

THE CHANGES OF THE RULES OF DIVORCE IN THE CHRISTIAN ROMAN EMPIRE

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Abstract in original language

The Christian Roman emperors drastically changed the classical legal rules of divorce which had been very liberal. The post-classical and Justinianean laws specified the just causes of unilateral divorce. These causes (different common crimes and various marital offences) were continuously altered by the successive constitutions. Persons who repudiated their consorts without a legitimate reason had to suffer a punishment. The punishment of frivolous repudiation (loss of dowry or prenuptial gifts, deportation, prohibition of remarrying, relegation to a monastery) was modified from time to time. The penalty of the women was usually heavier than the men's. This legal situation was changed only in 548 when Justinian decreed that men and women had to suffer the same punishment for the same offence. Persons who were repudiated by their consorts with a just cause were penalized, too. In Justinianean law there were only three exceptional reasons for which a marriage might be dissolved with impunity. They were impotence of the husband, entry of either party into the monastic life and captivity. Divorce by mutual consent remained unpenalized till 542 when Justinian prohibited this type of divorce except for the purpose of living in monastic chastity. This prohibition was revoked by Justin II. Summarizing, we can state that during the Christian era the Roman legal rules which restricted the right to divorce drew near the Christian religious and moral doctrines, but Roman law never precluded entirely the possibility of divorce. Even Justinian considered marriage only a human bond created by human affection, which, for this reason, was always dissolutive.

Key words in original language

Family law; Marriage; Divorce; Repudiation; Roman law; Christianity; Imperial legislation; Post-classical law; Justinian.

The classical Roman legal rules of divorce were very liberal. Either party could unilaterally end the marriage at any time, without offering an explanation.¹ A divorce at most went with some pecuniary loss: the husband had to restore his wife's dowry, except for some deductions (*retentiones propter liberos, propter mores, propter impensas, propter res donatas*, and

¹ This is why the frivolous repudiations became so numerous. According to Seneca, certain illustrious and noble ladies reckoned their years, not by the number of consuls, but by the number of their husbands (*De benef.* 3,16,2).

propter res amotas). After the victory of Christianity, this legal situation drastically changed. In 331 Constantine forbade the married persons to repudiate their consorts without a just cause.² Repudiation could be justified only in the case of certain crimes. A woman might legitimately divorce her husband only if he were a homicide (homicida), a sorcerer (medicamentarius), or a destroyer of tombs (sepulcrorum dissolutor). If she sent a notice of divorce to her husband for any other cause (such as drunkenness, gambling, or sexual offenses), she lost all of her property and was deported to an island.³ A man might divorce his wife only if she were an adulteress (moecha), a sorceress (medicamentaria), or a procuress (conciliatrix).⁴ If he repudiated his wife for other reasons had to restore her dowry and was debarred from a second marriage. If he remarried, his former wife could size his second wife's dowry.⁵

This law of Constantine was surely annulled by the emperor Julian (361-363).⁶ In 407 an African Council condemned all remarriages by divorced persons and decided to ask the emperor to pass a decree against this misdeed.⁷ In 421 Honorius enacted a law which distinguished between three

² CTh 3,16,1.

³ The text is obscure. According to Reynolds, the husband who was repudiated by his wife without a just cause could take all her property (Reynolds, Philip Lyndon, *Marriage in the Western Church: the Christianization of marriage during the patristic and early medieval periods*. Brill, Leiden/New York, 1994, 50). According to Evans Grubbs, however, the property of the woman was confiscated by the state, so the husband could obtain only her dowry (Evans Grubbs, Judith, *Law and Family in Late Antiquity. The Emperor Constantine's Marriage Legislation*. Clarendon Press, Oxford, 1995, 231). The text of the law (oportet eam usque ad acuculam capitis in domo mariti deponere) supports the opinion of Reynolds, but the text of the interpretation (ut et dotem, quam dederat, vel pro ipsa data fuerat, et donationem, quam percepit, amittat) supports the view of Evans Grubbs.

⁴ It is worth mentioning that only the man, and not the woman, might divorce his partner for adultery. Cf. Reynolds, *op. cit.*, 50.

⁵ The text is obscure again. According to Evans Grubbs, the former wife might size only the dowry of the second wife (Evans Grubbs, *op. cit.*, 231). According to Reynolds, however, the former wife might size not only the dowry of the second wife of her ex-husband but also his home and all his property (Reynolds, *op. cit.*, 50). The text of the constitution (domum eius invadere et omnem dotem posterioris uxoris ad semet ipsam transferre pro iniuria sibi illata) supports the view of Evans Grubbs, but the text of the interpretation (domum mariti sui atque omnem eius substantiam sibimet vindicare) supports the opinion of Reynolds.

⁶ Many passages of the Church Fathers relate to the fact that in the late 4th and early 5th centuries there were no great legal obstacles to divorce in Rome. See Arjava, Antti, *Divorce in Later Roman Law*. *Actos. Acta Philologica Fennica* 22 (1988), 9-13.

⁷ Council of Carthago, canon 102.

grades of reasons for repudium.⁸ A woman who sent a notice of divorce to her husband without any reason had to return his prenuptial gifts, lost her dowry, and was deported, and debarred from a second marriage. A wife who repudiated her husband for his bad character and trivial faults had to give back his prenuptial gifts, lost her dowry, and debarred from a second marriage. If she remarried, her ex-husband could prosecute her.⁹ A woman who divorced her husband for his serious crime might keep her dowry and gifts and remarry after a period of five years from the day of the divorce. A man who repudiated his wife without any reason had to restore her dowry, lost his gifts, and was compelled to live in perpetual celibacy. The unjustly divorced wife might remarry after the termination of a year. A husband who divorced his wife for her character faults had to return her dowry, but recovered his gifts, and might remarry after a period of two years. Finally, if his wife committed a grave crime, the husband could bring charges against her, and if she was convicted, he might keep her dowry, recovered his gifts, and could remarry immediately.

As Reynolds writes, these rules were based on Constantine's, but Honorius "recognized that merely moral faults, and not only criminal ones, might be grounds for divorce. In this way, he introduced an intermediate category between divorce without cause and divorce with good cause."¹⁰ Reynolds pointed out an interesting inequality regarding the intermediate category: a husband who divorced his wife because of her moral failings had the right to remarry, while a wife who divorced her husband on such grounds did not.¹¹

In 439 this law was revoked by Theodosius II who restored the classical, liberal rules of divorce.¹² This law was received in the West in 448,¹³ but

⁸ CTh 3,16,2.

⁹ According to Corbett, the repudiated husband might prosecute his ex-wife for adultery (Corbett, Percy Ellwood, *The Roman Law of Marriage*. Clarendon Press, Oxford, 1930, 244). Evans Grubbs, however, writes that the man might prosecute his ex-wife probably for stuprum, illicit sexual activity (Evans Grubbs, *op. cit.*, 234). I agree with the latter opinion. The woman could not be an adulteress, since her marriage was dissolved.

¹⁰ Reynolds, *op. cit.*, 51.

¹¹ Reynolds, *op. cit.*, 51.

¹² NTh 12. According to Jones, this law also forbade divorce by mutual consent (Jones, A. H. M., *The Later Roman Empire 284-602. A Social Economic and Administrative Survey*. Clarendon Press, Oxford, 1964, II, 974). I share the opinion of Evans Grubbs who writes that there is no reason to think this (Evans Grubbs, *op. cit.*, 235). It would have been entirely illogical to liberalize the rules of unilateral divorce and to prohibit bilateral divorce at the same time.

Valentinian III in 452 revoked it, going back to the law of Honorius.¹⁴ During this time, in 449, Theodosius II also enacted a new law prohibiting divorce without just cause.¹⁵ This constitution contained a comprehensive list of reasons justifying unilateral divorce. These reasons may be collected into three groups in the following way.¹⁶

(1) Infidelity: either party might repudiate the other for adultery.¹⁷ She might repudiate him for shaming her by consorting with immoral women in the common home. He might repudiate her for doing any of the following without his knowledge or against his prohibition: keeping company with other men; staying out all night; attending circuses, theatrical or amphitheatrical shows.

(2) Violence within marriage: either party might repudiate the other for threatening his or her life. She might repudiate him for wife-beating.

(3) Crimes outside the marriage: either party might repudiate the other for murder, poisoning, treason, forgery, violation of sepulchres, church-theft, harbouring of robbers, kidnapping. She might repudiate him for robbery and cattle-thieving.

A wife who repudiated her husband for any of these reasons could receive her dowry, keep the prenuptial gifts, and remarry after a year. A wife who divorced her husband without a just cause had to give back his gifts, lost her dowry, and was not allowed to marry again within five years. If she remarried within this period, her new union was not qualified as a lawful marriage, and she became an infamous person. A man who repudiated his wife for a just cause might keep her dowry, recover his gifts, and marry

¹³ NVal 26.

¹⁴ NVal 35,11.

¹⁵ C. 5,17,8.

¹⁶ Cf. Noonan, John T., *Novel 22. In The Bond of marriage: an ecumenical and interdisciplinary study* (ed. by William W. Bassett). University of Notre Dame Press, Notre Dame, Ind., 1968, 49-50; Reynolds, *op. cit.*, 52-53.

¹⁷ This, however, as Reynolds writes, "does not mean that a woman, like a man, could divorce her spouse on the ground of his mere infidelity to her. In classical Roman law and in the *lex Iulia de adulteriis*, adultery consists in the extra-marital sexual relations of married woman. Thus the paramour of the adulteress is an adulter because she is married, regardless of whether or not he himself is married. That a husband was unfaithful to his wife, therefore, did not in itself make him an adulterer" (Reynolds, *op. cit.*, 53).

again forthwith. A man who sent a notice of divorce to his wife without a just cause had to return her dowry, and lost his prenuptial gifts.¹⁸

In 528 Justinian to the just causes for unilateral divorce as laid down by Theodosius II added the husband's impotence keeping on two consecutive years, from the beginning of the marriage. In such a case the woman, while she recovered her dowry, had to restore the prenuptial gifts.¹⁹

In 533 the emperor added to the legitimate reasons for repudiation some further offences by the wife, such as procuring an abortion, bathing with other men, and attempted bigamy. The same law determined the penalty – both for just and unjust divorces – in cases where dowry was not given. In such cases the culpable party was liable to the forfeiture of one-quarter of his or her property to a maximum value of 100 pounds of gold. The forfeited money was at the free disposal of the innocent party where there were no children. When there were children or grand-children, the property had to be preserved intact for their benefit.²⁰

In 536 Justinian increased to three years the period after which the wife might divorced her impotent husband,²¹ and declared that either the husband or the wife might legitimately repudiate his or her consort for the purpose of living a life of monastic chastity.²² The party who entered monastic life was considered to have died. Any agreement made in the event of his or her death came into effect. When a man divorced his wife to live in chastity, then she (like the widow) might not remarry for one year.²³

¹⁸ Probably, as Corbett (op. cit., 245) and Reynolds (op. cit., 53) think, this law, in the same way as the previous law, forbade the man who repudiated his wife without a just cause to remarry within two years.

¹⁹ C. 5,17,10.

²⁰ C. 5,17,11.

²¹ Nov. 22,6.

²² Nov. 22,5.

²³ Cf. Reynolds, op. cit., 54.

In 542 the emperor modified in some measure the reasons and penalties for divorce. According to this new constitution, a husband was permitted to repudiate his wife if she was privy to machinations against the emperor, and did not inform him; if she was convicted by a court for adultery; if she tried to kill him, or failed to reveal that others wanted to do so; if she had a dinner or a bath with other men, against his will; if she remained away from his house without his consent; and finally, if she attended public entertainments without his knowledge, or against his prohibition. Under these circumstances the husband might keep his wife's dowry, and recovered his prenuptial gifts. In addition, in the case of the wife's conviction for adultery, the constitution assigned to him all her property if there were children (this property had to be preserved intact for their benefit), and a portion of it equal to one-third of her dowry if there were not.²⁴

A man who divorced his wife without a just cause had to return her dowry, lost his nuptial gifts, and was obliged to give her a sum equal to the third part of the amount of his gifts.²⁵

A wife might divorce her husband, if he was implicated in a plot against the emperor, or where he was in the secret that others committed such a crime, and did not denounce them; if he tried to kill her, or failed to reveal that others wanted to do so; if he attempted to violate her chastity, by seeking to deliver her to other men for the purpose of committing adultery; if he filed an accusation of adultery against her, but could not prove it; and finally, if he entertained another woman in the common home, or even in the same city, if the offence was repeated. In such cases the wife might keep the prenuptial gifts, and recovered her dowry. In addition, where her husband prosecuted her for adultery, but failed to prove her guilty, she could obtain all his property if there were children (this property had to be preserved for their benefit), and a portion of it equal to one-third of his gifts if there were not. If the husband entertained a mistress in the common home, in addition to her dowry and his prenuptial gifts the wife was allowed to obtain a portion from his other property up to one-third of the value of his gifts.²⁶

²⁴ Nov. 117,8.

²⁵ Nov. 117,13.

²⁶ Nov. 117,9.

A wife who repudiated her husband without a just cause had to return his prenuptial gifts, lost her dowry, and had to be sent to a monastery for life. When such a woman had children, two-thirds of her property was to be given to them, and the other third to the monastery to which she was sent. When she was childless, but had parents, two-thirds of her property was to be transferred to the monastery, and the other third to her parents. Where she had neither living children nor parents, all her property was to be given to the monastery.²⁷

As we can see, Justinian substantially reduced the list of just causes, eliminating most of the earlier grounds that had involved crimes against parties other than the spouse. Forgery, robbery, kidnapping and the other common crimes specified in the Theodosian law of 449 (with the exception of treason) no longer justified a repudiation. Wife-beating with a whip or a rod, which had been a just cause for divorce, was punished by the new Justinianean law merely by a fine equal in value to one-third of the prenuptial gift, and this was remitted when the circumstances were sufficient to cause dissolution of the marriage.²⁸

Apart from different offences a marriage might yet be dissolved without a penalty. Justinian made it possible if the husband was impotent; if either the husband or the wife desired to live in a monastery; and finally, if either consort was detained in captivity for a considerable time.²⁹

In 548 Justinian modified the penalty of the husband who repudiated his wife without a just cause. He decreed that in such cases men, like women, were to be relegated to a monastery for life.³⁰

Before Justinian the Christian emperors did not changed the classical rules of bilateral divorce. In 497 Anastasius cleared up an ambiguity by declaring that if a marriage dissolved by common consent, rather than by the

²⁷ Nov. 117,13.

²⁸ Nov. 117,14.

²⁹ Nov. 117,12. In case of captivity, as Corbett thinks (op. cit., 247), a five-year delay was presumably required.

³⁰ Nov. 127,4.

repudiation of the wife, and not on account of any cause included in the Theodosian law of 449, the woman did not have to wait five years but might remarry after the year laid down by the classical law.³¹ In 542 Justinian made an elementary change. He prohibited divorce by consent except for the purpose of living a life of monastic chastity.³² In 556 the emperor ordained that if the consorts divorced by consent for any other reason, both of them were to be confined in a monastery for the remainder of their lives, and their property was to be divided in fixed portions between the monastery and their children or parents, or failing such relatives all their property was to be transferred to the monastery.³³ The prohibition of bilateral divorce caused much discontent. In 566 Justin II, the successor of Justinian, had to revoke this prohibition, and reaffirm the right to divorce by consent.³⁴

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³¹ C. 5,17,9. In such a case a husband, of course, might remarry at once. Cf. Reynolds, *op. cit.*, 53.

³² Nov. 117,10.

³³ Nov. 134,11.

³⁴ Nov. 140. According to the explanation, "if matrimony is brought about by mutual affection, it is certainly reasonable that a contrary desire should annul it" (Nov. 140,1; trans. by Samuel Parsons Scott).

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