Derecho, Cultura y Sociedad en la Antigüedad Tardía

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«Marriage and Divorce in the Late Antique Legal Practice and Legislation»
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Marriage and Divorce in the Late Antique
Legal Practice and Legislation*

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I. INTRODUCTION

The purpose of the study I have been conducting in the past years – designed once in a much too ambitious attempt – is to trace the level of legal consciousness among «average» people in the Late Antiquity. Obviously the chief research field in such a survey would be the Dioskoros’ papers. These texts and their contemporary counterparts were created in a seemingly unambiguous legal environment – the realm of codified law, which in Justinian’s stern attempt was to be not only exclusive, and universally binding but also commonly known and absorbed. Such a research in a way turns to one of the primary questions of juristic papyrology, which we may put using the vulgarized Mitteis’ terms: how much of a Reichsrecht was present in Volksrecht (or vice versa, if you prefer). As it would be virtually impossible to deal with all the legal aspects of the late antique papyri, however, a selection was necessary. I have decided thus to narrow my study down to these papyri which, prima facie, seem to deal with these everyday matters in which one would expect the closest interrelation between the ‘real life’ and the established legal rules. The present paper shall be devoted to a general overview of the papyri illustrating marriage – especially its formation

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1 This paper, first delivered, at the 26th International Congress of Papyrology in Geneva in August 2010 is an abridged version of a chapter to be published in a book on Dioskoros and legal consciousness in the Late Antiquity I am presently writing. On the subject see the classical studies of J. Partsch (1911), V. Arangio-Ruiz (1919) and A. Steinwenter (1946) as well as, more recently the article of P. van Minnen (2003) and my two essays concerning some aspects of the law of succession (Urbanik 2008) and ‘alternative dispute resolution’ in Late Antiquity (Urbanik 2007a) with literature. All the dates refer to C.E.
and termination.\textsuperscript{2} This is one of the spheres of human life where we may expect possible tensions between the legal rules and the everyday customs. Its examination during the times of Dioskoros – the well known poet and notary\textsuperscript{3} – has seemed particularly appealing: it was during Dioskoros’ lifetime that Justianian drastically reformed the marriage and divorce law introducing norms which were obviously discordant with the social expectations and the long-standing tradition of the liberty of marriage.\textsuperscript{4} Moreover, in a classical study on the application of Roman law in Egypt, Raphael Taubenschlag maintained that whereas the formation and dissolution of marriage in this epoch followed closely the Justinianic principles, the matrimonial property relations were governed rather by the ‘volksrechtlichen Grundsätzen’.\textsuperscript{5}

\section*{1.1. Roman marriage. The Classical Doctrine}

In order to re-examine this proposition we have to turn briefly to the original Roman construction of marriage; suffice it to recall that according to the view nowadays predominant (see n. 3), it was formed by the mere consent of the parties with no formalities involved. While the standard of free formation and dissolution of marriage is highly unpractical, as our sources show,\textsuperscript{6} and this is not a place to discuss the possible reasons thereof.\textsuperscript{7} However, in view of the analysis of the papyri that shall follow – it is worth recalling the groundbreaking idea on the subject expressed by Fritz Schulz. The German scholar identified as the motive for the marital freedom what he called ‘a purely humanistic idea of marriage as a union of two equal partners’.\textsuperscript{8} In this view, the right to divorce at will granted to both of the

\textsuperscript{2} The obvious works of reference for the topic – especially in regards to the legal standing of women, both in dogmatic legal sources and the papyri are the studies of Joëlle Beaucamp (Beaucamp 1990 § 21 & Beaucamp 1992 § 34-36) as well of Antii Arjava, (Arjava 1996, passim).


\textsuperscript{4} The most emblematic legal source on the subject is a the famous constitution of Alexander Severus which firmly restated that freedom of marriages and the freedom of their dissolution belongs to the Roman public order (cf. \textit{CJ. 8.38.2: Libera matrimonia esse antiquitus placuit. Ideoque pacta, ne liceret diverserete, non valere et stipulationes, quibus poenae inrogarentur ei qui divorcion fecisset, ratus non habebi constat. a. 223}). For the general overview see the classical works of Volterra (1941) and Volterra (1960-61) \textit{passim}, a \textit{summa} thereof: Volterra (1991) and my recent resume, Urbanik (2007b).

\textsuperscript{5} Taubenschlag (1929) 422-423; 436 and 440. A few years later he put it even more strongly «The practice concerning marital law is in a high degree influenced by Justinianic legislation», Taubenschlag (1940-41, 1959) 71.

\textsuperscript{6} Cf. e.g. D. 24.1.64 (Iavolenus); D. 23.2.33 (Marcellus); D. 24.2.3 (Paulus).

\textsuperscript{7} See Urbanik (2007b) 5712-5713 and n. 14.

\textsuperscript{8} See Schulz (1951) 103 but the idea was first expressed in his \textit{Principles} (Schulz [1936], chapter «Humanity», in part. 193-197.
spouses practically meant an attempt at levelling the position of the wife and the husband.

I.2. Limitation of Divorce

This classical position was gradually being limited by emperors since Constantine the Great. The imperial regulations greatly restricted the possibility to proceed with unilateral divorce. Justinian, however, went one step further. Not only did he sanction the far-going limitations on the unilateral divorce, re-enacting the previous constitutions with slight modifications, but also in the series of the three Novels (117 of 542, 127 of 548 and 134 of 556), practically banned consensual divorce.

I shall now try to briefly sketch the legal environment of marriage in the times corresponding to the life-span of Dioskoros and, later, attempt to check how much the known contemporary papyri may tell us about the actual applications of these norms.

II. THE FORMATION OF MARRIAGE AND THE FUNCTION OF DOWRY DEED

II.1. Justinianic Innovations

As recalled above, for the formation and existence of marriage the mere will of the parties, or reciprocal affection, was originally enough; the marital union lasted therefore until at least one of the spouses lost interest in being married. This principle was still reaffirmed by the Justinianic Codification and, later, in the Emperor’s first general reform of the marriage law: the Novel 22 (536). Yet – most probably sanctioning the social custom – little by little the growing legal importance of the dowry document was to disturb this picture.

A mere two years after the Codification, chapter 4 of the Novel 74 (published in the year 538) changed the classical position. Even if in its introduction (74.4 pr.) the lawmaker restated the original rule that marriage was made only by the will of the parties, immediately afterwards he imposed on persons of the rank of illustres the duty to make a dowry agreement. The Novel 74, the main

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9 See Urbanik (2007b) 5707-5708 with the literature in n. 5, and most recently in English Evan-Grubbs (1995) and a very comprehensible description of the changes in Bagnall (1987) 42-45.

10 A brief résumé of the principle may be found in Bax, 28.4.47 pr. and its scholonion oox ūći. It seems that the roots of the regulation may be sought in the disposition of Justinian’s predecessor: Cl. 5.4.23. By this notorious constitution Justin I allowed legitimate unions between members of the senatorial class and repentant women who had previously carried out infamous professions. Validity of marriage, however, depended on execution of a dowry document, on the Nov. 74, its probable context and novelty see my recent study: Urbanik (2011).
aim of which was to regulate the ways in which illegitimate children were to be made into rightful offspring, specifically laid down modality in which the document was to be executed: in a holy place, in front of three clerical witnesses and by a defensor ecclesiae (defender of the church). § 1 gave the standard format for such a document. Should the parties not follow the prescribed procedure, the church official was supposed to make a deed himself and deposit it with the acts of the church in question (§ 2). What is indeed surprising is the role of defensor ecclesiae. Not much could be said with certainty about this office as the legal corpus provides very little information about its competences.\footnote{See, e.g. Martroye (1923) and Steinwenter (1958) 12.} In any case no other ‘notary duties’ of this office are attested either in normative or in legal practice sources.\footnote{This supposition is problematic as there is only one papyrus, a fragmentary P. Oxy. XXIV 2419 (6th cent.), which mentions this office, at any rate the ἐκκλησιακός seems to appear there in his regular functions, i.e. as the trial attorney of a church, see further Urbanik (2011) 34.}

A marriage contracted without a dotal agreement produced in this way was void. The very same norm was repeated and further précised in the chapter 4 of the Novel 117, dated to the year 542.\footnote{These principles are repeated in Bas. 28.4.47 with scholia.} It is the justification of the constitution that calls for the reader’s attention: the Emperor was apparently prompted to promulgate the regulation by a number of fictitious marriages. Justinian – defining himself as a lover of chastity – could obviously not permit such situation. We may observe that the legislator followed the good old tradition of Roman law-making in marital matters: he was only concerned with the morals of the upper classes. One is a bit surprised however: could we actually imagine that people of the highest ranks of the society would dispense of a property arrangement contracting marriage, a business involving impressive financial transfers? One is tempted to think that Justinianic reasoning is a pure invention, that in fact what the emperor did was nothing else but to give rank of a legal norm to the omnipresent legal practice. Let us remember this statement – I will come back to this point at the end of the present paper.

II.2. Marriage Settlements in the Papyri

There are only a very few extant matrimonial instruments datable to the period in question,\footnote{CPR I 30 = MChr. 290 (6th cent., Arsinoe) (another scrap of the frag. 1 of the same papyrus was published as SB XVI 12398 but it is not certain whether it belongs to the marital agreement); P. Flor. III 294 (6th cent., Antinoopolis); P. Nessana 18 (537, Nessana); P. Nessana 20 (538, Nessana); P. Michael. 42 a+b (Aphrodite, 30 Dec. 566); P. Cairo. Masp. III 67340 recto (written between 566-573, Antinoopolis, but reporting an act from the times of Justinian, cf. ll. 68-70 in which the parties take an oath on the imperial name); P. Cairo Masp. I 67006 verso (566-573 Antinoopolis); P. Lond. V 1710 (566-573, Antinoopolis) + to which SB XXII 15633 (= Kuehn Derecho Cultura y Sociedad.indd   262 16/4/14   13:04:46} none was made according to the Justinianic dispositions...
(actually neither do the literary sources confirm the application of these norms), moreover the execution of one of them actually post-dates the creation of marriage itself (P. Cairo Masp. III 67310). It is true that the texts in question do not record unions of persons belonging to the category of illustres. Yet their low number still surprises: it may only be explained by the random character of our finds. Let us briefly turn to the content of these papyri.

II.2.1. Dowry Clause

The best-preserved acts invariably contain a clause describing the constitution of dowry and handing over of bridal gifts. This aspect of the marriage document was studied almost a century ago by Gaetano Scherillo, who was certainly right in recognizing in the mention of isoproikon in P. Lond. V 1708 (Antinoopolis, 567/568) and CPR I 30 as well as of antiproikon in P. Flor. III 294, 74 (Aphrodite, 6th cent.), the direct influence of the Justinianic Novel 97 published as early as 539. The somewhat obscure calculations of the constitution aimed at equation of the dowry provided by the wife (or on her behalf) and the bridal gifts given to his consort by the husband.

A further application of the imperial law concerning the fate of the dowry and the property of the wife is perfectly evidenced in the well-known case of the imperial rescripts, P. Cairo Masp. I 67026 = 67027 and 67028. For a splendid discussion of these affairs one should consult the recent studies of Peter van Minnen (van Minnen 2003) and of Constantin Zuckerman (Zuckerman 2004). Let me just recall that the decrees reaffirmed the imperial law principles that any marriage gifts (or dowry) furnished by and for the first wife, as well as her personal property, should be devolved to her children and cannot be transferred to the second wife or her offspring.

II.2.2. Marital Obligations

The second important set of provisions in these documents – which for the sake of commodity, albeit not very adequately, we may call marriage agreements – are the resolutions of the spouses as to their mutual duties.

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15 Scherillo (1929-1930), passim. The scholar, ready in a juristic manner to categorize everything, seems to have sought way too elaborate distinction between various names of bridal gifts – for instance, he decided that hedna was a species of the medieval pretium pudicitiae.

16 P. Cairo Masp. I 67028 was at the centre of juristic analysis due to the fact that the draft of the rescript Dioskoros submitted to the imperial chancery cited a constitution of emperor Leo in a version not preserved in the Code, thus notably in breach of the decreed exclusiveness of the codification. See further van Minnen (2003), citing earlier literature but also the original study of Josef Partsch (Partsch 1911).
Invariably there is the husband’s resolution as to the maintenance of the wife\textsuperscript{17} to which the wife may respond with promises to live in the marital house and to obey the husband.\textsuperscript{18} Quite notably, there is no equivalent of these provisions in the normative sources. No imperial constitution or classical jurisprudence referring directly to marriage describes the marital duties of the consorts. This gap in the doctrine becomes even more curious, as it is counterbalanced by a strong preoccupation of the law-giver for issues totally absent from the sources of legal practice: a great concern for incestuous (in the broadest possible sense) marriages, unions of people of unequal rank, second marriage and the problem of mourning,\textsuperscript{19} or marriage between ward and her guardian. Contrariwise, what seems to worry the marrying couples, \textit{i.e.} the everyday life matters and a warranty for repayment of the dowry, does not really interest the legislator. No source in the legal corpus matches a skilful mechanism devised to secure dowry rights, found in the Dioscorian texts \textit{P. Cairo Masp.} II 67158 and \textit{P. Michael}. 42 a + b. In the former case, the marriage settlement was dressed in form of a partnership.\textsuperscript{20} The latter specimen is a curious pair of deeds by which first the groom and his parents secured the bride’s dowry by conveying to her 10 \textit{arurae} (even if the document nominally calls this act «a mortgage», the clauses employed clearly show that it produced an effective transfer of ownership of the estate), and then, the bride leased the land back to the her in-laws for the rent equaling the tax due on the field.

III. THE TERMINATION\textsuperscript{21}

III.1. Letter of Divorce

Since \textit{Theodosian Novel} 12, originally published in 439 and later incorporated into the Justinianic legal order under C. 5.17.8,\textsuperscript{22} a written letter of divorce, \textit{repudium}, became compulsory. The justification of the normative stated that making dissolution of marriage more difficult was of benefit to the children. One could doubt whether a duty to put a statement of divorce in writing would really prevent from doing it a party determined in his or her

\textsuperscript{17} See, \textit{e.g.} CPR I 30, 16-19; \textit{P. Cairo Masp.} III 67340 r. ll. 32-34; \textit{P. Cairo Masp.} III 67310, ll. 10-12.
\textsuperscript{18} See, \textit{e.g.} CPR I 30, 19-23; \textit{P. Cairo Masp.} III 67340 r. 43-45; \textit{P. Lond.} V 1711, 35-40.
\textsuperscript{19} The parties to the only act, \textit{P. Cairo Masp.} III 67340 recto, which documents a second marriage, do not show any concern for that issue, apart from securing maintenance of Euprepeia’s son born to her by the former husband.
\textsuperscript{20} On this case, see further Urbanik (2012).
\textsuperscript{21} See generally on the subject, Merklein (1967) and Arjava (1988).
\textsuperscript{22} C. 5.17.8: Imperatores Theodosius, Valentinianus: \textit{Consensu licta matrimonia posse contrah, contracta non nisi misso repudio solvi praeципimus. Solutionem etenim matrimonii difficiliorem debere esse favor imperat liberorum.}
resolution. We could imagine, even if this reason was not voiced by the legislator, that the reform aimed rather at giving some publicity to the act of divorce, which until then had been entirely private and informal. A compulsory letter of divorce provided a matrimonial rupture with some degree of certainty which the classical model lacked (which in turn would bring about quite a degree of troubles as to the personal status of the parties, their children and financial matters resulting from marriage).²³

How effective this regulation was in the legal practice? The not so high number of divorce settlements which post-date this norm do not allow to draw us any decisive conclusion as the actual application of the law.²⁴ A stronger argument may be provided by the fact that these acts denote themselves with a *latinism* ῥευσσοίδιον.²⁵ The earliest occurrence of this term in the papyri speaks even stronger for this hypothesis. In a petition, *P. Oxy.* L 3581, the petitioner, Aurelia Attiaina, recalled her having sent a *repudium* to her cruel husband «through the tabularius of the City, in accordance to the imperial law».²⁶ Another, yet still circumstantial argument, may be sought in the fact that the Byzantine divorce settlements would tend to use present tense in describing the act of dissolution of marriage, whereas the earlier ones opted for past tense.²⁷

III.2. Seven Witness Procedure?

Before banning divorce altogether, Justinian seems to have tried to make it more difficult by imposing a duty to divorce in the presence of seven adult Roman citizens — and possibly to add to the act some publicity thus making it more certain (just as Theodosius II might have wanted in his Nov. 12). Originally, the seven-witness procedure was most probably introduced to

²³ See sources listed in n. 6.
²⁴ Mutually agreed separations: *P. Cairo Masp.* III 67154 (Antinoopolis, reign of Justinian, see Bagnall [1987] 56); *P. Cairo Masp.* ii 67155 (Antinoopolis, 566-573); *P. Cairo Masp.* ii 67153= (of which counterpart is 67253) (Antinoopolis, 7.05.568); *P. Lond.* v 1712 (Antinoopolis, 15.07.569); *P. Lond.* v 1713 (of which counterpart is *P. Flor.* i 93 = *MChr.* 297) (Antinoopolis, 5.09.569); *P. Cairo Masp.* iii 67311 (Antinoopolis, 569-570); *BGU* xii 2203 (Hermopolis Magna ?, 7.07.571); *P. Cairo Masp.* i 67121 (Aphrodite, 15.09.573); *P. Herm. Rees* 29 (Hermopolis, 26.07.586); *P. Ness.* iii 33 (Nessana, vii); *P. Ness.* iii 57 (Nessana, 1-17.09.689); *B.M. Or.* 6201 A 29 (Coptic) (Ashmunein, vi/vii). *P. Oxy.* I 129 (533) = *MChr.* 296 is a singular act documenting a unilateral repudiation, even more curious by the fact that it is the father-in-law who divorces on behalf of his daughter, see further Urbanik (2002) 324-325 with literature where I followed Mitteis’ interpretation of this deed and not that of the original editors and Volterra (1937).
²⁵ The earliest occurrence of this term in the papyri is found in *P. Oxy.* L 3581 (IVth/Vth cent.)
²⁷ E.g. *P. Cairo Masp.* ii 67153, 7: τῷ ῥευσσόν τῆς ἀπόζωντις τόθεμα] οὐ καὶ διαπέμπων[αι]. See further, my Introduction to five papyri relating to divorce (Urbanik 2013).
secure performance of divorce, a duty imposed on the husband of an adulterous wife by *lex Iulia de adulteris*. The Justinian’s codification committee, however, generalized this norm by placing in the title *de divoritis* (*D. 24.4*) – creating thus a case of the so-called *duplex interpretatio* in this instance. None of the papyri, but for a very late and unique *P. Ness. III 57* of 689 follows this rule, and even in this case the direct influence of *D. 24.2.9* cannot be ascertained.

III.3. Efficacy of the Imperial Restrictions on Divorce

III.3.1. Settlements of Divorce

The «deeds of divorce» bring about a much more essential matter, viz. how effective was the imperial legislation aiming at limitation of divorce. Sadly, none of the divorce settlements could securely be dated to the period in which *Novela 117* prohibiting consensual divorce was in force. At any rate, they give an impression of a divorce as normality, just as it had been in the pre-Justinianic times in Egypt. In *P. Cairo Masp. I 67121*, for instance, Aurelios Isakos and Aurelia Tetrompia not only secure each other’s rights to remarry, but also agree not to protest the other party’s possible joining of a monastic life. Similar formulations, showing a totally «shameless» attitude towards divorce are found in other documents as well.

III.3.2. Justin’s II *Novela 140*

Other clues may lead to the assumption that the Justinianic norm was more of a wishful thinking than an operative disposition and as such met quite some social resistance. Its weak application factor is shown by the fact that Justinian himself felt the need to repeat his ban twice, issuing in 548 *Novela 127* and in the year 556 *Novela 134*. In these statutes the emperor equaled the penalties foreseen for men with the harsh sanctions decreed earlier for women (confineent to monastery, confiscation of property), and moreover decided to punish the intermediaries helping with divorce as well as lenient officials who would not prosecute the culprits. The subsequent and rapid abrogation of the ban by Justin II in 566 shows as well how unrealistic this regulation must have been. In *Novela 140* the new emperor explained that he had been moved by the

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28 *D. 24.2.9* (Paulus, 2 *de adulteris*): *Nullum divorcium ratum est nisi septem civibus Romanis puberibus adhibitis praeter libertum eius qui divorcium faciet. Libertum accepimus etiam eum, qui a patre avo proavo et ceteris susum*. The Roman law scholarship has tormently disputed this text, yet this interpretation by Volterra (cf. Volterra [1960-61] 300-301) is now majorly accepted.

29 See further Urbanik (2005) with literature therein cited.
sad fate of the couples that the law bound together, in view of this returning to the «immemorial» was seen as a minor evil.

III.3.3. P. Oxy. I 129 and the Ban on Unilateral Divorces

This matter could perhaps be better illustrated by extrapolation of the data provided the only extant unilateral act divorce, P. Oxy. I 129 = MChr. 296 dated to 533. Ioannes, father of Euphemia, while sending this letter of repudiation to his son-in-law Phoibammon, does not really take into consideration any of the lawful causes for a unilateral divorce admitted by the law then in force, i.e. CJ. 5.17.8 issued in 449 by Theodosius II and Valentinian. The wife’s father laconically motivated the act by the «lawless deeds pleasing neither to God nor to man and are not fit to be put in writing» of his son-in-law. Yet, in view of the patrimonial penalties for an illicit divorce (the wife would loose dowry and her nuptial donations), one would rather expect a direct and much more explicit reference to the causes, listed in § 2 of the constitution. They were, let us recall: imputed adultery, homicide, poisoning, forgery, perjury, conspiracy against the emperor, violation of tombs, sacrilege, theft or aiding of robbers, cattle stealing, as well as acts against the woman herself: husband’s relations with prostitutes, attempts to kill the wife or beating her. We find this silence even more surprising considering that the letter of divorce was sent via an official: the defensor civitatis of the city of Oxyrhynchos.

III.3.4. Separation Clause in Marriage Settlements

Yet another indication of the degree of actual influence on the legal practice of the Justinianic strict prohibition may be found in the nuptial agreements. In the better preserved ones we find provisions foreseeing the consequences of the possible separation of the spouses. A mere contemplation of the possible future separation of the union just contracted seem to contradict the imperial restrictions on divorces, yet we must not forget that the bulk of our evidence cannot be securely dated, so the deeds may either precede or succeed the times in which Novela 117 was in force. The acts which may befall to the epoch of Justinianic ban on divorce, are not only difficult to interpret due to

30 The only modification of the law in question before the execution of P. Oxy I 129 was Anasthasius’ reduction of the period in which an illicit divorcée could not remarry: from the original five years to just twelve months (CJ. 5.17.9 of 497).
31 Cf. P. Oxy. I 129, 4-6 (trans. Sel. Pap. I 9). One cannot but recall similar qualification of the deeds of Fabiola’s evil husband by which Jerome justified her divorce (cf. Ep. 76 ad Oceanum de morte Fabiolae): which might have referred to homosexual deeds.
32 Incidentally, it was the analysis of this document that prompted Taubenschlag (1940-41, 1959) 71-75 to ascertain that Justinian’s legislation had great influence in practice. This assumption, however, was based on wrong conviction that Justinianic law allowed father to dissolve marriage of his daughter. See Urbanik (2002) passim, but in part. 324-325.
their problematic dating, but also seem to provide contradictory information. On one hand, **CPR I 30** does not foresee the future separation of the spouses at all. Instead the parties, the groom Megas, *notarios* and his mother-in-law, Kale, having provided the usual clauses of marital duties, agreed that the «laws will be piously observed».

Mitteis saw in this statement a reference to the system of the devolution of the dowry/bridal gifts should the marriage terminate by the girl’s death. Naturally, one could expect from a notary a good command of imperial law, and therefore, possibly, this papyrus could prove at least some application of the Justinianic norm. Also securely dated to 566, **P. Michael. 42 a+b** does not mention a possible separation – yet this may be due to the particular character of these instruments, not being the typical marriage settlements (see above p. 269). On the other hand, **P. Cairo Masp. III 67340 recto**, if it indeed was originally executed under the regime of **Novela 117**, seems, notwithstanding its bad preservation and draft character, to prove to the contrary. Akyllinos promised to Euprepeia that if he should cast her out of the house, he would pay three pounds of gold as a fine. This private penalty, even if onerous, seems still trifling, if compared to the criminal sanctions imposed by Justinianic legislation on the perpetrators of illicit divorce. The same may be deduced from the clauses in **P. Lond. V 1711 (= P. Cairo Masp. III 67310)**. Horouonchis undertook not to cast out Scholastika, provided she kept her marital promises, but for the case of very grave offenses (‘*porneia* – adultery – evil practices or bodily indiscipline, proven by three worthy men, citizens or countrymen’).

**Prima facie** the Justinianic causes allowing a husband a licit divorce seem to resound in this formulation, yet let us observe that the parties contemplated a divorce even without these being verified. Should it happen the husband was to pay a private penalty of 18 solidi to his spouse.

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33 **CPR I 30**, 23-25: οἱ δὲ ὡς εἰκός συμβησόμενοι κάσοι διαβεβαιωθήσονται πρὸς τὰ δοκοῦντα τοῖς καλῶς καὶ εὔσεβῶς κεὶ ὑπομένοις νόμοις.

34 For its dating cf. above, n. 13.

35 **P. Cairo Masp. III 67340 recto**, 35-40: εἰ δὲ ὡς εἰκός δόθη αὐτῷ ταύτῃ ἄποθηκῇλέπτηθαι δήμα ὡς δήποτε φίλας εὐλόγως; παρέμενα αὐτὴ προστίμου λόγῳ ὄρθον λίταρχα τρεῖς [ .


37 Cf. Nov. 117, §§ 7-9. The law allows husbands to unilaterally dissolve the marriage if their wives: conspire against the emperor, or having got to know about a conspiracy do not inform her husband of such; are guilty of adultery, attempt at her husband’s life or know of such plan and do not inform her husband, and finally if they are disobedient towards their husband (attend a banquet or public baths without permission, go to a circus a theatre or generally leave their home without his knowledge (with the only exception allowing the woman to visit her parents). In parallel, a wife instead may blamelessly divorce her husband who has conspired against the emperor or has not revealed conspiracy to the wife; has attempted against his wife’s life, or having got to know about such an attempt has not revealed it to his spouse, has induced the wife to adultery or any conduct against good morals, has falsely accused his wife of adultery or has undertaken relations with other women which would displease his spouse.
IV. LAW IN BOOKS AND LAW IN PRACTICE

Does all this mean that the marriage legal practice and normative sources on marriage belong to two different worlds? I daresay there may be circumstantial evidence that they were actually interrelated, even if the connections are not as obvious and simple as Taubenschlag once wanted. There seems to have been quite some dissemination of the legal doctrine in everyday life. Even if in the particular cases there are some solutions dubious in the light of the official legal doctrine (as for instance a woman providing collateral in P. Lond. V 1711, in a manifest contravention of the provisions of sc. Velleianum), the imperial law found its way to the minds of the users of the law. This is best shown by the cases in which direct reference to the binding law is made38 as well as by the idiom used in these acts, which seems to resound the official legal parlance. There is a clamant instance of isoproikon/antiproikon, but not only. Reading these texts leaves an impression that the scribes were quite conscious of some general norms governing marriage which had to be applied. They stress «lawfulness» of marriage,39 contracted under best hopes and for procreation of children40 an expression well known from the legal corpus (cf. D. 50.16.220.3, Callistratus), the «wife» is also described is taken to be the «lawful» one (as in CPR I 30, 16: νομίμη γύνη). In Dioscoros’ papers, we have another striking example: the notary often used the word συναφία – ‘union’ to denote marriage. Amphilochos Papathomas noticed in his edition of P. Eirene II 24 (Hermopolites or Arsinoties, late 6th/early 7th cent.) that this term was typical for the Greek of Justinianic Novels.41

Also the separation clause in the marriage settlements refers to «lawful reasons» for divorce, which may very well be a direct reference to the imperial iustae causae divoritii listed in Novela 117, 7-9.42 It seems as well that the list of marital duties in the marriage settlements somehow reflects the catalogue of misconducts to be found in the Novela 117. One is particularly attracted by the formulation found in the linguistically calamitous P. Cairo Masp. I 67006. Viktorine not only stipulated to live with her husband and to respect and obey him in everything, but also not to act without her husband consent.43 This

38 Like in the case of P. Ness. 18, 20 where the devolution of the dowry is ordered to follow the Roman custom.
39 See, e.g. P. Cairo Mas. II 67154, 6.
40 See, e.g. P. Flor. I 93, 10-11.
41 See Papathomas (2004) 142: P. Cairo Mas. III 67154, 15; 67155, 24; P. Flor. I 93, 17; P. Lond. V 1713, 25; P. Cairo Mas. III 311, 21. The word is attested as well in P. Oxy. I 129, 7 which would further speak for interpretation of this document as a repudial of marriage and not a of betrothal.
42 Cf. e.g. P. Lond. V 1711, 43-44: ἐκβαλεν σε χωρίς εὐλόγου αἰτίας ως προγέγραπται; P. Cairo Mas. III 67340, 35-45 (supra n. 27) or even a very late Coptic P. Bal. 152, 8.
43 P. Cairo Mas. I 67006, 133-140 ὀμολογεῖ δὲ ἢ [προειρήματι] εὐγενεστάτη νύμφη Βικτώρ[η] στέγην τὸ συνυδόναι καὶ διαγράψας τὸν ὠδόν αὐτῆς ἀν[όρα] ἐν ὑπάνσιν, καὶ σκοποράν αὐτοῖς . . . . . . καὶ τῶν ὠδόν καθὴν διὰ τὸ . . . . πράττε[σθ]αι ὁμοιαία τῆς τοῦ ἀνδρὸς γνώσης...
promise sounds particularly similar to the dispositions of Nov. 117.8.4-6 allowing the husband to divorce the insolent wife, who would dare, without her husband’s permission, spend time with strangers, or bathe with them, or go to the theatre or amphitheatre or even just remain outside the house. The husband, Aphoutis, on his part, undertook not to maltreat her in any way. And again, may we look for a normative counterpart of this instance in chapter 9 § 14 of the same Novel which albeit does not allow the wife to divorce the husband who beats her, orders that she should be given the amount equal to the nuptial donation on account of this hybris.

I began this paper recalling the classical Roman construction of marriage and repeating Schulz’s statement that it was the women who benefitted from this legal creation. It is obvious, however, that the social feeling towards it was anything but amicable and understanding. With time passing the traditional Roman attitude to blame the woman for divorce in any case (cf. Apuleius, Apol. 92) would result in limitation of the freedom of marriage, the idea that a wife should be obedient to her husband would take over both in the dogmatic and everyday life sources.

Doubtlessly the infiltration of norms governing marriage went both ways. Taubenschlag’s strong assumption has to be weakened. One may doubt even whether the idea of a clear separation of Imperial and Vulgar Law is true in this late epoch. On the one hand the legal doctrine influenced – even if not always the way it wanted – the real life. On the other hand, the practical inventions of the latter triggered normative changes. Such was the case of rules governing matrimonial dowry and donations received by the imperial law.

Let me finish by a tiny example, that may illustrate the direct influence of real life happenings on legislation. In a petition, P. Cairo Masp. i 67092 (553), Aurelia Eirene asked the riparius to arrest and keep safe-guarded her ex-spouse-to-be, Makarios and his mother Tkoukouis. She complained to have suffered hybris from the man as he had promised to «take her as his wife» and then left her. One is tempted to see in this outrage an act of sexual misconduct.

The case immediately recalls Justinian’s justification of need to impose a duty of a written marriage agreement on the upper classes, retold above. Let us recall that the emperor was prompted to promulgate this law as he was repelled by these repugnant couples who faking marriage would live in debauchery.
The same Novel in its chapter 5 provides for the cases of brides too poor to be able to provide a dowry, often therefore a easy catch for unscrupulous men. The Emperor decided that should they, having been lured into a marriage, be later deserted, they would be entitled to a quarter of their unfaithful grooms estate. The interpolationes of the poor women that Justinian evokes as the
reason must have been of the same kind as the one presented a couple of years later by Aurelia Eirene. And so, as one may have suspected, in the sphere of life as delicate and important as marriage, the new rules were product of the law-maker’s reaction to the real life problems.

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that this situation should be repaired. And so if a woman is able to prove by legitimate means that a man has taken her to his home in such a way that she may be his legitimate wife and mother of legitimate issue, by no means whatsoever is he allowed to expel her from the house, except for the cases foreseen by the law, but he must have her as legitimate and the her children as his. And she herself, if indeed she is undowered, shall use the benefit of our constitution taken the quart of the estate of the husband, no matter whether she is expelled or the husband dies. And we shall not examine whether he dismissed her using a deed of divorce or not: he is not likely to send the deed of divorce if he denies the (existence) of marriage itself. And if the husband unreasonably expels her from home, this very fact shall be a just plea against him. Having so happened the woman shall send him the deed of divorce and demand the quart, if she can prove that she was the wife, even if she joined (him) without a dowry trusting his oath. For what else may a woman – who is unable to have a dowry – do, one who gives herself in place of a dowry?


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