ARCTOS

ACTA PHILOLOGICA FENNICA

VOL. XXII

HELSINKI 1988 HELSINGFORS

INDEX

Divorce in Later Roman Law*

ANTTI ARJAVA

In few issues has the contrast between the early and the later Roman Empire been considered so great as in the case of divorce. The pagan society has been characterized as one of frequent and totally accepted divorces, whereas the Christian emperors are praised or blamed for having introduced severe restrictions. This has even been regarded as the strongest impact of the Christian doctrine on Roman private law.[1]

But it has also been proposed that the whole question of a new morality in Roman society is more complex. The social and ideological evolution of pagan culture has been seen as parallel to the rise of Christianity, often facilitating it and sometimes shaping its form and content. On the other hand, the practical influence of the new religion on people's behaviour has been questioned.[2]

In this article I am not trying to deny all Christian influence on Roman legislation on divorce. I am, however, suggesting that it cannot be the whole truth. After briefly discussing the allegedly favourable pagan

---

* I owe many useful references and suggestions to Dr. Judith Evans Grubbs (Sweet Briar College).

1 M. Kaser, Das römische Privatrecht II, 1975^2, 175.

2 P. Veyne's article in AESC 33 (1978) 35-63, has been influential, though it has met with some criticism. See also e.g. A. Cameron, JRS 76 (1986) 266-71; J. Evans-Grubbs, Munita coniugia: The Emperor Constantine's Legislation on Marriage and the Family, Diss. Stanford (UMI) 1987; R. MacMullen, Historia 35 (1986) 322-343; K. Thraede, Frau, RLAC 8, 197-269. In legal history a vast literature exists on the question of a possible Christian influence, with no satisfactory final results so far, see e.g. M. Sargenti, SDHI 51 (1985) 367-91.

attitudes I will present the view that our knowledge of the later development is insufficient and even some existing evidence has hitherto been neglected. Consequently, no unambiguous interpretation is possible.

Seneca (Benef. 3, 16, 2), Martial (6, 7; 10, 41), Juvenal (6, 224-230) and Tertullian (Apol. 6, 6) tell us that the contemporary Roman *matronae* freely sought divorces whenever they wished. The idea of a liberal pagan society is largely based on the reports of these satirists. But they attest only that this practice was possible, not that it was approved of – quite the contrary: it was vehemently criticized. There is no doubt that divorces, especially those sought by women, were always seen as an offence in Roman society.[3]

Preparing the prosopography of senatorial women M.-Th. Raepsaet-Charlier has counted 27 certain and 24 possible divorces known to us between B.C. 10 and A.D. 200. A large number of them are imperial or otherwise politically motivated. Moreover, their number seems to decrease from the Julio-Claudians towards the end of the period and, according to her, the documentation cannot explain the development. She links the change in habits to that discussed by Veyne: a pre-Christian shift in Roman morals.[4]

What is absolutely clear, however, is that during the Principate divorce was legal. The latest explicit statement comes from the early 3rd century (Alex. Sev. CI 8, 38, 2).[5] But though permissible, divorce was not without its consequences. In unilateral divorce the culpable party was determined, and if there were children, the wife could lose up to half of her *dos*. Smaller *retentiones* could be withheld *propter mores*, and if these were on the husband's side, he had to pay the *dos* back without the usual period of grace (Boeth. In top. Cic. 4, 19 PL 64, 1075-6; Ulp. Tit. 6, 9-13; Fr. Vat. 107; 121; D. 24, 2, 6; 24, 3, 39). Thus, in the normal situation, wives could not divorce without financial penalty whereas men could.

---

[3] Cf. D. 4, 4, 9, 3 and Verrius ap. Fest. 281 ('*repudium*').

[4] M.-Th. Raepsaet-Charlier, Acta Class. Univ. Sc. Debrecen. 17-18 (1981-82) 168-71. It should be clear that statistics like these can only be regarded as suggestive.

[5] The Diocletianic CI 5, 4, 14, which is sometimes mentioned in the same connection, has plainly been taken out of context and may concern paternal authority in divorce rather than freedom of unilateral repudiation. Both these rescripts can naturally be seen as opposing growing popular practices.

However, additional arrangements were often made in the dotal pact in anticipation of a future divorce (Fr. Vat. 106; 114; D. 23, 4, 17; 24, 3, 45; 45, 1, 19). It was evidently possible to agree that the wife would leave the whole *dos* (Fr. Vat. 120; D. 23, 4, 2; 24, 3, 48).[6] If such contracts were becoming more common it would indicate an increasingly stringent attitude towards divorce. But that is something we cannot know. We should not forget that the legal documentation of the later 3rd century is fragmentary at best. Only those rescripts which were taken to the Justinian Code 300 years later have been handed down to us, and they were taken out of context, heavily abridged and sometimes emendated.[7] These problems are particularly clear in the case of divorce: most 3rd century legislation was obsolete in the 6th century and had no place in the Code. Thus, we have no direct evidence to determine whether the legal consequences of divorce had remained the same during the century. It is quite possible, for the passages taken to Fr. Vat. (above) imply that there had been no radical changes at the time of its compilation (probably in the 310s).[8] The liberal laws and allusions to *retentiones* by later, "classicizing" emperors (see below) also support this view. But the fact should not be underestimated that for about a hundred years before 331, imperial legislation on divorce is not available for us.

It is generally assumed that Constantine only began to take action against divorce in 331, and that may be so. But it has to be remembered that from the first five books of the Theodosian Code only about one third of the

---

[6] It should be noted that Fr. Vat. 120 is quite fragmentary in the manuscript and has been reconstructed by Mommsen. For these passages of Digest cf. the following footnote.

[7] The fear of Justinian emendations is a constant threat to every theory that seeks antecedents to the later legislation in the 3rd century. This applies to a very significant rescript of Diocletian (CI 5, 12, 24): "*Si dotem marito libertae vestrae dedistis nec eam reddi soluto matrimonio vobis in continenti pacto vel stipulatione prospexistis, hanc culpa uxoris dissoluto matrimonio penes maritum remansisse constitit, licet eam ingratam circa vos fuisse ostenderitis.*" The rescript does not focus on divorce but on patronal rights. Consequently the Justinian compilators may well have substituted '*hanc*' for e.g. the original '*retentiones*'.

[8] F. Raber, RE Suppl. X, 235-40.

original text is preserved.[9] The fragmentary manuscript T (lost in a fire in 1904) did not contain the crucial title *De repudiis* (3, 16) at all, and consequently only the two constitutions which were included in the Visigothic Breviarium Alaricianum (compiled in 506) are known. We do not know what other constitutions there were besides those.[10] And even the complete Code hardly contained all of the original legislation.

Under these circumstances we should be wary of arguing ex silentio. As early as 321, Nazarius had extolled Constantine's virtuous laws: "*Pudor tutus, munita coniugia*" (Paneg. Lat. 10, 38). Even a panegyric requires, if not exceptional measures, at least something to have happened. In the extant Constantinian moral legislation before 321 there is in fact very little to substantiate Nazarius' claims.[11]

In any case a very outspoken law was enacted in 331 and unilateral divorce was clearly penalized (CT 3, 16, 1). A wife could be repudiated only for adultery, sorcery or procuration, a man for homicide, sorcery or destruction of tombs. The penalty for a woman was loss of her *dos* or even all of her property (the wording is somewhat ambiguous) and exile. A man would lose the *dos* and could not remarry. As can be seen, there was no such thing as equality between the sexes, nor would the divorcing husband have had any right to the *dos* even under classical law.[12] The striking omission is to any mention of divorce by mutual consent.[13] This continued to be allowed throughout Late Antiquity, thus forming an important link with earlier tradition and leaving a wide gulf between secular legislation and ecclesiastical doctrine.

---

9 Th. Mommsen in Prolegomena to his edition of the C. Theodosianus, xxxviii.

10 One may compare the titles 3, 5 and 3, 30, which were partially preserved in T and reveal the omissions of the Breviarium. We can suspect that in 3, 16 there was at least one other constitution (see below).

11 Cf. A. Ehrhardt, ZRG 72 (1955) 170 on Constantinian laws mentioned by Eusebius but not preserved in the Codes.

12 He could have kept an eighth if he was able to show some moral flaws in his wife (Tit. Ulp. 6, 12), cf. above.

13 That this omission is intentional, is usually assumed, Kaser, op. cit. 179; Evans-Grubbs, op. cit. 61. In view of the later development it is probable though perhaps not absolutely certain.

The next development is not recorded in the Codes as we have them, but it is revealed by an unknown Christian writer, the so-called Ambrosiaster:

Ante Juliani edictum mulieres viros suos dimittere nequibant, accepta autem potestate coeperunt facere quod prius facere non poterant: coeperunt enim cottidie licenter viros suos dimittere. Ubi latuit fatum tantis temporibus? Timore, credo, legis occultabat se. (Quaest. de utr. test. 115, 12 CSEL 50, 322)[14]

Here are at least three interesting points. The writer apparently believes that the Constantinian marriage laws were much more effectively enforced than those of e.g. Augustus. Particularly women who sought divorce had caught the pious observer's eye. And it becomes clear that Julian, the defender of traditional Rome, and someone who was very fond of repealing Constantine's laws, was opposing him even in this detail.

We should now raise the question whether Julian's edict was again revoked and the Constantinian law restored when he was out of the way.[15] No revocation of the statute is extant but that could quite plausibly be attributed to the fragmentary preservation of the Code. However, Ambrosiaster seems rather to mean that after Julian there was no change in the situation up to the date he was writing, which was probably little after 374.[16] This interpretation receives a great deal of support from certain passages of the Church Fathers, written between 385 and 420, which have not previously been cited in this connection.

---

[14] CT 3, 13, 2 is probably a part of this edict, see Kaser, op. cit. 176 A. 20.

[15] This is still the subject of some debate, but probably the more common assumption has been that Julian's edict was revoked, recently e.g. C. Castello, Acc. Roman. Cost. Atti V conv. int. (1983) 270. Among the scholars who believe that it remained in force are H. J. Wolff, ZRG 67 (1950) 262, A. Merklein, Das Ehescheidungsrecht nach den Papyri der byzantinischen Zeit, Diss. Erlangen 1967, 69-70 and R. Bagnall, Church, State and Divorce in Late Roman Egypt in Florilegium Columbianum (ed. K.-L. Selig and R. Somerville), 1987, 41-61, 43. Kaser, op. cit. 176, mentions the edict but does not discuss its subsequent fate. Evans-Grubbs, op. cit. 59-61, evidently has some doubts.

[16] For Ambrosiaster and the date see O. Heggelbacher, Vom röm. zum christl. Recht (Arbeiten aus dem Iur. Seminar der Univ. Freiburg Schw. 19), 1959, 6.

...nec sterilem coniugem fas sit relinquere, ut alia fecunda ducatur. Quod si quisquam fecerit, non lege huius saeculi, ubi interveniente repudio sine crimine conceditur cum aliis alia copulare conubia...sed lege Evangelii reus est adulterii, sicut etiam illa, si alteri nupserit. (Aug. nupt. et concup. 1, 10 CSEL 42, 223)

Ceterum aliter se habere iura gentilium quis ignorat? ubi interposito repudio sine reatu aliquo ultionis humanae et illa cui voluerit nubit et ille quam voluerit ducit. (Aug. bon. coniug. 8, 7 CSEL 41, 197)

Dimittis ergo uxorem quasi iure, sine crimine, et putas id tibi licere, quia lex humana non prohibet; sed divina prohibet. (Ambr. in Luc. 8, 5 CChr 14, 300)[17]

...qui per effrenatam libidinis voluptatem absque fornicationis causa dimissis uxoribus, in alia volunt transire coniugia. Quod idcirco se credunt impune committere, quia humanis et saeculi legibus id videtur permissum... (Chromat. in Matth. 24, 1, 4 CChr 9A, 310)

Nec eam feminam quae per repudium discessit a marito, licet vobis ducere vivo marito. (Aug. sermo 392, 2 PL 39, 1710)[18]

Sed et vos moneo, viri... non commisceri adulterino corpori... nec dare hanc occasionem divortii mulieribus. (Ambr. Abr. 1, 25 CSEL 32/1, 519)

In the first four passages the bishops clearly indicate that the human law of the empire was disturbingly liberal, and in the last two they at least

---

17 That the divorce is unilateral is attested a little later when Ambrose calls the wife *repudiata*. The terminology remains regrettably ambiguous. Even if *repudium* as a legal term often signifies only the document (*libellum repudii*) and not specifically a unilateral desertion (cf. Nov. Th. 12 and CI 5, 17, 9), at least most of the present examples plainly refer to precisely the practices that Constantine wanted to forbid.

18 A little further in the text it is indicated that *per repudium discedens* is really the active party in the divorce; it is perhaps somewhat less certain in the case of *repudio discedens* (Aug. bon. coniug. 29, 32 CSEL 41, 227).

attest that among their flock practices exist that would have been most illegal if the Constantinian divorce law were in force.[19] This would in fact not be exceptional. In their decisions the Fathers and the Church Councils often imply that it is quite possible e.g. to commit adultery without suffering the harsh official punishment.

However, there is also some ambiguous evidence from the eastern part of the empire from the same period:

Μὴ γάρ μοι τοὺς παρὰ τοῖς ἔξωθεν κειμένους νόμους ἀναγνῷς, τοὺς κελεύοντας διδόναι βιβλίον ἀποστασίου, καὶ ἀφίστασθαι. Καὶ οἱ τῶν ἔξωθεν δὲ νόμοι οὐχ ἁπλῶς, οὐδὲ προηγουμένως τοῦτο τεθείκασιν, ἀλλὰ καὶ αὐτοὶ κολάζουσι τὸ πρᾶγμα· ὥστε καὶ αὐτόθεν δείκνυται, ὅτι ἀηδῶς πρὸς ταύτην ἔχουσι τὴν ἁμαρτίαν. Τὴν γοῦν αἰτίαν τοῦ ἀποστασίου γινομένην γυμνὴν καὶ ἔρημον χρημάτων ἐκβάλλουσι, καὶ ὅθεν ἂν γένηται τῆς διαλύσεως ἡ πρόφασις, καὶ τῇ ζημίᾳ τῆς οὐσίας τοῦτον κολάζουσιν· οὐκ ἂν οὖν τοῦτο ποιήσαντες ἐπῄνουν τὸ γινόμενον. (Joh. Chrys. hom. de lib. repudii 1 PG 51, 219)

τοῖς τῆς μητρὸς δὲ νῦν δικαιώμασιν ἰσχυρῶς αἱ θυγατέρες κέχρηνται κατὰ τῶν ἀγνωμόνων καὶ ἀπίστων ἀνδρῶν, ὥστε σοι πανταχόθεν ἡ καταφρόνησις τῆς γαμετῆς ἀδύνατος, καὶ ἀρχαίοις νόμοις τοῖς θείοις καὶ νέοις τοῖς ἀνθρωπικοῖς δεδεμένῳ. (Aster. Amas. hom. 5, 5)[20]

When Chrysostom mentions that the secular laws disapproved of divorce and punished a wife who sought divorce with the loss of her property, it can hardly be identified with the old *retentiones*, even if some exaggeration is allowed. It could clearly fit the Constantinian law or some modification of

---

19 Additional statements making similar claims are found e.g. in Aug. adult. coniug. passim CSEL 41, 347-410, and Basil. Ep. 188, 9 and 199, 35 (Lettres, ed. Y. Courtonne, Coll. Budé 1957-66, vol. 2, 128-9/161). Jerome gives a similar impression in his story of Fabiola, whose divorce as he describes it would not have been permissible according to CT 3, 16, 1 (Ep. 77, 3). Unfortunately, the occasion cannot be dated more precisely than to the second half of the 4th century; Fabiola is mentioned only in Jerome's epistles 64 and 77, see e.g. PLRE.

20 Homilies I-XIV. Ed. C. Datema, Leiden 1970, 47.

it. As regards the second passage, the context makes it probable that Bishop Asterius is referring to some secular restrictions of divorce, which are not specified.

But on the whole both Asterius' and Chrysostom's homily make it clear that this morality is something which their male audience does not put into practice in their daily life. They reject their spouses for the slightest reason and "change wives like clothes", as Asterius puts it. One gets the impression that excuses are often sought, no doubt primarily by accusing the wife of immoral conduct. But it is not clear whether the excuses are meant for secular or ecclesiastical authorities or just for neighbours.

The legal reality in the empire evidently showed more temporal and local variations than our meagre sources indicate. We do not know how accurate the bishops' information was about imperial legislation. But in the correspondence of Gregory of Nazianzus (Ep. 144-5)[21] there is a most interesting piece of evidence, because it also involves secular authorities. In 382 A.D. a certain Verianus sought a separation between his daughter and her husband, and the governor had asked his friend Gregory to make some investigations into the case. The bishop regarded the matter as delicate but wrote:

Ἐγὼ δὲ ἥδιστα ἂν γνώμην ἔδωκα τῷ υἱῷ Οὐηριανῷ πολλὰ τῶν ἐν μέσῳ παραδραμεῖν ἐπὶ τῷ μὴ κυρῶσαι τὸ ἀποστάσιον, ὃ τοῖς ἡμετέροις ἀπαρέσκει πάντως νόμοις, κἂν οἱ Ῥωμαίων ἑτέρως κρίνωσι.

When speaking of "our laws", which were more restrictive, Gregory can refer either to surviving local custom or to Biblical commands. But "the laws of the Romans" are different, and the two letters reveal that although both the bishop and the governor disapprove of the divorce, they have no legal means to prevent it. Details are not given but the crucial point seems to be whether the girl is more loyal to her parents or to her husband, which indicates a unilateral repudiation.[22]

In view of the evidence presented above it seems quite certain that

---

21 Ed. P. Gallay, Coll. Budé, 1967, tom. 2, 35-7.

22 As Merklein, op. cit. 47-48, appositely remarks, "mutual consent" could often be only technical: even an unwilling spouse would have been inclined to consent unless he/she wanted to drag the divorcing party through the courts. Here this is apparently not the case.

the Constantinian ban on unilateral divorce was not restored after Julian. If any restrictions existed at all, they had to be in a much milder form which we can no longer reconstruct. Thus for 60 years in the late 4th and early 5th centuries, under many Christian emperors, in the most productive period of Ambrose, Jerome and Augustine, there were no great obstacles to divorce in Rome.

Many observers obviously found this situation quite unsatisfactory. In 407 an African Council condemned all remarriages by divorced persons and decided to ask the emperor to enact a law against this misdemeanour (Reg. eccl. Carth. exc. can. 102 CChr 149, 218, cf. p. 325).[23] It is doubtful whether this request was heard at all. At any rate the bishops' wish was very incompletely fulfilled, when in 421 a new decree was passed. It distinguished between three grades of reasons for unilateral divorce (CT 3, 16, 2). Wives especially met with increasing difficulties. For unfounded divorce they lost both their *dos* and the *donatio ante nuptias* and they were exiled.[24] If they could show some minor reasons (such as, presumably, the spouses' adultery), the penalty of exile was reduced to celibacy for life. Only for very heavy reasons (*magna crimina* of the husband) could they go unpunished and even then remarriage was forbidden for five years to leave no doubt about their motives. Husbands had much more freedom, for they had lost their wives' *dos* even in the old days. This was the only major setback if a husband divorced for "minor reasons" ("*ut solet fieri, femina morum levitate displiceat*", as the *interpretatio* later in the 5th century put it). Loss of the *donatio* and a lifelong ban on remarriage were imposed in the case of totally unfounded repudiation.

This law was promulgated in the western empire and took practical effect in the east probably only in 438, when the Theodosian Code was published.[25] Next year Theodosius II revoked it and restored the classical freedom to divorce, obviously with the old *retentiones* as sole punishment

---

23 The canon speaks explicitly only of deserted spouses who were considered capable of remarriage even in the Constantinian law

24 It is interesting to note that in the Constantinian law the marriage gifts from the bridegroom's side were not yet mentioned. In the Principate their value was quite modest, but it increased in the later empire until the *donatio* totally replaced the wife's *dos* in the early Middle Ages, see D. Herlihy, Medieval Households, 1985, 15-16, 50, 73-74.

25 Kaser, op. cit. 176.

(Nov. Th. 12; 14, 4). This would seem to confirm that the old Constantinian law had not been in force in the eastern empire before 438. It is quite improbable that such a pious Christian emperor as Theodosius would have revived forgotten ancient practices if divorce had been prohibited since Constantine, i.e. for over a hundred years.[26]

As for the Theodosian statute, it was evidently published in the west only in 448 with his other Novellae.[27] The next year saw a new emendation. A long list of grounds was given that justified unilateral divorce (CI 5, 17, 8). But even the lack of grounds brought with it only a loss of *dos* and *donatio* and additionally five years' celibacy for the wife. It is hard to say how far this compromise was acknowledged in the west, but soon after Theodosius had died the western emperor Valentian III in 452 re-enforced his father's more severe CT 3, 16, 2 from the year 421 (Nov. Val. 35, 11).

Once more it must be stressed that this history is based on existing laws and contains potentially important gaps. The same applies to later developments, although a certain status quo seems to have been reached. In 497 an eastern law of Anastasius explicitly approves of divorce by consent (CI 5, 17, 9). The liberal eastern tradition continued in the early 6th century when Justinian introduced some new legal grounds and maintained the mainly financial penalties (CI 5, 17, 10-11; Nov. Just. 22, 3-19). But later in his reign, celibacy is again imposed on divorcees and both sexes are for the first time treated in the same way; now even divorce by consent is prohibited (Nov. Just. 117, 7-14; 127, 4; 134, 11). This latter restriction was again removed in 566 by his successor Justin II, who was softened by unfortunate couples who flocked to him for help (Nov. Just. 140).[28]

Development in the west can be traced in the collections of Roman law that were made mainly in southern Gaul for the Roman subjects of the Germanic kings around the year 500. The Breviarium Alaricianum contains the strict constitutions CT 3, 16, 1-2 from the Theodosian Code, logically omitting Julian's edict and perhaps some unknown laws. Of the Theodosian Novels the Breviarium similarly omits c. 12, which had proclaimed freedom to divorce. Edictum Theoderici 54 follows Constantine's CT 3, 16, 1 as far as

---

26 Cf. Evans-Grubbs, op. cit. 61.

27 Cf. Nov. Th. 2 and Nov. Val. 26.

28 K. Visky believes that Justinian's legislation did not correspond to the common opinion and therefore met with failure, RIDA 23 (1976) 262-64.

permissible grounds are concerned – penalties are not mentioned. Lex Romana Burgundionum 21 similarly adopts the Constantinian rule but begins with an explicit approval of divorce by consent.

Thus, legal theory in the western provinces seems to have remained more hostile to divorce than in the east, coming close to the old scheme of Constantine.[29] The new Germanic population had even more determined attitudes in its own laws: women could not divorce, and among the Burgundians they were drowned in a bog if they tried; husbands could escape with financial penalties (e.g. Lex Burg. 34; Lex Visig. 3, 6, 1). Mutually consented divorces are attested by Formulae in Gaul at least up to the 8th century, despite increasing legislation by the Carolingians.[30]

If someone had asked the bishops about Christian influence in secular morals, they would have confessed that it was indeed negligible. The Constantinian ban on divorces had been short-lived. Over two hundred years after Constantine's conversion Justinian tried in vain to prohibit divorces by mutual consent. In the west legislators were more in favor of restrictions. However, only unilateral divorces were affected, and even then remarriage was in many cases possible, especially to men. Serious new attempts were made only in the Carolingian empire, half a millennium after Constantine.

If an early 3rd century classical Roman jurist had observed the same development, he would probably have had mixed feelings: the old stumbling block of Roman society, wives who sought divorce, was being removed at last, but only with the side effect that husbands, too, had new difficulties. He would evidently have blamed Christianity – or would he?[31]

A "Christian influence" can have two quite distinct meanings: the political and/or spiritual power of bishops among the governing circles on the one hand, and a genuine penetration of Christian doctrine into the popular morals on the other. We can fairly safely assume that the laws tell us little

---

[29] The can. 25 of Conc. Agath. (506 A.D.), CChr 148, 204, implies, though, that the secular law was not particularly well enforced.

[30] J.-A. McNamara - S. F. Wemple, Marriage and Divorce in the Frankish Kingdom, in Women in Medieval Society, ed. S. M. Stuard, 1976, 100ff. (with references).

[31] The Christian influence on divorce laws has caused much theorizing among legal historians. Part of the literature is listed by Evans-Grubbs, op. cit. 64 n. 36, and Kaser, op. cit. 175 A. 11, earlier literature by Wolff, op. cit. passim.

about the latter aspect. There can hardly have been a common opinion about moral issues in the different social strata and geographical areas of a large empire, and even if such a thing had prevailed (e.g. after "Christianization") the population at large could not directly initiate legislation. In the case of divorce it would be particularly difficult to explain the fluctuating legislation by shifts in popular opinion. Thus our evidence mainly reflects ideals embraced by the court or the upper classes at most.

Taking Constantine first, he was clearly one of those emperors who since Augustus had shown a lively interest in regulating his subjects' morals. His concern for the purity and well-being of upper-class families is reflected in his legislation, which predominantly promotes old Roman conservative values.[32] But these same values could often be linked up with later Christian teaching. In his efforts the emperor found a welcome ally in the Church, and we need not even question his religious sincerity (although we can, of course).

The Christian writers maintained that divorce was one of the ideological differences between them and pagans. As usual, they were exaggerating and forgot that they were not the first ones who tried in vain to prompt Romans into moral reform. I have earlier noted that distaste for (female) divorce was a traditional feature of Roman society. But it was left to Constantine to forbid it. In fact, this is one of those very few cases where later Roman moral legislation does not simply follow pagan traditions.

Constantine would hardly have enacted his law if it had not been supported by the Church and been a positive gesture towards its leaders.[33] On the other hand, he would certainly not have assented to their demands if it had been detrimental to the state. Demography had already played a part in Augustan policy towards the family. It was hardly ignored by Christian emperors.[34] It was important to get people to marry and produce legitimate

---

[32] This tendency is discernible in my material for a thesis on women in later Roman law. Similar conclusions have been reached by Evans-Grubbs, op. cit. 242ff. and cf. Bagnall, op. cit. 51-2.

[33] Evans-Grubbs, op. cit. 80 (following Sargenti) stresses, perhaps rightly, the role of the law's official addressee, the Christian praetorian prefect Ablabius.

[34] This is clearly stated in 458 (Nov. Maj. 6, 5) when all widows are ordered to remarry. It is quite in line with Augustan policy and in startling contrast to Christian ideology.

children. 300 years of experience had shown that Romans could not be compelled to marry. Perhaps they could at least be prevented from dissolving their marriages.

Be this as it may, it seems that the Constantinian family policy met the same fate as the Augustan: his later successors were less active in their moral emphasis. Perhaps even ecclesiastical support was losing its strength. In the Christian congregations during Constantine's reign there was probably some old idealism, sense of seclusion and community left, which upheld morals and church discipline. But as Romans were being Christianized, Christians and their habits were becoming irrevocably Romanized at the same time. The celibate Church Fathers eventually became a moral minority even in their own flock.[35] This may in part help to explain why many "Christian" emperors after Julian were not eager to restrict divorces, although the political power of the Church had grown even greater.

The fluctuating legislation in the 5th century shows the incapacity of the eastern and western governments to take a uniform stand on divorce. Religious conviction seems to have played a minor role. It is difficult to believe that the eastern emperors or their advisors had been less convinced Christians than their western colleagues. One explanation may lie in the cultural tradition. The eastern legal schools (and also apparently the eastern court) preserved a scholarly, respectful attitude towards classical jurisprudence and its old urban, upper-class values, whereas in the west legislation was more quickly adapted to new social conditions and thinking.[36]

This leaves us with the last problem, which proves to be the most difficult: why was legislation against divorce again passed in the west in 421 and thenceforth enforced? We cannot exclude the possibility that the western lawgivers were more effectively influenced by their spiritual advisors and at the same time less loyal to the ancient juridical traditions. This would then have been the origination of the western legal tradition. However, other contributing factors can be sought.

As noted above, Roman legislation is no direct source for shifts in lower-class morals. But an important qualification has to be made. Evidently in the political and social upheavals of the later empire more people who were not from the traditional urban upper classes entered government. Thus,

---

35 This is illustrated by Evans-Grubbs, op. cit. 75-78, using Basil. Ep. 188, 9 and Innoc. Ep. 6 PL 20, 495-502.

36 E.g. Kaser, op. cit. 26-27, 32-33; E. Levy, ZRG 49 (1929), 240.

it is possible that in Late Antiquity the ruling class was adopting morals that had previously been more typical of the provincial, rural and perhaps poor urban population or at least that these norms of behaviour were more often taken into consideration in the laws.[37] Such development, though not easy to prove and certainly not easily defined, would eventually focus the attention on lower-class behaviour after all.

In practice, we have little evidence of lower-class attitudes towards divorce in Antiquity, for they are not attested in literature or in epigraphy.[38] But it has usually been assumed on the grounds of modern comparisons and of deductive reasoning that divorce was much less common outside the Roman nobility, which had both the financial means and political reasons to dissolve its marriages.[39] We can also cite the traditional total incapacity of Germanic women to initiate divorce, which certainly cannot be attributed to Christian influence.

It must be stressed that the influence of popular morals on the law of Honorius and Constantius III in 421 is purely a hypothesis. It gains some strength in the later 5th century when the central government had collapsed and the Gallo-Roman jurists commissioned by the Germanic kings were excerpting statutes from the old Codes. Is it only by chance that provincials chose the Constantinian restrictions, which most closely resembled archaic habits, habits which also appeared in the laws of their new Germanic neighbours?[40]

Naturally this interpretation is not without its problems. The bishops would not have used so much energy to fight divorce if it had not been a common phenomenon in their flock, although it is hardly clear which social strata they were mainly addressing in their homilies.[41] The Egyptian papyri show that men and women were relatively freely divorcing from Hellenistic to Byzantine times and this behaviour had few traces of imperial

---

37 This possibility is brought out by Evans-Grubbs, op. cit. 247ff. though not in connection with divorce.

38 Cf. I. Kajanto, REL 49 bis (1969) 99-113.

39 Evans-Grubbs, op. cit. 249; Kajanto, op. cit. 102.

40 In the new kingdoms Roman laws applied only to people of Roman descent, while Germans clung to their customs.

41 The theological treatises are apparently meant for a more educated audience.

or Christian influence.[42] Evidently in some areas the popular opinion about divorce was more tolerant than in others, but through the homilies we only catch glimpses of the differences. And certainly in any society the same actions can be morally reprehended and yet nevertheless be commonly practiced.

The unequal treatment of the sexes is an underlying thread in classical Roman attitudes, late imperial legislation and pagan Germanic traditions. Double standards were not sanctioned by the church, for it has to be said to the bishops' credit that in this respect they were honestly egalitarian and demanded equal morals for both sexes – in vain, however. It is remarkable that e.g. the Merovingian legislation on divorce is actually Germanic in content and not Christian.[43]

As can be seen, the divorce laws cannot be explained by any one factor. But they should clearly be studied in the wider context of the whole Late Ancient legislation on the family. One connecting aspect is the protection of the interests of children in divorce which is mentioned in Nov. Th. 12, CI 5, 17, 8, 7 and Nov. Just. 117 and forms a link with the legislation on remarriage and other subjects.[44] Thus, divorce could be one of those cases where secular and religious motives converged to create "Christian Late Antiquity".

So far it is probably safe to assert only a few things: distaste for unilateral divorce had roots even in the upper classes in the Principate, it was probably stronger in the lower classes, it fitted well into Constantine's family policy, it received strong support from ecclesiastical authorities but it never effectually prevented individuals from divorcing.

We shall conclude by considering who primarily felt the effects in this complex history. We have seen that in practice women met with more severe restrictions, but in principle the laws applied to both sexes. Did women gain or lose?

It is surprisingly difficult to assess the financial consequences of a divorce (and so the force of the restrictions), for they would depend on the

---

42 Merklein, op. cit. 81-2, 102-6; Bagnall, op. cit. 57-61.; Kaser, op. cit. 51. The evidence is admittedly scarce.

43 McNamara - Wemple, op. cit. 99-100.

44 This is stressed also by Bagnall, op. cit. 51-3.

relative value of the *dos* and *donatio* in the total property of the persons concerned. Similarly, an impending celibacy would have a wholly different significance for people in varying situations and at different ages. It is quite possible that women who sought divorce were not only morally but also quantitatively a greater problem for the contemporary upper-class society of the day than men. Since Seneca and Juvenal, male observers had paid special attention to women, and Ambrosiaster agreed: the liberty of divorce was liberty for women. The reason may have been the same as today. When a marital conflict became acute the weaker partner was the one who had fewer options. And if only the *dos* or part of it or even celibacy was at stake, it would not restrain a wealthy elderly lady for long.

But the possibility of divorce had an effect on firm marriages, too. This effect was based on the fact that the wife's property, at least the *dos*, was usually governed by the husband. Consequently, she had little to lose in divorce, while the husband had to stay alert to prevent his wife's wealth from slipping out of his hands – and such fears were well known (e.g. Apul. Apol. 92). Thus the freedom to divorce limited the husband's power even if the actual threat was never uttered. When divorce was more or less restricted it evidently weakened the position of propertied women, whose wealth would have offered them the opportunity to lead an independent life.[45]

But men could also initiate divorce. That became clear in the passages from Asterius and John Chrysostom cited earlier. Augustine gives some examples of the reasons men had for dismissing a wife: if she was poor, ugly, infertile or too ill to be able to have intercourse (adult. coniug. 2, 16, 17 CSEL 41, 403). In the next passage he admits:

Incomparabiliter quippe numerus est amplior feminarum, quae cum pudice adhaereant maritis, tamen si dimissae fuerint a maritis, non differunt nubere.

The statement shows that rejected wives were not outcasts and could remarry if they wished. This was essential, for it was not good for a woman to remain unmarried in the Mediterranean world, unless she was a rich heiress – or joined an ascetic Christian community. Thus, in the lower classes wives

---

45 In the 4th and 5th centuries Rome saw an increasing number of well-to-do widows, taking full advantage of the new ascetic habit, often perhaps with mixed motives (cf. Nov. Maj. 6, 5; Hier. Ep. 77, 4; 127, 3).

had less use for the freedom to divorce. At least some of them may have gained from an increased stability of marriages – if the law could be enforced in a man's world. And considering the mortality rates, there was an all too common way out of marriage besides divorce. For many ordinary women in Antiquity divorce as well as widowhood was clearly a human tragedy rather than an emancipatory victory.