens*..., p. 2.

[123] Ibidem.

among other things — different juridical institutions, as for example the institution of marriage, based on *aliena instituta*, and not on a Christian teaching.

As far as the engagement (*sponsalia*/μνηστεία) was concerned, in *Ecloga* it was stated that, in case of Christians, engagements were made from an early age, that is, after the age of seven, with the affianced consent and with their parents and the relatives' consents (*Ecloga*, I, 1).[124]

According to *Ecloga*, "the betrothal of Christians is affected by the payment of earnest money or a bond for it, or in writing. And the contract can be made by children from seven years of age and older, by mutual consent of the betrothed and with the assent of their parents and guardians" (*Ecloga*, I, 1).[125]

In the same *Ecloga*, there are express references to 'dower' (προῖκα), to the 'dower contract' (τὴν ὑποχεσδεὶσαν ἀυτῶ προὶκα) (*Ecloga*, III, 1),[126] to "the second marriage" (*Ecloga* II, 11),[127] to "the legitimate marriage" from the point of view of *ius civile romanum* (*Ecloga* II, 9),[128] to the "indissoluble" nature of the marriage (*Ecloga*, II, 13)[129] etc.

This testimony of *Ecloga* also attests the fact that, in that time, that is in the years 738—741, when this collection of Byzantine laws was published, there were two kinds of marriages, that is, the marriage stipulated by contract — a legitimate marriage according to *ius civile* — and the religious marriage.

In one of his imperial constitution, Justinian asserted that "the greatest gift that God, in his celestial benevolence, has bestowed on mankind are priesthood and sovereignty,"[130] that these ones are the supreme authority of Byzantine state (the emperor and the patriarch), and that "the one serving on matters divine, and the other ruling over human affaire, and caring for them. Each proceeds — added the emperor Justinian — from one and the same authority, and regulates human life,"[131] that is derived from a common divine source, hence the imperious necessity

[124] C. Mititelu: "About Engagement (*Sponsalia*). From *Ius Romanum* to *Ius Civile* of Romania." *Technium Social Sciences Journal* 29 (2022), pp. 672—682; C. Mititelu: "Elemente de drept matrimonial în Pravilele româneşti, tipărite, din secolul al XVII-lea [Elements of matrimonial law in the Romanian Nomocanons printed in the 17th century]." *Dionysiana* 1 (2008), pp. 412—419.

[125] K. E. Zachariae Von Lingenthal, K. Eduard: *Collectio librorum iuris graeco-romani ineditorum…*, p. 14; C. A. Spulber: *L'Éclogue des Isauriens…*, p. 9.

[126] C. A. Spulber: *L'Éclogue des Isauriens…*, pp. 13—14.

[127] Ibidem, pp. 15—17.

[128] Ibidem, p. 19.

[129] Ibidem, p. 21.

[130] *The Novels of Justinian…*, p. 97.

[131] Ibidem.

that between two institutions, *recte* the imperial office (*imperium*) and the priesthood (*sarcedotium*), has to be "a satisfactory harmony" (Novel 6, *Preamble*).[132]

With such an opinion about the two main institutions of the Roman Empire, that is, the priesthood and the sovereignty, it is therefore unsurprising that the Emperor Justinian was considered to be the first Roman emperor who showed his "strong concern for the state of matrimony,"[133] and the one who recognized that "[…] antiquity was not very much concerned to make a distinction between first and second marriages" (Novel 22).[134] In fact, by his Novel 22, Justinian has not only "effectively Christianized and codified Roman marriage law,"[135] but, among other things, he protected "the interests of children in divorce"[136] and penalized "those who dissolve their marriage by mutual consent."[137]

Justinian was also the first Roman emperor who obliged "the members of respectable society (above the level of the peasantry and military rank-and-file) to have their marriages witnessed and registered at Church"[138] (cf. Novel 74). In other words, we could say that a marriage stipulated by contract acquired the legal effects only after it was witnessed and registered at a church. And, by such measures, Justinian created in fact a *reformed law* that made even the "divorce much harder."[139]

St. Theodore Studites (9th century) composed or revised an older text of the Prayer of the crowning of the brides and grooms, and thus he completed and imposed this prayer in the service of the Holy Wedding, that is, in the liturgical ritual of the Eastern Church. And thus, the Sacrament of the Wedding continued to be celebrated at every Sunday Mass as in the Apostolic age, and at the *crowning* of the bride and groom the priest read a prayer "before the whole people"[140] present at the Holy Mass.

At the end of the 9th century, the marriage blessed by the Church became a bearer of legal effects, as the Emperor Leo VI the Wise expressly provided in one of his imperial constitutions, *alias* Novel 89, as it was in fact provided in the *Epanagoge*,[141] or in accordance with its initial title,

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[132] Ibidem.
[133] Ibidem, p. 233.
[134] Ibidem.
[135] Ibidem, vol. II, p. 751, n. 1.
[136] Ibidem.
[137] Ibidem.
[138] Ibidem, vol. I, p. 523, n. 1.
[139] Ibidem, vol. II, p. 751, n. 1.
[140] Theodore Studites: *Letters*, I, 22. In: J. Meyendorff: *Marriage…*, p. 25.
[141] P. Zepos, J. Zepi: *Ius graecoromanum*. Athenis 1931, vol. 6.

Ἐπαναγωγη τοῦ νομου[142] ('The Restauration of the law'), that is, a collection of Byzantine laws published "between 884—886"[143] by the Emperors Leo and Alexander, sons of Basil I the Macedonian.

The two Byzantine emperors wanted — as the term *Epanagoge* tells us — to *restore* or re-enact laws that had been disregarded by the *Eclogue* of Emperor Leo II the Isaurian and his son Constantine V, who, by an imperial edict of 726, had declared persecution against icons.

In the *Epanagoge*, marriage is defined as "an alliance between a man [ἀνδρος] and a woman [γυναικὸς]"[144] and a "union [συνάφεια] for life" (lb. XVI, 1),[145] that is in the same terms used once by the famous Roman jurist Modestinus of the 2nd—3rd centuries AD. Indeed, for the Roman jurist, Modestinus, *Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communication* (Marriage is the union of a man and a woman, forming an association during their entire lives, and involving the common enjoyment of divine and human privileges) (Justinian, *Digesta*, lb. XXIII, 2, 1).[146]

In the same collection of Byzantine legislation (*Epanagoge*), it is stated that a marriage is made by blessing, and by crowning, or by agreement (lb. XVI, 1). From this statement, it can be understood that at that time, namely at the end of the 9th century, there were two forms of marriage, that is, the civil marriage, which was of contractual origin, and the religious marriage, with the crowning ceremony, to which St. Theodore Studites († 826) had made express reference in one of his epistles.

As mentioned above, Emperor Leo VI the Wise was the one who — in Novel 89, published immediately after the collection *Epanagoghii* (*Epanagoge*) — provided that a civil marriage did not have a legal effect, and, in fact, it was not a legal one without "the blessing [ἐλογίας],"[147] hence his order to observe "τοῦ γάμου τὰ πράγματα [marriage rules],"[148] and, as such, "marriages may be confirmed by the witness of a holy blessing"[149]; thus, "if the future spouses did not wish to complete their union in this

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[142] K. E. Zachariae Von Lingenthal, K. Eduard: *Collectio librorum iuris graeco-romani ineditorum…*, p. 53.

[143] I. N. Floca: *Drept canonic ortodox. Legislație și administrație bisericească* [Orthodox canon law. Legislation and church administration], vol. I. Bucharest 1990, p. 103.

[144] K. E. Zachariae Von Lingenthal, K. Eduard: *Collectio librorum iuris graeco-romani ineditorum…*, p. 106.

[145] Ibidem.

[146] *Justinian's Digest*, http://legalhistorysources.com/Law508/Roman%20Law/JustinianDigest.htm [accessed 22.01.2023].

[147] P. Noailles, A. Dain: *Les Novelles de Léon VI le Sage…*, pp. 294—295.

[148] Ibidem.

[149] Ibidem.

way from the beginning,"[150] that is, with the help of holy prayers, "their marriage is not valid and such cohabitation will not produce the effects of marriage."[151] In other words, without these *prayers* of the Church, civil marriage would not have any legal effect.

The text of Novel 89 of the Emperor Leo VI the Wise also reveals that his predecessors had failed to "impose a rigorous formality in connection with marriage,"[152] and that "they allowed them to be concluded without blessing [ἐλογίας]."[153] But, since "by God's grace, we have reached a higher and holier level of social life" (Novel 89),[154] that is, to enjoy the privilege of living in a society with eminently spiritual-religious values, the emperor considered it appropriate to order those civil marriages be confirmed by the *holy blessing* of the Church. Ignorance or non-compliance with this law therefore meant that the respective civil marriage was not considered a valid marriage, and, in fact, did not bear legal effects.

The Emperor Leo VI the Wise concluded the text of his imperial constitution, *alias* Novel 89, by warning the bride and groom that if "the worries of marriage [τοῦ γάμου τὰ πράγματα]"[155] were not to their liking, all they had to do was choose "celibacy [ἀγαμία],"[156] and in this way they will not "violate the rules of marriage either."[157] Therefore, Leo VI also recommended the celibacy as a moral style of life.

In his Novel 89, he acknowledged that the civil marriage, concluded in accordance with the provisions of *ius conubii* (Gaius, *Institutiones*, lb. I, 56), is a *iustae nuptiae* ('legal marriage') only through the liturgical service of the Holy Crowning performed by the priests of the Church of Christ, hence the conclusion that only in this way a civil marriage concluded by *contract* is legally enforceable.

By the said constitution Leo VI the Wise contributed both to the formalization of the sacralization of marriage, and to its preparatory part, that is the Christian engagement,[158] called by *Epanagoge*, μνηστεία, that signify 'a remembrance' and 'a promise'(ἐπαγγελία) for the wedding and

[150] Ibidem.
[151] Ibidem, pp. 296—297.
[152] Ibidem, pp. 294—295.
[153] Ibidem.
[154] Ibidem.
[155] Ibidem.
[156] Ibidem.
[157] Ibidem.
[158] C. Mititelu: "Logodna şi Căsătoria în *Pravila* lui Andronachi Donici [Engagement and Marriage in Andronachi Donici's *Nomocanon*]." *Revista Națională de Drept* 10—12 (2019), pp. 110—118; C. Mititelu: "On the 'Concordat Marriage' and its Legal Regime. Considerations and Assessments." *Teologia* 1 (2022), pp. 59—60.

which could be concluded both ἐγγράφος and ἀγράρως,[159] that is, by a written act or orally (*Epanagoge*, XIV, 1).

By his constitution (Novel 89), the Emperor Leo IV the Wise contributed decisively to the acknowledgement of the practice of administering the Holy Sacrament of the Wedding during the Holy Eucharistic Service, and by this the communion with the Holy Sacraments, even if they were kept from a previous liturgy.

As a clear testimony about the initial connection of the Sacrament of the Wedding with the Holy Sacrament of the Eucharist remains the liturgical ritual, according to which the bride and groom who are not *worthy*, do not share the Holy Sacraments, but receive only "a common cup of wine blessed by the priest."[160]

Both the canonical tradition and the liturgical practice of the Eastern Church attest the fact that the Eucharist is a *seal* of marriage, which makes that "a non-Christian couple admitted into the Church through Baptism, Chrismation, and Communion"[161] was not to be considered "remarried," since "their joint reception of the Eucharist is the Christian fulfillment of a 'natural' marriage concluded outside the Church."[162]

The liturgical tradition of the Eastern Church of which St. Symeon, the Archbishop of Thessalonica,[163] gave testimony in the year 1420, confirms that the *priest* communed the bride and groom during the Holy Liturgy, when he says: "the Presanctified holy Things for the Holy. And all respond: One is Holy, One is Lord."[164]

The same Holy Father stated that "the priest then gives Communion to the bridal pair, if they are worthy. Indeed, they must be ready to receive Communion, so that their crowning be a worthy one and their marriage valid. For Holy Communion is the perfection of every sacrament and the seal of every mystery."[165]

It should also be mentioned that St. Symeon — as St. Theodore Studites (759—826) had previously done — that "those who get married must be worthy of Holy Communion; they must be united before God in a church, which is the house of God, […] where He is being offered to us and where He is seen in the midst of us."[166]

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[159] K. E. Zachariae Von Lingenthal, K. Eduard: *Collectio librorum iuris graeco-romani ineditorum…*, p. 102.

[160] J. Meyendorff: *Marriage…*, p. 28.

[161] Ibidem, p. 29.

[162] Ibidem.

[163] Symeon of Thessalonica: *Marriage and Holy Communion*. In: J. Meyendorff: *Marriage…*, p. 111.

[164] Ibidem.

[165] Ibidem.

[166] Ibidem, p. 112.

Finally, St. Symeon wrote that to "those who are not worthy of *Communio* […] the Divine Gifts are not given, but only the common cup, as a partial sanctification, as a sign of good fellowship and unity with God's blessing."[167]

Although this cup of communion is regarded as a *partial sanctification*, yet, in the perception and definition of Byzantine theology, it remained a clear sign of an accompaniment and union with God's blessing, which it was imposed by Byzantine state legislation at the turn of the 9th and 10th centuries as a binding legal act for civil marriage.

In lieu of conclusions

The religious marriage was a reality in all religions of the world since antiquity, when *lex divina* and *proti philosophia*,[168] born in the tabernacle of temples, coexisted, and contributed to developing the process of human knowledge about God and his things.

That in the antiquity *matrimonium* (marriage) had a pronounced religious nature is attested by various sacred texts on religious ceremonies that accompanied the act of officiating religious marriage in the temples of those religions that enjoyed the freedom of religion.[169]

Also, in order to highlight this reality from a legal point of view, in my study I made some references on the text of the Roman law (*iuris romanum*), that is studied even in China of our days, since Roman law confirms that the *pontiffs*, namely the servants of Roman temples, were not only those who performed the ritual of religious marriage by *confarreatio*, but also those who were entitled to dissolve it by *diffarreatio*, an

[167] Symeon of Thessalonica: *Marriage…*, p. 112.

[168] N. V. Dură: "From 'Proti Philosophia' to Nietzsche's thinking. Some considerations as philosophical knowledge is concerned." *Philosophical-Theological Review* 5 (2015), pp. 9—25.

[169] N. V. Dură: "The Right to Freedom of Religion during of Emperors Cyrus 'the Great' (559—529 BC) and Alexander 'the Great' (336—323 BC)." *Studii filosofice* 2 (2015), pp. 231—242; N. V. Dură, C. Mititelu: "The Freedom of Religion and the Right to Religious Freedom." In: *Conference on Political Sciences, Law, Finance, Economics & Tourism*. Vol. I. Albena 2014, pp. 831—838; C. Mititelu: "About the Right to the Freedom of Religion." In: *Rethinking Social Action. Core Values*. Eds. A. Sandu et al. Bologna 2015, pp. 833—838; C. Mititelu: "Jurisprudența Curții Europene privind dreptul la religie. Considerații și evaluări [The jurisprudence of the European Court on the Right to Religion. Considerations and assessments]." *Jurnalul Libertății de Conştiință* 2 (2022), pp. 168—187.

act which was also accompanied by a religious ceremony officiated by temple servants.

The transition from the marriage by *confarreatio* to the marriage as Sacrament (*Mistyrion*) happened in Cana of Galilee, when Our Lord Jesus Christ performed his first miracle, turning water into wine (John 2:1—11), hence our duty to get better acquainted with the theology of the religious marriage established by the New Law of our Savior Jesus Christ, who raised it to the rank of Sacrament, whereby God's grace is shared with those who are accompanied through marriage, namely the groom and bride (male and female), by the blessing of the priests.

This sacramental act, which from the beginning of the Church was accompanied by the administration of the Holy Sacrament of the Eucharist, led to an increased *sacralization* of marriage. Therefore, it is noteworthy that the dissociation of the Sacrament of Marriage from the Sacrament of the Eucharist cannot be considered only as a result of the *secularization* of the theology of religious marriage, but also of the consequence of the impact of the secular values, including of some of the provisions of the laws of the Roman Empire (the West and the East), on Christians over the centuries.

In my study, special reference was also made to the initial ontological relationship between the Holy Sacrament (*Mistyrion*) of the Marriage and the Holy Eucharist, because only the true and authentic knowledge of this connection can help us eliminate some confusion and misunderstandings about the Sacrament of Marriage, that continues unfortunately to circulate even among some theologians of our days.

In order to bring better clarification in this regard, we referred the texts of some classical Byzantine theologians (e.g. St. Theodore Studites and St. Symeon of Thessalonica) and to the texts of some collections of Byzantine legislation, such as that of the Emperor Justinian, the *Eclogue*, the *Epanagoge*, and the Novels of Leo the Wise, which revealed that only through a return *ad fontes*, that is, to the sources, and through an interdisciplinary approach — theological, canonical, and legal — can one really bring a concrete contribution to the knowledge of the evolutionary process of the transition from marriage by *confarreatio* to marriage as Sacrament (Μυστήριον/*Sacramentum*), present both in the Eastern Orthodox Church (cf. can. 51 ap.), and in the Roman Catholic Church (cf. can. 1055 of *Codex Iuris Canonici*).

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Nicolae Dură

Sur le mariage religieux
Du mariage par *confarreatio* au mariage en tant que sacrement (μυστήριον/*sacramentum*)

Résumé

Le mariage, l'une des institutions les plus anciennes de l'humanité, était initialement réglementé par la loi divine (tant naturelle que positive), d'où son caractère religieux, que l'on retrouve également dans le mariage romain connu sous le nom de mariage par *confarreatio*.

Conformément aux dispositions du *ius civile*, un homme et une femme contractaient le mariage par le biais d'un accord. Cependant, en vertu d'une constitution impériale proclamée par l'empereur Justinien, seul le mariage civil conclu sous la forme d'un contrat écrit dans l'Église est considéré comme *iustae nuptiae* (mariage légal) (cf. Novelle 74).

Le mariage en tant qu'institution, assuré par le *ius civile*, a évolué en un acte sacramentel de mariage lorsqu'il a été élevé au rang de Saint Sacrement de l'Église par notre Sauveur Jésus-Christ à Cana en Galilée (cf. Jn 2: 1-11). Depuis l'époque apostolique, le sacrement du mariage (*mystirion*) était accompagné de la réception de la Très Sainte Eucharistie par le marié et la mariée, c'est-à-dire par l'homme et la femme. Cet acte sacramentel de mariage était réglementé par le droit ecclésiastique, c'est-à-dire le droit canonique des Églises orientales et occidentales (cf. canon 3 du Concile in Trullo).

À partir de 893, les sujets de l'empereur byzantin devaient recevoir le sacrement du mariage après avoir contracté le mariage civil (cf. Novelle 89 de l'empereur Léon le Sage). Ce n'est qu'ainsi que le mariage pouvait avoir des effets juridiques.

Mots-clés: mariage religieux et civil, droit romain, droit byzantin, droit canonique, théologie chrétienne du mariage

Nicolae Dură

Sul matrimonio religioso
Dal matrimonio per *confarreatio* al matrimonio come Sacramento (μυστήριον/*sacramentum*)

Sommario

Il matrimonio, una delle istituzioni più antiche dell'umanità, era inizialmente regolato dal diritto divino (sia naturale che positivo), da cui deriva il suo carattere religioso, che si può ritrovare anche nel matrimonio romano noto come matrimonio per *confarreatio*.

Secondo le disposizioni dello *ius civile*, l'uomo e la donna contrattavano il matrimonio attraverso un accordo. Tuttavia, in virtù della costituzione imperiale proclamata dall'imperatore Giustiniano, solo il matrimonio civile contratto in forma scritta nella Chiesa è considerato *iustas nuptias* (matrimonio legale) (cfr. Novella 74).

Il matrimonio come istituzione, garantito dallo *ius civile*, è evoluto in un atto sacramentale quando è stato elevato a rango di Santo Sacramento della Chiesa dal nostro Salvatore Gesù Cristo alle nozze di Cana di Galilea (cfr. Gv 2,1-11). Fin dai tempi apostolici, il sacramento del matrimonio (*mistyrion*) è stato accompagnato dalla somministrazione e dalla ricezione della Santissima Eucaristia da parte dello sposo e della sposa, ossia dell'uomo e della donna. Questo atto sacramentale del matrimonio era regolato dal diritto ecclesiastico, ovvero dal diritto canonico delle Chiese orientali e occidentali (cfr. can. 3 del Concilio in Trullo).

Dal 893, i sudditi dell'imperatore bizantino dovevano ricevere il sacramento del matrimonio dopo aver contratto il matrimonio civile (cfr. novella 89 dell'imperatore Leone il Saggio). Solo in questo modo il matrimonio poteva avere effetti legali.

Parole chiave: matrimonio religioso e civile, diritto romano, diritto bizantino, diritto canonico, teologia cristiana del matrimonio