

Two ancient institutions of mankind, „Engagement” and „Marriage”, in the light of the biblical and legal texts. Some considerations and assessments  
კაცობრიობის ორი უძველესი ინსტიტუტი, „ნიშნობა“ და „ქორწინება“, ბიბლიური და სამართლებრივი ტექსტების მიხედვით. განხილვა და შეფასებები

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**Abstract:** A hermeneutical examination to both biblical text (Old and New Testament) and of the legal texts, has enabled us to ascertain that the institution of marriage - preceded by betrothal – have their primary legal basis in *jus divinum* (divine law) and *jus naturale* (natural law), or better said in the natural-moral law, and then in *jus scriptum*.

We have also remarked that the provisions of principle laid down in divine law and natural law, concerning engagement and marriage, have been taken up and affirmed both in the *jus gentium*, and in Roman law ('vetus' (old) and 'novum' (new), alias Byzantine law), and through them in international and national matrimonial law.

Hence, therefore, the duty of any research (jurist and historian of the legal institutions), who wants to speak about the two ancient institutions of mankind, id est Engagement and Marriage, to resort both to the biblical text of the Old and New Testament, that is with Bible, and to the legal texts (from Antiquity until our days).

**Key words:** Roman law, Mosaic law, New Testament Law, Byzantine law, betrothal and marriage

კატალინა მიტიტელუ

თეოლოგიის დოქტორი, კონსტანცას ოვიდიუსის  
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**აბსტრაქტი:** ბიბლიური (ძველი და ახალი აღთქმა) და სამართლებრივი ტექსტების ჰერმენეუტიკური შესწავლა საშუალებას

გვადლევს, რომ დავასკვნათ, რომ ქორწინების ინსტიტუტი – რომელიც იწყება დანიშვნით – თავის საწყის სამართლებრივ საფუძველს წარმოადგენს *jus divinum* (ღმერთის კანონი) და *jus naturale* (ბუნებრივი კანონი), ან კიდევ უფრო ზუსტად - ბუნებრივ-მორალურ კანონში, და შემდეგ *jus scriptum*-ში.

გავამახვილეთ ყურადღება, რომ ღვთის და ბუნებრივი სამართლის პრინციპული დებულებები, რომლებიც დაკავშირებულია ნიშნობასა და ქორწინებასთან, აისახა როგორც *jus gentium*-ში, ასევე რომაულ სამართალში („*vetus*” (ძველი) და „*novum*” (ახალი), იგივე ბიზანტიური სამართალი). ასევე განვიხილეთ მათი გავლენა როგორც საერთაშორისო, ისე ეროვნული ქორწინების კანონებზე.

ამრიგად, ნებისმიერი კვლევის მოვალეობა (სამართლებრივი ინსტიტუტების მკვლევარ სამართალმცოდნისა და ისტორიკოსებისა), ვინც განიხილავს კაცობრიობის ამ ორ უძველეს ინსტიტუტებს – ნიშნობასა და ქორწინებას, უნდა იხელმძღვანელოს როგორც ძველი და ახალი აღთქმის ბიბლიური ტექსტებით, ასევე სამართლებრივი მასალებით (ანტიკური დროიდან დღემდე).

**საკვანძო სიტყვები:** რომაული სამართალი, მოსეს კანონი, ახალი აღთქმის კანონი, ბიზანტიური სამართალი, ნიშნობა და ქორწინება

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**Introduction.** In order to approach and clear up the theme of our study - with an interdisciplinary content (biblical, legal (State and Church) and historical) - we called upon both to the biblical text (Old and New Testament), and to the legal texts.

By referring both to Mosaic Law and to „New Law” brought by Jesus Christ, we wanted to offer the reader of our study the opportunity to become acquainted first of all with the text of the divine law, which - since the creation of man by God - has been and remains for mankind the "lex primordialis et fundamentalis" (primordial and fundamental law) also with regard to the two ancient institutions, that is betrothal (sponsalia) and marriage (matrimonium).

According to the definition left to us by Roman jurists from the classical epoch of 'jus romanum antiquum' (ancient Roman law), the Engagement was „mentio et repromissio nuptiarum futurarum”, that is "the mutual announcement and promise of future marriage" (Florentinus, *Institutiones*, lb. III)<sup>179</sup>, and which "consensus

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<sup>179</sup> Justiniani Digestae, lb. XXIII, 1, 1, in Corpus Juris Civilis, ed. P. Krueger, T. Mommsen, R. Schöll, W. Kroll, New Jersey, 2010, vol. I, p. 294.

eorum exigendus est", that is, presuppose "the consent (consensus) of both parties, as in marriage (matrimonium)" (Paul, *Edict*, lb. XXXV)<sup>180</sup>.

According to the same famous roman juriconsults of the classical epoch of the Roman law (2-3 centuries) the marriage (matrimonium) is „*coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio*” (Modestinus in *Digestae*, lb. XXIII, II, I)<sup>181</sup>, that is „a union of male and female and a partnership of all life, a sharing of divine and human law”.

In other words, the partnership of a man and a woman is programmed for „all life”, and it involve „divine and human law”, hence our duty to resort both to the divine and natural law, which provisions will find in the text of the Holy Bible, and to the written human law, such as Roman law (Vetus and Novum) and international law.

The same roman juriconsults wrote that „*Nuptiae consistere non possunt nisi consentiant omnes, id est qui coeunt quorumque in potestate sunt*” (Paulus libro trigesimo quinto ad edictum)<sup>182</sup> (Marriage cannot take place unless everyone involved consents, that is, those who are being united and those in whose power they are).

In our paper, to these special references to the Roman law we also added some references to the texts of the Christian legislation, such as canon 87 of the Six Ecumenical Council and the imperial Constitution of the emperor Justinian (Novel 134), which give as the possibility to make some considerations and assessment about the two ancient institution of mankind, id est Engagement and Marriage, that will help the reader to understand better their evolutionary process.

## I. Engagement and Marriage in the Old Testament

As it is known, "Torah is the Jewish people's Book of the Testimony of the Revelation at Sinai, the moment of 'encounter' between God and the Jews"<sup>183</sup>, and according to Jewish tradition, "Torah was created by God even before the creation of the world". Moreover, the same Jewish biblical scholars assert that "without Torah, the connection between the Divine and the human is in distress. Without Torah, the purpose of Creation cannot be achieved"<sup>184</sup>.

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<sup>180</sup> Ibidem, lb. XXIII, I, 1, 7, in *Corpus Juris Civilis ...*, I, p. 294.

<sup>181</sup> Ibidem, I, p. 295.

<sup>182</sup> Ibidem, I, p. 295.

<sup>183</sup> *Tora și Haftarot* (Torah and Haftarat), transl. and annotations by Ș. S. Rosen, Bucharest, 2022, p. XI.

<sup>184</sup> Ibidem.

Both Jewish and Christian traditions attest that "Moses" is the "author" of the Torah, and "the Orthodox Church, in full accordance with rabbinic tradition and its schools, has approved this attestation since the apostolic age. It is based above all on the fact that the Saviour Jesus Christ Himself presents Moses as the author of the Law"<sup>185</sup>. Indeed, it was just the Lord Christ who that "Moses gave them the law" (Jn. 7:19), that is the written law of the Old Testament, written on "tablets of stone" (Exodus 24:12).

According to the testimony of the Old Testament text, Yahweh gave Moses "a law and commandments ... that ... teach them" (Exodus 24:12). And, this Old Testament law, called by the Apostle of the Gentiles - the former Rabbi Saul of Tarsus Cilicia - "law to God" (I Cor. 9:20-21), was followed - according to the same Apostle - by "the Gospel of God" (Rom. 1:1).

Therefore, the law of Moses was only a "Way" or a "schoolmaster to bring us unto Christ" (Gal. 3:24)<sup>186</sup>, because "for Christ is the end of the law for righteousness" (Rom. 10:4). And, according to the teaching of the Holy Apostles, "The Gospel of God" is the "Law of Christ" (Gal. 6:2; I Cor. 9:21) and the "Law of grace" (Jn. 1:17; Rom. 5:20; 6:14).

The Book of Genesis tells us that God created man "in the image of God" and in "our likeness" (Gen. 1:26). And in accordance with the statement of the orthodox biblists, the phrase after "our likeness" is in fact "the first scriptural revelation of the persons of the Holy Trinity"<sup>187</sup>. The same biblical text says explicitly that God made Man (Adam) "male and female" (Gen. 1:27) and "God blessed them" (Gen. 1:28) and commanded them to "replenish the earth" (Gen. 1: 28). And, according to the Jewish sources of the biblical text, "man was originally created as a two-part being, a human being who was then separated by God into two distinct entities: male and female"<sup>188</sup>.

It is about this testimony that both the text of the Hebrew Bible - which is in fact "a unique work of philosophy in narrative form"<sup>189</sup> - and the Septuagint, tell us about "Man" (Adam), whom the Greeks called "ἄνθρωπος" (who looks up to His

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<sup>185</sup> B. V. Anania, *Introducere la Pentateuh* (Introduction to the Pentateuch), in *Biblia sau Sfânta Scriptură. Ediție jubiliară a Sfântului Sinod* (The Bible or Holy Scripture. Jubilee Edition of the Holy Synod), version diortosed after the Septuagint, Edited and diortosed by Bartolomeu Valeriu Anania, Archbishop of Cluj, Ed. IBMBOR, Bucharest, 2001, p. 19.

<sup>186</sup> Bible, King James Version, <https://www.biblegateway.com/versions/King-James-Version-KJV-Bible/>

<sup>187</sup> B. V. Anania, *Introducere la Pentateuh*, p. 23 n.f.

<sup>188</sup> *Torah and Haftarat ...*, p. 8 n.h.

<sup>189</sup> *Ibidem*, p. 3.

Creator), and the Latins called him "homo / minis", from "humus", i.e. earth, because Adam was created from "dust of the ground" ("adama" in Hebrew) (cf. Gen. 2, 7). "Adam" is indeed the first creature on earth, and without him and his wife, Eve, both complementary parts of the same human being, can be neither engagement and marriage, nor family. Hence, the apodictic rabbinic saying, "a celibate is not truly human"<sup>190</sup>.

Our Saviour Jesus Christ also testifies to this reality, reminding his fellow Christians that it is written in the law that God "... at the beginning made them male and female" (Mt. 19:4), and, being "one flesh", they "are no more twain", and "what therefore God hath joined together, let not man put asunder" (Mt. 19:6).

These provisions of the Mosaic law included also the institution of betrothal, as we see from the Fifth Book of Moses, from which we retain that "a man" who was "betrothed to a woman" and did not "take her", i.e. did not marry, could go to war against his enemies, but "let him go and return unto his house, lest he die in the battle, and another man take her" (Deut. 20:7). From this biblical testimony we see therefore that the provisions of the Mosaic law also applied to betrothal, not only to marriage.

Some commentators on the Jewish biblical text also make express reference to the text of Exodus 22:16, where there is no reference to betrothal, but to the man who "... entice a maid that is not betrothed, and lie with her", and who was obliged "to give her a contract of marriage as his wife"<sup>191</sup>. The text in verse 16 of Exodus chapter 22, refers therefore to "an unmarried girl", but "seducing a girl" was and it is considered "adultery" by the Law of Moses<sup>192</sup>.

According to the same commentators on the Jewish text, the term betrothal - in the text of Deuteronomy 20:7 - "does not actually refer to betrothal, but to the period between the first and second stages of Jewish marriage"<sup>193</sup>, i.e., to the two stages of Jewish marriage, namely "erusin and nesuin", the first consecrating the marriage and the second allowing for intimate relations between the spouses<sup>194</sup>.

From the same Old Testament text, we must also note that "... two young men were considered to be married only after the man "took to himself" his wife (Deut.

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<sup>190</sup> Cf. C. Mihoc, *Taina căsătoriei și familia creștină în învățăturile marilor Părinți ai Bisericii din secolul al IV-lea* (The Mystery of Marriage and the Christian Family in the Teachings of the Great Fathers of the Church in the 4th Century), Ed. Oastea Domnului, Sibiu, 2020, p. 29.

<sup>191</sup> *Torah and Haftarat ...*, p. 306.

<sup>192</sup> *Ibidem*, n. b.

<sup>193</sup> *Ibidem*, p. 794, n.e.

<sup>194</sup> *Ibidem*, p. 306, n. b.

20:7)"<sup>195</sup>. Therefore, only "this *"taking"*, in the sense of *"taking possession"*, in Hebrew *hakhnachah*, meant the actual marriage"<sup>196</sup>.

This reality is also confirmed by the text of the Gospel of Matthew, according to which the angel "appeared" to Joseph, to whom Mary, the mother of Jesus Christ, was betrothed, and said to him, "Joseph, thou son of David, fear not to take unto thee Mary thy wife: for that which is conceived in her is of the Holy Ghost" (Mt. 1:20)<sup>197</sup>.

As far as the rights and duties of the betrothed, and particularly of the women betrothed, are concerned, it can be seen from the Old Testament text that they were "almost identical to those of the married"<sup>198</sup>. For example, if the betrothed was guilty of adultery, she was stoned to death, as was the adulterous wife. The betrothed could also only be repudiated by a "bill of divorcement" (cf. Deut. 24:1; Jer. 3:1; Mt. 5:31 and 19:7). Moreover, even if "the betrothed died, she (the betrothed, ed.) was counted as a widow. And the child conceived during the betrothal period was considered legitimate"<sup>199</sup>.

Concerning the dowry, it can be seen that, in accordance with what is stated in the text of the Book of Genesis, it was not the girl's father who gave the dowry, but the betrothed or groom who was to provide the dowry, regardless of the "dowry and gift" required by her father (Gen. 34:12). And, in the case of Abraham's son's marriage to Rebekah in Mesopotamia, the Book of Genesis also shows that Isaac took with him "all the goods" (Gen. 24:10) to give to his future wife, Rebekah, and her family.

The same biblical text tells us that Abraham's son - having arrived in Mesopotamia - gave Rebekah "a golden earring of half a shekel weight, and two bracelets for her hands of ten shekels weight of gold" (Gen. 24:22). In her parents' house, he "brought forth jewels of silver, and jewels of gold, and raiment, and gave them to Rebekah: he gave also to her brother and to her mother precious things" (Gen. 24:53).

From the same Old Testament text, we can see that the betrothed or bride did not leave her parents' home without first having received the "blessing" of her parents, as was the case with "Rebekah" (cf. Gen. 24:60), and that "a bridegroom decketh

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<sup>195</sup> C. Mihoc, *The Mystery of Marriage* ..., p. 33.

<sup>196</sup> Ibidem.

<sup>197</sup> Apud, *Bible or Holy Scripture* ..., p. 1461.

<sup>198</sup> C. Mihoc, *The Mystery of Marriage* ..., p. 33.

<sup>199</sup> Ibidem, p. 33.

himself with ornaments", and "the bride" was "adorneth herself with her jewels" (Is. 61-10)<sup>200</sup>.

These provisions of the Mosaic law, which become part of the heritage of the customary law of the chosen people, were usually taxed as the "customs of our fathers" (cf. 2 Mac. 7: 24). And, among these "customs of our fathers", i.e., of the Jewish people, were also those concerning these two ancient institutions of mankind, namely betrothal and marriage.

Regarding the father's rights over his children, it can be seen from the Old Testament text that there are also some similarities with the realities of ancient Roman law, in which the *pater familias* (head of the family) held and exercised full power over his offspring. For example, in the Book of Genesis, we also find that it was the *pater familias* who decided when and to whom the sons and daughters of the chosen people should marry (cf. Gen. 28:1; 29: 28; Exodus 21:7-10; Judges 11:30-40; I Kings 1, 24-28 et. al.).

Therefore, just as with other nations (Thracians, Romans, Greeks, etc.), the young people could not become engaged or marry without the consent of the "pater familias" (head of the family) and "parents (parentum)", "under whose power they are (quonim in poteste sunt)" (*Justiniani Institutiones*, lb. I, X, Praefatio).

Evidence of the customs and traditions of the "Chosen People" concerning the betrothal and wedding ceremonies can also be found in some of the New Testament texts, beginning with the text about the Wedding at Cana of Galilee (cf. Jn. 2:1-12). For example, from the Gospel text of John we also note - among other things - that "he that hath the bride is the bridegroom: but the friend of the bridegroom, which standeth and heareth him, rejoiceth greatly because of the bridegroom's voice" (Jn. 3:29).

In the Gospel text of Matthew, we find another testimony about the tradition of married life in the Old Testament epoch, according to which the "bridegroom" was welcomed to the house of his bride-to-be by her friends, who were also to be "virgins" (οἱ παρθένοι) and with "their lamps" (Mt. 25:1-7).

This New Testament text has its source in the Old Testament texts, and more specifically in the text of the Song of Songs, a text to which "... the Jewish rabbi ... gave the credit of an inspired book", and which was transmitted "... from generation to generation, and has been taken over by Christianity on the authority of ten centuries of existence", hence the obligation for this book to be "read and

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<sup>200</sup> Apud, *Bible or Holy Scripture...*, p. 959.

interpreted allegorically: the hierogamic relationship between Yahweh and His chosen people"<sup>201</sup>.

The same well known consecrated writer and theologian, the late Archbishop Bartholomew Valerius Anania († 2011), also noted that in the Song of Songs the "bridegroom" and the "bride" "... run through the whole poem in the most disparate poses, ..., as in the pre-nuptial games of the earthly pairs"<sup>202</sup>. This is why it has been said that this book, Song of Songs, "remains a hymn to the perfect love between man and woman, whose corollary is fulfilment, marriage"<sup>203</sup>.

From the same book, the Song of Songs, we also can see that, after imploring his future wife, with the words, "Come with me from Lebanon, my spouse, with me from Lebanon" (Song of Songs 4:8), words which the priest still utters today at the wedding Mass, the bridegroom speaks of his "bride" in whom "there is no spot in thee" (*Song of Songs* 4:7).

Applying an allegorical interpretation to the words, "there is no spot in thee", i.e. the spotless "Bride", the Fathers of the Eastern Church identified her with the Church of Christ, founded by His Sacrifice, and which is indeed undefiled, hence her privilege to preserve and transmit the truth of Christ's teaching, by which they would be blessed "all the nations of the earth" (Gen. 22:18).

The Mosaic law forbade marriage between persons who were related by blood, as attested by the text in the Book of Leviticus (the Third Book of Moses), which states that "none of you shall approach to any that is near of kin to him, to uncover their nakedness" (Lev. 18:6). Indeed, it was forbidden for a man to accompany or unite with his mother, his father's wives, his sister or half-sister, his aunt or niece, his daughter-in-law and sister-in-law, (except in the case of levirate), two sisters (cf. Lev. 18:7-18; Deut. 27: 20-23 et. al.).

In accordance with the Mosaic law, anyone who violated these prohibitions was punished by death (cf. Lev. 20: 11-12, 14). However, in some Old Testament texts we also find exceptional cases in which marriage was also permitted in degrees of physical kinship. For example, Isaac's son of Abraham, "... commanded" his son Jacob not to take "a wife of the daughters of Canaan", but to go "to Padanaram (Mesopotamia), to the house of Bethuel thy mother's father", and from "there" to take "a wife from thence of the daughters of Laban thy mother's brother" (Gen. 28:1-2).

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<sup>201</sup> B. V. Anania, Archbishop of Cluj, *Introducere la Cântarea Cântărilor* (Introduction to the Song of Songs), in *The Bible or Holy Scripture...*, p. 868.

<sup>202</sup> Ibidem.

<sup>203</sup> Ibidem, p. 871.



The Mosaic law also forbade any kind of sexual intercourse with half-brothers (cf. Lev. 18:9, 17), with daughters in law (Lev. 18:15) and with "your wife's sister" (Lev. 18:18), i.e., with your sister-in-law, because such acts were considered "wickedness" (Lev. 18:17).

The same Mosaic law forbade in the clearest possible terms any sexual intercourse "with thy neighbour's wife" (Lev. 18:20), or to "lie with mankind, as with womankind: it is - the Old Testament law provided - abomination. Neither shalt thou lie with any beast to defile thyself therewith: neither shall any woman stand before a beast to lie down thereto: it is confusion", Yahweh commanded by his prophet, the great Moses, "defile not ye yourselves in any of these things, ... and the land is defiled" (Lev. 18: 22-25)<sup>204</sup>. Hence God's command to the Jews to keep His "ordinance" and to do nothing "of these abominable customs" (Lev. 18:30)<sup>205</sup>, for God has stopped "these abominations" (cf. Lev. 18:1-30).

As for levirate marriage (cf. Deut. 25:5-10), the Mosaic Law provided that if a man of the chosen tribe died "and have no child" the "wife of the dead" man "shall not marry without unto a stranger", but "her husband's brother shall go in unto her, and take her to him to wife ... and ... that the firstborn which she beareth shall succeed in the name of his brother which is dead, that his name be not put out of Israel" (Deut. 25:5-6). But, as some biblical theologians have noted, "... the practical application of the law of levirate was by no means simple; hence, in the Talmud, its codification occupies almost an entire treatise (the treatise Yebamoth)"<sup>206</sup>.

The name "levirate marriage" derives from the Hebrew word "yaham", which translates as "brother-in-law"<sup>207</sup>. In Latin, the Hebrew noun "yaham" (brother-in-law) was translated as "levir-viri" (brother-in-law, brother of the husband)<sup>208</sup>, hence the phrase "levirate marriage".

That the practice of "levirate marriage" was still in use among the Jews in the time of our Saviour Jesus Christ is also attested by the fact that, "... in one of His discussions with the Sadducees, they invoked as a reason for their unbelief in the resurrection of the dead the case of a woman who had seven brothers as her husband's one by one" (Mt. 22:24-27)<sup>209</sup>.

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<sup>204</sup> Ibidem, p. 143.

<sup>205</sup> Ibidem, p.144.

<sup>206</sup> C. Mihoc, *The Mystery of Marriage* ..., p. 32.

<sup>207</sup> Ibidem.

<sup>208</sup> G. Guțu, *Dicționar latin-român* (Latin-Roman Dictionary), Ed. Științifică și Enciclopedică, Bucharest, 1983, p. 696.

<sup>209</sup> C. Mihoc, *The Mystery of Marriage* ..., p. 32.

Although the seventh commandment of the Decalogue resolutely forbade not only the adultery and fornication of the woman but also of the man (cf. Ex. 20:14), nevertheless, among the Jews, the wife was considered "inferior" to her husband, and her unfaithfulness was punished by stoning, a punishment which was also in force in the time of our Lord Jesus Christ (cf. In. 8:5).

As for divorce, which materialized by the repudiation of the woman by "parting card", it required that the procedure of separation of the spouses be justified by "a serious reason"<sup>210</sup>, otherwise "the man lost the dowry he had given to his father-in-law; then, he had to provide the repudiated wife with an allowance (kethuba); ..."<sup>211</sup>.

## II. Engagement and Marriage in the New Testament Law

Our Lord Jesus Christ reminded the Sadducees that God made "male and female" (Mt. 19:4), and that "what God has joined to man, let him not separate (*Ὁ ὄν ὁ Θεὸς συνέζευξεν, ἄνθρωπος μὴ χωριζέτω*)" (Mt. 19, 6)<sup>212</sup>, because "from the beginning (*ἀπ' ἀρχῆς*) it was not so" (Mt. 19, 8), or, according to St. Jerome's version, "ab initio autem non fuit sic"<sup>213</sup>.

In order to better understand the meaning of the Lord's words concerning divorce, we will reprint - in translation - the text of the Gospel of Matthew from the Bible translated into Latin by Saint Jerome (342-420) - born in Stridon, a town on the borders of Dalmatia and Pannonia - from which we note that, "... from Galilee", Jesus "came to the borders of Judea beyond the Jordan", where he was tempted by "certain Pharisees", who said to him: "Is it lawful for a man to leave his wife for any cause?" He answered and said to them: "Have you not read that he who made them (men) from the beginning made them male and female? And he said: Therefore, shall a man leave his father (his) and his mother (his), and shall cleave to his wife, and they shall be two in one body, so that they are no more two, but one body. Therefore, what God has joined together, let not man put asunder!" They said to him: "Then why did Moses command that a parting book should be given to him, and that he should leave her?" He said to them: "Because of the hardness of your heart Moses permitted you to leave your wives, but from the beginning it was not so. And I say to you that whoever leaves his wife, and does not leave her because of

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<sup>210</sup> Ibidem, p. 269.

<sup>211</sup> Ibidem, p. 270.

<sup>212</sup> *Noul Testament (text grec și român)* (New Testament (Greek and Romanian text)), Vatoped Monastery, Mount Athos, 2022, p. 57.

<sup>213</sup> *Apud Biblia Sacra Vulgata*, bilingual edition, vol. VII, trans. W. Tauwinkl et. al, ed. University Al. I. Cuza, Iași, 2015, p. 136.

fornication, and marries another, commits adultery, and whoever marries the one left commits adultery"<sup>214</sup>.

According to modern-day biblical theologians, "the Pharisees' question reflects one of the topics of debate in the rabbinical schools of the time, concerning the reasons that may justify a divorce", which they relate to the text of Deuteronomy 24:1-4. But the Pharisees interpreted the text of Deuteronomy 24:1 "... as a positive commandment, while Jesus considered it only a concession"<sup>215</sup>.

From what Jesus said to his fellow countrymen it is clear that, according to the teaching of our Lord Jesus Christ, marriage is eminently monogamous and indissoluble, and whoever divorces his wife, except in the case of fornication, and marries another, "commits adultery" (Mt. 19:9).

After the "New Law" - given by Jesus Christ - there is, however, another state of adultery, because "whosoever looketh on a woman to lust after her hath committed adultery with her already in his heart" (πάς ο βλέπων γυναίκα πρὸς τὸ ἐπιθυμήσαι αὐτῆς ἤδη ἐμοίχευσεν αὐτήν ἐν τῇ καρδίᾳ αὐτοῦ) (Mt. 5:28), and, therefore, from the text of the chapter 19 of Matthew's Gospel Jesus' disciples understood this state of adultery as an impact of the interdiction of separation, hence why they said to him: "if the case of the man be so with his wife, it is not good to marry" (Mt. 19, 10)<sup>216</sup>.

According to the interpretation of some modern-day biblical scholars, the words of Jesus' disciples "... might imply that they valued marriage according to the possibility of divorce; ..."217. Now, the Saviour told his disciples that "all men cannot receive this saying, save they to whom it is given" (Mt. 19:11)<sup>218</sup>, because, in addition to this way of life, i.e., that of marriage, Jesus recommended both "voluntary virginity" and "perpetual abstinence for those who want to devote themselves entirely to the spiritual life"<sup>219</sup>.

However, from the words of the Saviour we cannot conclude that He recommended the life of celibacy, or that "this verse", that is, verse 12 of chapter 19 of Matthew's Gospel, would be "an argument in favour of the conformity of celibacy to the priesthood", as it is affirmed "in the Latin Church"<sup>220</sup>.

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<sup>214</sup> Ibidem, p. 137.

<sup>215</sup> Ibidem, p. 136, chap. 19-3.

<sup>216</sup> *The Bible or Holy Scripture...*, p. 1483.

<sup>217</sup> *Biblia Sacra Vulgata*, vol. VII, ..., p. 137, n. 10.

<sup>218</sup> *The Bible or Holy Scripture...*, p. 1483.

<sup>219</sup> Ibidem, p. 1483.

<sup>220</sup> *Biblia Sacra Vulgata*, vol. VII, ..., p. 138, n. 12.

### III. From the biblical text, to the principles expressed in the text of Byzantine Law (Church and State) about Marriage

Those who faithfully followed and preached the teaching of the biblical text on marriage (cf. Mt. 5:31-32; Lk. 16:18), taught both the monogamous principle and the indissolubility of marriage, and thus naturally also vehemently condemned divorce.

Due to these principles proclaimed by our Lord, Jesus Christ, the "New Law" has proved its decisive complementary role with regard to the divine-human institution of marriage, about which also made special reference both the greatest Fathers of the Ecumenical Church in their canons, that is in the text of Christian legislation, and the great law-givers, like the last Roman emperor and the first Christian emperor, that is Justinian in his imperial Constitutions (Novels).

For example, St. Basil the Great – who was one of law-gives of the Church – whenever he referred to divorce, referred to the biblical texts of the Old and New Testaments (cf. Mt. 5:27; I Cor. 6:16; Jer. 3:1 etc.), and on the basis of these biblical texts this ecumenical Father concluded that according to "the Lord's decree, ... no one is forgiven for divorcing from marriage except for the reason of adultery (Mt. 5:32)". However, he also made it clear that, "following the meaning of the Lord's words", the divine command "... is equally applicable to both men and women" (can. 9, St. Basil the Great)<sup>221</sup>.

This canon of St. Basil the Great was expressly referred to by the Fathers of the Sixth Ecumenical Council (Second Session)<sup>222</sup>, also known as the Trullan Council (691/692), in canon 87, according to which „she who has left her husband (τὸν ἄνδρα) is an adulteress (μίχλις) if she has come to another, according the holy and divine Basil”. And „he who leaves his wife lawfully (νομίμως) given him and shall take another is guilty of adultery” (can. 87 Syn. VI ec.)<sup>223</sup>. In fact,

according to the orthodox canonical doctrine, a "divorce without cause is assimilated to adultery, if the one who has the initiative marries or cohabits with a stranger"<sup>224</sup>.

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<sup>221</sup> *Canoanele Bisericii Ortodoxe. Note și Comentarii* (Canons of the Orthodox Church. Notes and Commentaries), ed. I. N. Floca, Sibiu, 1991, p. 326.

<sup>222</sup> N. V. Dură, *The Ecumenicity of the Council in Trullo: Witnesses of the Canonical Tradition in the East and the West*, în *The Council in Trullo Revisited*, coord. G. Nedungatt, M. Featherstone, Roma, 1995, p. 229-262.

<sup>223</sup> Rhali, G. A.; Potli, M, *Σύνταγμα τῶν θείων καὶ ἱερῶν κανόνων* (*Syntagma of the Divine and Holy Canons*) (*Athenian Syntagma*), vol. II, Athens, 1852, p. 505-506.

<sup>224</sup> I. Floca, *Canoanele Bisericii Ortodoxe ...*, p. 145.

It is also noteworthy, however, that the text of Canon 87 of the Sixth Ecumenical Council not only made reference to the texts of Sacred Scripture, but also partly reproduced them ad litteram, as for example in the case of the texts of Jeremiah 3:1 and Proverbs 18:23, hence the Synod's ruling that "the woman who leaves her husband and goes after another is an adulteress", and that "the man who leaves his lawfully taken wife and brings another, according to the commandment of the Lord he is subject to the penalty of adultery" (can. 87 Syn VI ec.)<sup>225</sup>.

In their commentary on this canon, the famous Byzantine canonists of the 12th century made it clear that "among Christians there are limited causes for which a marriage can be dissolved ..., apart from the cause of fornication (ἐκτὸς λόγου πορνείας) ..." (can. 87 Syn. VI ec.)<sup>226</sup>.

The new Roman law, alias the Byzantine law, make express reference not only to that "repudium" of Roman law, or to the "libellus repudii" (book of separation), which spouses could hand to or send to each other, but also to the principles laid down in the Old Testament and New Testament texts on marriage.

These principles are indeed found expressed in the text of Church law<sup>227</sup> and Byzantine law<sup>228</sup>, that is in the Christian law of the Eastern Roman Empire, which begins with the age of the emperor Justinian (527-565) and ends with the fall of Constantinople in 1453.

For example, in his imperial Constitution – promulgated in 1st May 536 – the emperor Justinian foresee that, „if ever a charge of adultery should be clearly proven, ... to be inflicted on the guilty are those determined by Constantine of pious destiny” (Novel 134, 10)<sup>229</sup>, that is the death penalty for adultery. But the

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<sup>225</sup> *Athenian Syntagma*, vol. II, p. 505-506.

<sup>226</sup> *Ibidem*, p. 506.

<sup>227</sup> N. V. Dură, P. Kroczeck, C. Mititelu, *Marriage from the Roman Catholic and Orthodox points of view*, Ed. Scriptum, Krakow, 2017, p. 136-193; N. V. Dură, *Impedimentele la Căsătorie în lumina hotărârilor celei de a II-a Conferințe Panortodoxe Presinodale (3-12 septembrie 1982) (Impediments to Marriage in the Light of the Decisions of the Second Pre-Synodal Pan-Orthodox Conference (September 3-12, 1982))*, în *Mitropolia Banatului*, XXXIV (1984), nr. 7-8, p. 404-416.

<sup>228</sup> N. V. Dură, *The Byzantine Nomocanons, fundamental sources of old Romanian Law*, în vol. Proceedings "Exploration, Education and Progress in the third Millennium", vol. I, no. 3, Galați University Press, Galați, 2011, p. 25-48; N. V. Dură, *Legislația nomocanonică, bizantină, și receptarea ei în Principatele Române (The nomocanonical, Byzantine legislation and its implementation in the Romanian Principalities)*, în *Revista de Teologie Sfântul Apostol Andrei*, Anul XIX-XX, nr. 1 / 2015-2016, p. 42-63; C. Mititelu, *The Byzantine Law and its Reception in the Romanian Principalities*, in *Philosophical-Theological Review*, nr. 4, 2014, p. 33-43.

<sup>229</sup> *The Novels of Justinian. A Completed Annotated English Translation (2018)* ed. D. J. D. Miller and P. Sarris, vol. II, Cambridge University Press, p. 897.

same Constitution suggest that under Justinian the standard punishments were death or confiscation of property with imprisonment<sup>230</sup>.

According to the provisions of the same Constitution, „should the adulterer have a wife, her dowry and the gift before marriage – or the share under our law, if the marriage was not accompanied by dowry-settlements – are to be reserved intact for her out of his property, while the rest of his property is to be taken by descendants or ascendants as far as the third degree ..., if not, we command that it is to accrue to our fiscus” (Novel 134, 10)<sup>231</sup>.

In our opinion, the main innovation contained in this imperial Constitution would appear to be the defense of the women, which we are not meet before the laws enacted by the emperor Justinian, as it is also proved by the text of other of his imperial Constitutions<sup>232</sup>.

### **Instead of Conclusions**

From the Old and New Testament texts, we could therefore to retain that the institution of Marriage, preceded by the Engagement, has been monogamous and indissoluble since the creation of man by God<sup>233</sup> (cf. Gen. 2:24; Mt. 19, 3-6), and that the prophet Moses allowed the Israelites to separate from their wives in view of "the hardness of (their) hearts" (τὴν σκληροκαρδίαν ὑμῶν) (*duritiam cordis vestri*) (Mt. 19:8), because they did not obey God's will (cf. Mt. 19:7-8), hence the legalization of polygamy (cf. Deut. 21: 15-17) and levirate marriages (Deut. 25: 5-6).

From this perspective of the biblical text, both Old and New Testament, we see only as an exception the fact that Moses allowed the Jews to separate from their wives, and he had to accept the divorce only an indulgence for the weaknesses of human nature, which had led however to the violation of both divine and natural law by some of his countrymen.

Some biblical texts of New Testament allow a woman to ask for a divorce when her husband is guilty of fornication (cf. Mk. 10:11-12). But, from the point of view of the teaching of the New Law, the dissolution of marriage is accepted only in the

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<sup>230</sup> Ibidem, p. 897.

<sup>231</sup> Ibidem, p. 899.

<sup>232</sup> C. Mititelu, *Emperor Justinian's Novel 74 and its Importance for European Marriage Law*, in *Teologia*, 2019, nr. 4 (81), pp. 26-37.

<sup>233</sup> N. V. Dură, *The "Man" and His Creation in the Perception of "Creationism" and "Evolutionism". Contributions of "Christian Philosophy"*, in *Philosophical-Theological Review*, no. 4, 2014, p. 9-27; N. V. Dură, *Man in the view of some Christian Theologians with Philosophical Background*, in *Annals of the Academy of Romanian Scientists, Series on Philosophy, Psychology, Theology and Journalism*, vol. 5, nr. 1-2, 2013, p. 75-97.

case of adultery (cf. I Cor. 7:2-7), and not in the case of fornication, although this one is perceived and defined as a sin opposed to holiness, and is harshly condemned (cf. I Cor. 6:15-19), hence the obligation of the spouses to keep their vow of fidelity, because after marriage "the wife hath not power of her own body, but the husband: and likewise also the husband hath not power of his own body, but the wife" (cf. I Cor. 7:4).

By this special relationship, the spouses are therefore obliged to keep their marriage bed undefiled (cf. Heb. 13:4), since our Savior Jesus Christ raised the institution of marriage "from the order of nature", that is of natural law, "to the order of grace"<sup>234</sup>.

Undoubtedly, from these brief considerations and evaluations of the Biblical text, both Old and New Testament, it also could be seen that according to provisions of the "Old Law" and the "New Law", called "New Testament" (Lk. 22:20; 1 Cor, 11, 25) or "New covenant" (Heb. 8, 8), the two ancient institutions of mankind, i.e., betrothal and marriage, have their original basis in the "jus divinum" (divine law) and in the "jus naturale" (natural law), or in other words, in the "natural moral law"<sup>235</sup>.

The foundations given to the two institutions, betrothal and marriage, by divine and natural law, are to be found - in the form of provisions of principle - not only in *jus canonicum* and in *jus romanum novum* (Byzantine law), but also in the law of other peoples of the world, even in the law of our times.

The provisions of principle laid down by divine law and natural law, as well as by the Roman law<sup>236</sup> and canon law<sup>237</sup>, concerning the Engagement and Marriage<sup>238</sup>, were affirmed in the legal norms of each people, i.e., in *jus civile* of every nation<sup>239</sup>,

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<sup>234</sup> D. Stăniloae, *Teologie dogmatică ortodoxe* (Orthodox Dogmatic Theology), vol. III, Ed. IBM, Bucharest, 1978, p. 183.

<sup>235</sup> N. V. Dură, *Loi morale, naturelle, source du Droit naturel et de la Morale chrétienne*, in vol. *La morale au crible des religions*, coord. M. Th. Urvoy, Éditions de Paris, 2013, p. 213-233; N. V. Dură, *Law and Morals. Prolegomena (I)*, în *Acta Universitatis Danubius. Juridica*, nr. 2/2011, p. 158-173; N. V. Dură, *Law and Morals. Prolegomena (II)*, în *Acta Universitatis Danubius. Juridica*, nr. 3/2011, p. 72-84.

<sup>236</sup> C. Mititelu, *Matrimonium (Marriage) in Roman Law. The Impact of the Provisions of "Jus Romanum" on International and National Matrimonial Law*, în *Bulletin of the Georgian National Academy of Sciences*, vol. 14, no. 4, 2020, p. 120-130.

<sup>237</sup> N. Dură, Mititelu C., *Legislația canonică și instituțiile juridico-canonice europene, din primul mileniu*, Ed. Universitară (*European canon law and canonical legal institutions in the first millennium*), București, 2014, p. 93-124.

<sup>238</sup> C. Mititelu, *About Engagement ("Sponsalia"). From "Jus Romanum" to "Jus Civile" of Romania*, in *Technium Social Sciences Journal*, vol. 29 (2022), p. 672-682.

<sup>239</sup> C. Mititelu, *Reglementări ale Noului Cod civil român privind logodna (Regulations of the New Romanian Civil Code regarding engagement)*, în *Revista Națională de Drept*, nr. 7-9, 2018, p. 59-62.

from which some of them were also adopted in text of the international law<sup>240</sup>, known in Gentile times as "jus gentium" (Gentile law) (cf. Gaius, *Institutiones*, lb. I, 1).

Hence, therefore, the imperious duty of those who wish to pronounce knowingly on the two ancient institutions of mankind, i.e., Engagement and Marriage, which have their institutional basis in *Jus divinum* and in *Jus naturale*, to resort both to the biblical texts of the Old and New Testaments, i.e., to the Bible, the "Book" which is a source of knowledge in many areas of human life, and to the text of the Roman law, Byzantine law (State and Church), international and national law.

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<sup>240</sup> C. Mititelu, *Reglementări ale dreptului roman, privind instituția căsătoriei, exprimate și comentate în "Decretum Gratiani" (Regulations of Roman Law, on the Institution of Marriage, expressed and commented in "Decretum Gratiani")*, în *Jurnalul juridic național: teorie și practică*, nr. 2 (36) 2019, p. 32-35; N. V. Dură, *Despre caracterul prioritar al normelor dreptului internațional, privind drepturile și libertățile fundamentale ale omului, în raport cu cele ale dreptului național (On the priority nature of international law norms, regarding fundamental human rights and freedoms, in relation to those of national law)*, în *Revista Națională de Drept*, nr. 7-9, 2018, p. 54-58.



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