

Corpus Iuris Civilis: The Digest and Codex: Marriage Laws

Roman law developed as a mixture of laws, senatorial consults, imperial decrees, case law, and opinions issued by jurists. One of the most long lasting of Justinian's actions was the gathering of these materials in the 530s into a single collection, later known as the Corpus Iuris Civilis [The Code of Civil Law]. The text is of historical importance for a number of periods: first it illuminates the Roman society of the time the individual parts were first written; next it says a great deal about 6th century Byzantium both in the selection criteria, and in the laws made specifically by Justinian; and finally it was of tremendous importance in later Western Europe where it provided, after the 11th century, the basis for the development of both Church, or "canon" law and the civil law of most European countries except England. As a system of law based on principles, not case law, it was re-invigorated by Napoleon and in that form remains the basis of the legal system of most of continental Europe, as well as the former colonial dependencies of those European countries [including most of Africa, China, Latin America and Japan]. It is also the basis of law in Louisiana and Quebec. In fact the only legal systems that rival Roman law in usage are the Anglo-American "common law" tradition, and the Islamic Sharia.

*The texts here address the issue of marriage, and date back particularly to the time of Augustus [r. 27BCE-14CE] who was very concerned about family matters and ensuring a large population. In the selections that follow the first part comes from the **Digest** and contain the opinions on marriage law of famous lawyers - Marcianus, Paulus, Terentius Clemens, Celsus, Modestinus, Gaius, Papinianus, Marcellus, Ulpianus, and Macer. Note that the most important were Papinianus (executed by the Emperor Caracalla in 212), who excelled at setting forth legal problems arising from cases, and Ulpianus (d. 223), who wrote a commentary on Roman law in his era. All these were legal scholars of the Roman imperial period whose works were considered important enough to keep in the Digest. The second section, from the **Codex** contain the later receipts of emperors concerning marriage law and punishments. IN the Corpus individual authors were identified, and these names have been kept here.*

DIGEST

Book XXIII. Title II. On the Marriage Ceremony.

19. Marcianus, Institutes, Book XVI.

In the Thirty-fifth Section of the Lex Julia [a law of Augustus in 18BCE which made marriage a duty for Roman patricians], persons who wrongfully prevent their children, who are subject to their authority, to marry, or who refuse to endow them, are compelled by the proconsuls or governors of provinces, under a Constitution of the Divine Severus [r. 193-211] and Antoninus [ie Caracalla, r. 212-217], to marry or endow their said children. They are also held to prevent their marriage where they do not seek to promote it.

20. Paulus, On the Rescript of the Divine Severus and Commodus [r. 180-192]

It must be remembered that it is not one of the functions of a curator [legal guardian for a minor] to see that his ward is married, or not; because his duties only relate to the transaction of business. This Severus and Antoninus stated in a Rescript [a response to legal questions from officials] in the following words: "It is the duty of a curator to manage the affairs of his ward, but the ward can marry, or not, as she pleases.

21. Terentius Clemens, On the Lex Julia et Papia, Book III.

[The Lex Papia of 9CE was treated with the Lex Julia. It tried to make Romans marry within their class]

A son under paternal control cannot be forced to marry.

22. Celsus, Digest, Book XV.

Where a son, being compelled by his father, marries a woman whom would not have married if he had been left to the exercise of his own free will, the marriage will, nevertheless, legally be contracted; because it was not solemnized against the consent of the parties, and the son is held to have preferred to take this course.

23. The Same, Digest, Book XXX.

It is provided by the Lex Papia that all freeborn men, except senators and their children, can marry freedwomen.

24. Modestinus, Rules, Book I.

Where a man lives with a free woman, it is not considered concubinage but genuine matrimony, if she does not acquire gain by means of her body.

25. The Same, Rules, Book II.

A son who has been emancipated can marry without the consent of his father, and any son that he may have will be his heir....

28. Marcianus, Institutes, Book X.

A patron cannot marry his freedwoman against her consent....

30. Gains, On the Lex Julia et Papia, Book II.

A pretended marriage is of no force or effect....

34. Papinianus, Opinions, Book IV.

Where a general commission has been given to a man by someone to seek husband for his daughter, this is not sufficient ground for the conclusion a marriage. Therefore it is necessary that the person selected should be introduced to the father, and that he should consent to the marriage, order for it to be legally contracted....

(2) Marriage can be contracted between stepchildren, even though they have a common brother, the issue of the new marriage of their parents.

(3) Where the daughter of a senator marries a freedman, this unfortunate act of her father does not render her a wife, for children should not be deprived of their rank on account of an offence of their parent....

41. Marcellus, Digest, Book XXVI.

It is understood that disgrace attaches to those women who live unchastely, and earn money by prostitution, even if they do not do so openly. (1) If a woman should live in concubinage [this was legal state of sexual domestic partnership without official "marriage" (connubium) or dowry] with someone besides her patron, I say that she does not possess the virtue of the mother of a family

42. Modestinus, On the Rite of Marriage.

In unions of the sexes, it should always be considered not only what is legal, but also what is decent.

(1) If the daughter, granddaughter, or great-granddaughter of a senator should marry a freedman, or a man who practices the profession of an actor, or whose father or mother did so, the marriage will be void.

43. Ulpianus, On the Lex Julia et Papia, Book I.

We hold that a woman openly practices prostitution, not only where she does so in a house of ill-fame, but also if she is accustomed to do this in taverns, or in other places where she manifests no regard for her modesty.

(1) We understand the word "openly" to mean indiscriminately, that is to say, without choice, and not if she commits adultery or fornication, but where she sustains the role of a prostitute.

(2) Moreover, where a woman, having accepted money, has intercourse with only one or two persons, she is not considered to have openly prostituted herself.

(3) Octavenus [a minor Roman jurist], however, says very properly that where a woman publicly prostitutes herself without doing so for money, she should be classed as a harlot.

(4) The law brands with infamy [not just a bad reputation but a legal state which removed certain legal protections] not only a woman who practices prostitution, but also one who has formerly

done so, even though she has ceased to act in this manner; for the disgrace is not removed even if the practice is subsequently discontinued.

(5) A woman is not to be excused who leads a vicious life under the pretext of poverty.

(6) The occupation of a pander is not less disgraceful than the practice of prostitution.

(7) We designate those women as procuresses who prostitute other women for money....

(9) Where one woman conducts a tavern, and keeps others in it who prostitute themselves, as many are accustomed to do under the pretext of employing women for the service of the house; it must be said that they are included in the class of procuresses....

(12) Where a woman is caught in adultery, she is considered to have been convicted of a criminal offence. Hence if she is proved to have been guilty of adultery, she will be branded with infamy, not only because she was caught *flagrante delicto* [ie in the act of committing an obvious wrong], but also because she was convicted of a criminal offence. If, however, she was not caught, but was, nevertheless, found guilty, she becomes infamous because she was convicted of a criminal offence; and, indeed, if she was caught but was not convicted, she would still be infamous. I think that even if she should be acquitted after having been caught, she will still remain infamous, because it is certain that she was taken in adultery, and the law renders the act infamous and does not make this dependent upon the judicial decision.

(13) It is not mentioned here, as in the Lex Julia on adultery, by who or where the woman must be caught; hence she is considered infamous whether she was caught by her husband or by anyone else. She will also be infamous according to the terms of the law, even if she was not caught in the house of her husband or her father....

45. Ulpianus, On the Lex Julia et Papia, Book III.

In that law which provides that where a freedwoman has been married to her patron, after separation from him she cannot marry another without his consent; we understand the patron to be one who has bought a female slave under the condition of manumitting her (as is stated in the Rescript of our Emperor and his father), because, after having been manumitted, she becomes the freedwoman of the purchaser....

Novellae of Justinian I:

On Homosexuality Novel 77 [538] and Novel 141 [544 CE]

Roman Law

There had been earlier Roman legislation against homosexual acts. There was a shadowy Lex Scantinia supposedly passed in the early Republic against homosexual activity, but it seems to have had little effect. Certainly in the late Republic/early Empire the law was not applied, and social attitudes did not condemn homosexual sex (although "passive" sexual roles for men were despised). A tax was indeed levied on homosexual prostitutes. In the later Imperial period legal commentators enlarged the Lex Julia de adulteris (originally of c.17BCE) to include first offenses against boys and then, possibly, all male homosexual practices

In the Institutes of the Corpus Juris Civilis [which went into effect Dec 30, 533] summed up the legal opinions:

Institutes IV. xviii .4: In criminal cases public prosecutions take place under various statutes, including the Lex Julia de adulteris, "...which punishes with death (gladio), not only those who violate the marriages of others, but also those who dare to commit acts of vile lust with [other] men (qui cum masculis nefandum libidinem exercere audent)."

Note that this not only extends the law to homosexual acts, but also extends the death penalty to adultery, which was not part of the original law.

[Bailey 64-70].

Christian Emperors

The Christian emperors continued to collect taxes on male prostitutes until the time of Anastasius (ruled in Constantinople - 491-581). But there are occasional laws which seem to have been directed against homosexuality.

Against Same-Sex Marriage?

On Dec 16 342 Constantius and Constans passed a law (actually issued a legal decision) which was included in the later Theodosian Code:

Cod.Theod. IX. VIII. 3: (=Cod. Justin IX.ix.31): When a man marries in the manner of a woman, a woman about to renounce men {*quum vir nubuit in feminam viris porrecturam*), what does he wish, when sex has lost all its significance; when the crime is one which it is not profitable to know; when Venus is changed to another form; when love is sought and not found? We order the statutes to arise, the laws to be armed with an avenging sword, that those infamous persons who are now, or who hereafter may be, guilty may be subjected to exquisite punishment. [Bailey 70]

The meaning of this law has been hotly debated. Some have argued it indicates a previous legal status of same-sex marriage [John Boswell], others that "marries" simply means "give himself sexually"; and others that it relates to a particular legal case.

The Law of 390

A clearer law was issued by Valentinian II, Theodosius and Arcadius on Aug 6, 390. It also survives in the Theodosian Code:

Cod.Theod. IX. Vii. 6: All persons who have the shameful custom of condemning a man's body, acting the part of a woman's to the sufferance of alien sex (for they appear not to be different from women), shall expiate a crime of this kind in avenging flames in the sight of the people.

The wording is obscure - is it directed at passive partners or "sodomists" for instance? - but the attitude is clear. Again, it is less clear that this was ever applied, and, as noted, the tax on boy prostitutes continued to be collected. Still, this is beginning of the penalty or burning which was supposed to have been applied in areas in which Roman law ran. .

[Bailey 70-73]

Justinian [r. 527-565]

With Justinian, the situation seems to change. First we have historical accounts in Procopius and Malalas indicating that there was active persecution of some homosexuals. Secondly, Justinian's legislative activity was persistent. First there was the strictness of the Corpus Juris Civilis of 529. More significantly, Justinian issued two "Novels" directed against homosexual activity. Because of Justinian's fame as a legislator these have been widely read and were influential. But they are also qualitatively different from the earlier laws: they are as much about mix moralism with sternness and as extreme punishment. Although legal provisions against homosexual activity [Bailey 80, thinks primarily concerned with the corruption of boys and male prostitution] were maintained in later Byzantine legal codes, there is much less evidence that these laws were applied in practice, especially in the later years of the Byzantine empire.. [See the bibliography attached, especially Laiou..]

NOVEL 77 [358 CE] [relevant extracts]

...since certain men, seized by diabolical incitement practice among themselves the most disgraceful lusts, and act contrary to nature: we enjoin them to take to heart the fear of God and the judgment to come, and to abstain from suchlike diabolical and unlawful lusts, so that they may not be visited by the just wrath of God on account of these impious acts, with the result that cities perish with all their inhabitants. For we are taught by the Holy Scriptures that because of like impious conduct cities have indeed perish, together with all the men in them.

#1: *[there follows a section condemning various blasphemies -- swearing by God's Hairs', or "by God's head"]...For because of such crimes [not clear if this means just blasphemies or homosexual practices as well] there are famines, earthquakes, and pestilences; wherefore we admonish men to abstain from the aforesaid unlawful acts, that they may not loose their souls. But if, after this our admonition any are found persisting in such offenses, first they render themselves unworthy of the mercy of God, and then they are subjugated to the punishment enjoined by law.*

#2: For we order that most illustrious prefect of the Capital to arrest those who persist in the aforesaid lawless and impious acts [*this must refer to homosexual and blasphemous acts*] after they have been warned by us, and to inflict on them the extreme punishments, so that the city and the state may not come to harm by reason of such wicked deed. And if, after this our warning, and be found who have concealed their crime, they likewise shall be condemned by the Lord God. And if the most illustrious prefect find any who have committed any such offense. And shall omit to punish them according to our laws, first he will be liable to the judgment of God, and he will also incur our indignation.

[trans. in Derrick Sherwin Bailey, *Homosexuality and the Western Christian Tradition*, (London: Longmans, Green, 1955), 73-74]

NOVEL 141 [344 CE] [complete]

Preamble: Though we stand always in need of the kindness and goodness of God, yet is this specially the case at this time, when in various ways we have provoked him to anger on account of the multitude of our sins. And although he has warned us, and has shown us clearly what we deserve because of our offenses, yet he has acted mercifully towards us, and, awaiting our penitence has reserved his wrath for other times -- for he "has no pleasure in the death of wicked; but that the wicked turn from his way and live". Wherefore it is not right that we should all despise God's abundant goodness, forbearance, and long-suffering kindness and, hardening our hearts and turning away from penitence, should heap upon ourselves wrath in the day of wrath. Rather, we ought to abstain from all base concerns and acts -- and especially does this apply to such as have gone to decay through that abominable and impious conduct deservedly hated by God. We speak of the defilement of males (*de stupro masculorum*) which some men sacrilegiously and impiously dare to attempt, perpetrating vile acts with other men.

#1: For, instructed by the Holy Scriptures, we know that God brought a just judgment upon those who lived in Sodom, on account of this very madness of intercourse, so that to this very day that land burns with inextinguishable fire. By this God teaches us, in order that by means of legislation we may avert such an untoward fate. Again, we know what the blessed Apostle says about such things, and what laws our state enacts. Wherefore it behoves all who desire to fear God to abstain from conduct so base and criminal that we do not find it committed even by brute beasts. Let those who have not taken part in such doings continue to refrain in the future. But as for those who have been consumed by this kind of disease, let them not only cease to sin in the future, but let them also duly do penance, and fall down before God and renounce their plague [in confession] to the blessed Patriarch; let them understand the reason for this charge, and, as it is written, bring forth the fruits of repentance. So may God the merciful, in abundance of pity, deem us worthy of his blessing, that we may all give thanks to him for the salvation of the penitents, who we have now bidden [to submit themselves] in order that the magistrates too may follow up our action, [thus] reconciling to themselves God who is justly angry with us. And we also, wisely and prudently having in reverence the sacred season, entreat God the merciful that those who have been contaminated by the filth of this impious conduct may strive for penitence. Next, we proclaim to all who are conscious that they have committed any such sin, that unless they desist and, renouncing it [in confession] before the blessed Patriarch, take care for their salvation, placating God during the holy season for such impious acts, they will bring upon

themselves severer penalties, even though on other counts they are held guilty of no fault. For there will be no relaxation of enquiry and correction so far as this matter is concerned, nor will they be dealt with carelessly who do not submit themselves during the time of the holy season, or who persist in such impious conduct. Lest if we are negligent we arouse God's anger against us. If, with eyes as it were blinded, we overlook such impious and forbidden conduct, we may provoke the good God to anger and bring ruin upon all - a fate which would be deserved.

[trans. in Derrick Sherwin Bailey, *Homosexuality and the Western Christian Tradition*, (London: Longmans, Green, 1955), 74-75]

It may be noted that, although Justinian was clearly concerned with homosexuality, these Novels do not, as Bailey points out create any new crime or impose any new penalties {for the crimes and punishments were already in the Corpus Juris Civilis . In fact they are more exhortations than laws, and refer to local circumstances and seasons.

*Bailey notes that the so-called "crusade" of the Christian emperors against homosexuals was nothing of the sort. Late Roman pagan lawyers already applied the Lex Julia to homosexual acts; the number of decrees issued by the Christian emperors amounts to **four** in a two-hundred year period, and of these, the two by Justinian are as much concerned with penance as penalty [Bailey 79-81]. The implications of this point of view in understanding homosexuality in Byzantine society have not really been explored.*

Justinian, Novel 137, Regulating Church Ritual

[Bernard and Hodges]

The concept of a free and independent Church was unacceptable to Justinian. He regarded himself as head of the Church and insisted on his right and duty not to regulate the smallest details of discipline but also to dictate the theological opinions of the Church. Samples of his ecclesiastical legislation follow.

If for the general welfare, We have taken measures to render the civil laws more effective, with whose execution, God, through His good will towards men, has entrusted Us, how much more reason is there not for Us to compel the observance of the sacred canons, and Divine Laws, which have been promulgated for the safety of Our souls? For those who observe the sacred canons become worthy of the assistance of Our Lord God, while those who disobey them render themselves liable to be punished by Him. Therefore, the most holy bishops who are charged with the enforcement of these laws are liable to severe penalties when they allow any breaches of them to remain unpunished. And, indeed, as the sacred canons have not been, up to this time, strictly observed, various complaints have been made to Us of clerks, monks, and certain bishops, on the ground that they do not live in accordance with the divine canons; and indeed there are even some among them who are either ignorant of, or do not perform the holy service of the mass, or of the ceremony of baptism.

Therefore We, conceding the authority of the sacred canons, do promulgate the present law, by which We decree that every time it may be necessary to consecrate a bishop in any city, the clergy and principal citizens of the said city shall assemble, and issue proclamations by which they nominate three persons, and then make oath on the Holy Gospels, in conformity with the Scriptures. This oath, inserted in the proclamations, shall be worded as follows: "That they did not select the three persons whom they have nominated in consideration of any gifts or promises made to them; nor through friendship, nor induced by any affection whatsoever, but for the reason that they knew that the candidates whom they have chosen are steadfast in the Catholic Faith, and of honorable life; that they have passed the age of thirty years, and have neither wives nor children; and that they have had neither concubines nor natural children, nor have any at present; and if any of them formerly had a wife, he had but one, and she was neither a widow, nor separated from her husband, and that his marriage with her was not prohibited, either by the sacred canons, or by secular laws; that neither of the three candidates is charged with the duties of any public office. . . .

As what is laid down in the canons relating to the episcopal synods, which should be held in every province, is not observed, this is the first thing that should be remedied. . . We order that one synod shall assemble in each province in the month of June or September. . . . We desire that ecclesiastical questions having reference to the Faith, to canonical points, and such as relate to the administration of church property; . . . and . . . to all matters which have need of correction, shall be debated and examined in each synod, and We desire that abuses shall be disposed of in accordance with Our laws and the sacred canons.

We order all bishops and priests to repeat the divine service and the prayer, when baptism is performed, not in an undertone, but in a loud voice which can be heard by the faithful people, in such a way that the minds of the listeners may be induced to manifest greater devotion, and a higher appreciation of the praises and blessings of God. . . . We notify all ecclesiastics that if they should violate any of these provisions, they must render an account of their conduct on the terrible judgment Day of Our Lord and Saviour Jesus Christ; and that We, when informed of these matters, shall not disregard them, and leave them unpunished.

We also order that if the Governors of provinces should ascertain that any of the rules which We have promulgated are not observed, they shall first compel the metropolitans and other bishops to call the synods together, and do what We have just prescribed; and when the bishops do not immediately obey, the Governors must notify Us of the fact, in order to enable Us to promptly punish those who refuse to convoke the synods; and We hereby warn the Governors, as well as their courts, that if they do not see that what We have decreed is executed, they shall be put to death.

From Justinian, Novella, CXXXVII, translated by S.P. Scott in *The Civil Law* (Cincinnati, Ohio: 1932), Vol. XVII, pp. 152-156. Reprinted in Leon Bernard and Theodore B. Hodges, eds. *Readings in European History*, (New York: Macmillan, 1958), 57-58.

Justinian: Novella 146: On Jews

8.ii.553. Nov.146. Justinian to Areobindas, P.P.

A Permission granted to the Hebrews to read the Sacred Scriptures according to Tradition, in Greek, Latin or any other Language, and an Order to expel from their community those who do not believe in the judgment, the Resurrection, and the Creation of Angels.

Preface.

Necessity dictates that when the Hebrews listen to their sacred texts they should not confine themselves to the meaning of the letter, but should also devote their attention to those sacred prophecies which are hidden from them, and which announce the mighty Lord and Saviour Jesus Christ. And though, by surrendering themselves to senseless interpretations, they still err from the true doctrine, yet, learning that they disagree among themselves, we have not permitted this disagreement to continue without a ruling on our part. From their own complaints which have been brought to us, we have understood that some only speak Hebrew, and wish to use it for the sacred books, and others think that a Greek translation should be added, and that they have been disputing about this for a long time. Being apprised of the matter at issue, we give judgment in favour of those who wish to use Greek also for the reading of the sacred scriptures, or any other tongue which in any district allows the hearers better to understand the text.

Ch. I.

We therefore sanction that, wherever there is a Hebrew congregation, those who wish it may, in their synagogues, read the sacred books to those who are present in Greek, or even Latin, or any other tongue. For the language changes in different places, and the reading changes with it, so that all present may understand, and live and act according to what they hear. Thus there shall be no opportunity for their interpreters, who make use only of the Hebrew, to corrupt it in any way they like, since the ignorance of the public conceals their depravity. We make this proviso that those who use Greek shall use the text of the seventy interpreters, which is the most accurate translation, and the one most highly approved, since it happened that the translators, divided into two groups, and working in different places, all produced exactly the same text.

i. Moreover who can fail to admire those men, who, writing long before the saving revelation of our mighty Lord and Saviour Jesus Christ, yet as though they saw its coming with their eyes completed the translation of the sacred books as if the prophetic grace was illuminating them. This therefore they shall primarily use, but that we may not seem to be forbidding all other texts we allow the use of that of Aquila, though he was not of their people, and his translation differs not slightly from that of the Septuagint.

ii. But the Mishnah, or as they call it the second tradition, we prohibit entirely. For it is not part of the sacred books, nor is it handed down by divine inspiration through the prophets, but the handiwork of man, speaking only of earthly things, and having nothing of the divine in it. But let

them read the holy words themselves, rejecting the commentaries, and not concealing what is said in the sacred writings, and disregarding the vain writings which do not form a part of them, which have been devised by them themselves for the destruction of the simple. By these instructions we ensure that no one shall be penalised or prohibited who reads the Greek or any other language. And their elders, Archiphericitae and presbyters, and those called magistrates, shall not by any machinations or anathemas have power to refuse this right, unless by chance they wish to suffer corporal punishment and the confiscation of their goods, before they yield to our will and to the commands which are better and clearer to God which we enjoin.

Ch.II.

If any among them seek to introduce impious vanities, denying the resurrection or the judgment, or the work of God, or that angels are part of creation, we require them everywhere to be expelled forthwith; that no backslider raise his impious voice to contradict the evident purpose of God. Those who utter such sentiments shall be put to death, and thereby the Jewish people shall be purged of the errors which they introduced.

Ch. III.

We pray that when they hear the reading of the books in one or the other language, they may guard themselves against the depravity of the interpreters, and, not clinging to the literal words, come to the point of the matter, and perceive their diviner meaning, so that they may start afresh to learn the better way, and may cease to stray vainly, and to err in that which is most essential, we mean hope in God. For this reason we have opened the door for the reading of the scriptures in every language, that all may henceforth receive its teaching, and become fitter for learning better things. For it is acknowledged that he, who is nourished upon the sacred scriptures and has little need of direction, is much readier to discern the truth, and to choose the better path, than he who understands nothing of them, but clings to the name of his faith alone, and is held by it as by a sacred anchor, and believes that what can be called heresy in its purest form is divine teaching.

Epilogue.

This is our sacred will and pleasure, and your Excellency and your present colleague and your staff shall see that it is carried out, and shall not allow the Hebrews to contravene it. Those who resist it or try to put any obstruction in its way, shall first suffer corporal punishment, and then be compelled to live in exile, forfeiting also their property, that they flaunt not their impudence against God and the empire. You shall also circulate our law to the provincial governors, that they learning its contents may enforce it in their several cities, knowing that it is to be strictly carried out under pain of our displeasure.

Source.

from James Parkes: *The Conflict of the Church and the Synagogue: A Study in the Origins of Antisemitism*, (New York: JPS, 1934), 392-393

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