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The Evolution of the Legal Institution of Marriage in Roman Law

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ABSTRACT**:** Marriage was the union performed with the intention to establishing a family. Among the Romans, the family was stronger than the state. This explains the fact that they took measures, including of a legal nature, to protect marriage and, implicitly, the family. These measures had become necessary towards the end of the Republic, when Oriental-type morals had penetrated Rome. These had changed the mentality of women, who no longer wanted to come under the power of their husbands and who had begun to live in simple *de facto* unions. In order to save the family, Roman jurists consecrated the legal institution of marriage without *manus*. According to it, the woman no longer fell under the power of her husband, but remained under the *patria potestas* of the *pater familias* of the family of origin. Over time, as the Romans gained social and legal experience, they paid even more attention to this legal institution because civil marriage became an important tool in achieving the Romanization process.

KEYWORDS**:** marriage with manus, marriage without manus, confarreatio, usus, coemptio, connubium, affectio maritalis

The appearance and evolution of marriage in Roman Law

Marriage is the legal union performed in order to establish a family. In ancient times, marriage had the effect of the woman falling under the power of the man, who exercised over the married woman a power called *manus*. In this way, the man ensured that he would exercise parental power over the children resulting from the marriage and authority over the woman. These issues were due to the fact that the Roman family was patriarchal, and the Roman society was one in which the man participated in the activities of public and private life.

As society developed and realities changed as a result of the penetration of morals from the East, Roman women began to live in cohabitation, as they wanted to emancipate themselves and get out of the power of their husbands (Axente 2022, 175). This practice was likely to endanger the family itself, which, for the Romans, was stronger than the state. To avoid these consequences, marriage without *manus* was created. In this way, the woman was partially emancipated, as she no longer fell under the power of her husband, but remained under the power of the *pater* from the family of origin.

The formal conditions of marriage

The Roman marriage was concluded in two forms: with *manus* and without *manus*. In turn, marriage with *manus* was concluded in three forms: *confarreatio*, *usus* and *coemptio*.

Confarreatio is the oldest form of marriage. This form of marriage involves the intervention of the religious authority. It was accessible only to the patricians, as they had access to the exercise of acts specific to the religious cult. The jurisconsult Gaius gives us precious information about this form of marriage conclusion: *"farreo in manum conueniunt per quoddam genus sacrificii, quod Ioui Farreo fit; in quo farreus panis adhibetur, unde etiam confarreatio dicitur; complura praeterea huius iuris ordinandi gratia cum certis et sollemnibus uerbis praesentibus decem testibus aguntur et fiunt. quod ius etiam nostris temporibus in usu est: nam flamines maiores, id est Diales, Martiales, Quirinales, item reges*

sacrorum, nisi ex farreatis nati non leguntur: ac ne ipsi quidem sine confarreatione sacerdotium habere possunt" (Girard 1890, 180). Therefore, the *confarreatio* required the presence of the future spouses, the *pontifex maximus,* the flamin of Jupiter and ten witnesses. On this occasion, a cake of wheat flour was offered to Jupiter (the supreme god) and solemn formulas were uttered. As long as *confarreatio* was the only way to conclude marriage, plebeians lived in illegitimate unions, since they could not perform acts of worship.

In order to eliminate these shortcomings, Roman jurists created a new way of marriage, called *usus* (Hanard 1997, 148). And this time, the jurisconsult Gaius gives us information about how this form of marriage was concluded: *"usu in manum conueniebat, quae anno continuo nupta perseuerabat; quia enim uelut annua possessione usu capiebatur, in familiam uiri transibat filiaeque locum optinebat. itaque lege duodecim tabularum cautum est, ut si qua nollet eo modo in manum mariti conuenire, ea quotannis trinoctio abesset atque eo modo cuiusque anni usum interrumperet. sed hoc totum ius partim legibus sublatum est, partim ipsa desuetudine obliteratum est"* (Girard 1890, 180). Therefore, the *usus* comes true by the cohabitation of the spouses for one year. It was inspired by the *usucapio* of *res mobiles*, which had to be possessed for one year. After the passage of a year, the woman fell under the power of the man, became his daughter and, implicitly, an element of his heritage. If the woman did not want to come under the power of the man, she had the right to be absent from home for three nights.

Coemptio (Gaudemet and Chevreau 2009, 47) is another form in which marriage with *manus* was performed. And this time, the jurisconsult Gaius sends us precious information. According to him, *"coemptione uero in manum conueniunt per mancipationem, id est per quandam imaginariam uenditionem: nam adhibitis non minus quam V testibus ciuibus Romanis puberibus, item libripende, emit uir mulierem, cuius in manum conueni".* (Girard 1890, 180-181). Therefore, *coemptio* was one of the applications of mancipation. This explains the fact that it consisted of a symbolic sale, which involved the performance of certain rituals and the recitation of solemn formulas in the presence of at least five witnesses who were pubescent Roman citizens and a person holding a copper scale.

Marriage without a *manus* appeared towards the end of the Republic, when, on the background of borrowing morals from the East, the woman wants to become independent in relation to her husband. Many women, who did not have access to *confarreatio*, preferred to use *ius trinoctii* (the right of three nights), which interrupted the one-year period specific to *usus* marriage. These practices endangered the family, birth and, implicitly, the Roman society. To avoid these consequences, Roman jurists created marriage without *manus*, which was achieved by installing the woman in the man's house *(deductio mulieris in domum mariti)* (Axente 2020, 181-182). On this occasion, a party was organized, which ensured the necessary publicity for the birth of the family.

Basic conditions of marriage

In order to conclude a marriage, regardless of whether it is with *manus* or without *manus*, certain basic conditions had to be fulfilled. These are *connubium*, consent and age.

Connubium (ius connubii) is the citizen's right to enter into a Roman civil marriage. Latin *veteres* and certain soldiers who were ending their military service also enjoyed this right. The latter had the right to conclude legitimate marriages with the Latins or peregrines with whom they wanted to found a family, thus contributing to the realization of the Romanization process.

Connubium was used with two meanings: objectively and subjectively (Hanga and Bocşan 2006, 135). *Connubium* in the objective sense meant a person's ability to enter into a marriage in accordance with the norms of *ius civile*. *Connubium* in the subjective sense meant the possibility of two people marrying each other. Not all people have the ability to marry each other because of circumstances that prevent marriage. These circumstances are called

impediments to marriage. Roman legal texts established kinship, alliance and social condition as obstacles to marriage.

The blood relationship was of two kinds: in the direct line and in the collateral line. Consanguinity in the direct line was a bar to marriage indefinitely. In this sense, the jurisconsult Gaius states that people who have, in relation to each other, the quality of ascendant or descendant cannot marry each other. Father and daughter, mother and son, grandfather and granddaughter are in this situation.

Collateral kinship was a hindrance to marriage to a certain degree. And this time, Gaius tells us that there is an obstacle to marriage between persons related by a degree of collateral kinship, since between brother and sister, marriages are prohibited, whether they are born of the same father and the same mother, or come from only one among them (Popescu 1982, 81) *(inter fratrem et sororem prohibitae sunt nuptiae, siue eodem patre eademque matre nati fuerint siue alterutro eorum*). Exceptionally, in the era of the Principate, the conclusion of marriage between collateral relatives of the third degree was allowed, through an imperial constitution adopted by Emperor Claudius. This measure enabled him to marry his brother's daughter, Agrippina. Later, Agrippina poisoned the emperor, which is why he reverted to the old system.

The alliance was the connection between one spouse and the relatives of the other. The alliance was of two kinds: in direct line and in collateral line. Only the alliance in a direct line was an obstacle to marriage. This explains the fact that the surviving spouse could not marry a descendant of the deceased spouse resulting from another marriage.

Another obstacle to marriage was the social condition. Until 445 BC plebeians could not marry patricians. For a long time, even the ingenues could not marry *libertini*. This restriction was abolished by the emperor Octavian.

Consent to marriage was designated in Roman legal texts by the expression *affectio maritalis.* Consent to marriage indicated the intention of the future spouses to conclude the marriage. If the future spouses were persons *sui iuris,* their consent was necessary; the consent of the woman *sui iuris* had to be supplemented by the consent of her *tutor*, because the woman was considered incapable in fact. If the future spouses were persons *alieni iuris,* their consent did not matter in ancient times; the consent of the two *pater familias* was sufficient to conclude the marriage. If the husband's *pater familias* was the grandfather, the father's consent was also required, according to the principle that no one can be given heirs without his consent (*nemini invito heres suus adgnascitur*). Later, against the background of the evolution of legal ideas, the emancipation of the sons and daughters of the family begins. This explains the fact that, during the reign of Augustus, the sons of the family could address the praetor when the head of the family objected, without reason, to the conclusion of the marriage. Later, in the age of the Antonines, the consent of the future *alieni iuris* spouses becomes sufficient to conclude the marriage.

The required age for marriage was the age of puberty. The establishment of this age was the subject of a controversy, which was settled by Justinian. He established that boys can marry at 14, when they become pubescent, and girls at 12, when they become *nubilis*.

Marriage Dissolution

Roman legal texts mentioned the existence of three causes of dissolution of marriage: the death of one of the spouses, *capitis deminutio* and divorce.

Capitis deminutio meant the abolition of personality and was of three kinds: *capitis deminutio maxima, capitis deminutio media* and *capitis deminutio minima. Capitis deminutio maxima* was due to the loss of liberty; together with freedom, the other elements of personality *(status civitatis* and *status familiae*) also disappeared. This happened, as a rule, when the Roman citizen was imprisoned. However, as the jurisconsult Gaius showed, the

effects of *capitis deminutio maxima* could be erased by the effect of *ius postliminii* (Popescu 1982, 101). *Capitis deminutio media* had the effect of losing citizenship. Along with citizenship, the person also lost *connubium*, and this fact had the effect of dissolving the marriage. *Capitis deminutio minima* produced effects in the case of marriage with *manus* and resulted in the loss of family rights. It took place in the case of adoption, when the married son of the family leaves the power of the pater of the family of origin and enters under the *patria potestas* of another *pater familias.*

In Roman Law, divorce was carried out depending on how the marriage was concluded with or without *manus*. In the case of marriage with *manus*, the divorce could be achieved in a different way. If it was a matter of *confarreatio*, which was a religious act, the marriage took place through a symmetrical act, called *difarreatio*, since the old *ius civile* was governed by the principle of symmetry of forms. According to this principle, a legal act could be abolished with the help of legal forms identical to those through which the act was created. In the hypothesis of the other forms of marriage with *manus*, *usus* and *coemptio*, divorce is achieved by using mancipation; in this way, the wife was sold to a third party, and the power that the husband had exercised over the married woman (*manus*) ceased.

In the hypothesis of marriage without *manus*, things were much simpler. Since the marriage was concluded by the simple agreement of the spouses, symmetrically, it ended when it no longer existed, according to the rule *consensus nuptiae facit, dissensus divorceum facit* (Hamangiu and Nicolau 2022, 200).

Roman legal texts from the Post-classical Era mentioned four forms of divorce. The first is *divortium communi consensu.* It was allowed by Emperor Justinian in the hypothesis that the spouses want to divorce in order to become monks. The second form of divorce was *repudium*. This form of divorce could be achieved under the conditions imposed by the *lex Iulia de maritandis ordinibus*, which enshrines the fact that the divorce was achieved through a written notification given to the other spouse, in the presence of a free man, through the formula *tuas res tibi habeto*. In the time of Emperor Justinian, repudiation was carried out in three forms: *divortium bona gratia* (based on a legitimate reason of the divorcing spouse - for example, the infertility of the other spouse), *divortium ex iusta causa* (based on reasons imputable to the other spouse - for example, adultery or murder) and *divortium sine iusta causa* (based on unjust grounds).

Effects of marriage

The effects of marriage differed depending on whether the marriage was concluded with *manus* or without *manus*.

In the case of marriage with *manus*, the woman left the *patria potestas* and fell under the power of the husband. The exit from the *pater*'s parental power from the family of origin implied the termination of agnation with him and with civil relatives from the family of origin (Cătuneanu 1927, 148). The fall of the wife under the *manus* had the effect of creating agnation in relation to the husband and the children resulting from the marriage. This explains the fact that the woman married to *manus* became the man's daughter and the children's sister; in this capacity, she could come to their inheritance. Thus, she was considered a person *alieni iuris,* even if before the conclusion of the marriage she had been a person *sui iuris.* Being considered a daughter of the family, the *pater* exercised unlimited power over her person and her property. The goods that the woman had received as a dowry were to enter the husband's patrimony. The woman remained related to the members of the original family, but this was of no importance, since, in ancient times, *cognatio* did not produce legal effects. As *pater familias,* the husband could impose the death penalty on the woman married with *manus*, but with the consent of the woman's former agnates, who constituted a family council for this purpose.

In the case of marriage without a *manus*, the woman did not fall under the power of the husband. She remained under the power of the *pater* of the family of origin, who could ask her back through the *interdictum de filia exhibenda et ducenda.* In other words, the marriage did not have the effect of extinguishing the connection with the members of the family from which she came. For this reason, she was not considered a civil relative neither with her husband, nor with the children resulting from the marriage. Against the backdrop of the weakening of the power of the *pater familias* and the evolution of legal ideas, it was recognized that blood kinship plays an important role in the organization of the family. In this context, the praetor reformed the system of persons who had a vocation to succession. The wife married to the *manus* and his children were included in the third category of Praetorian heirs (*unde cognati*). These reforms were finalized by the Emperors Hadrian and Marcus Aurelius (Molcuț 2011, 152-153). Hadrian, through Tertullian Senatusconsult, allowed mothers who enjoyed *ius liberorum* to come to the succession of children as relatives of the second circle of praetorian heirs (*unde legitimi*). Later, the Emperor Marcus Aurelius, through the Orfitian Senatusconsult, perfected the system, allowing the children resulting from the marriage without *manus* to come to the mother's succession as persons who are part of the first category of heirs (*unde liberi*).

The marriage also had other effects. The wife had to respect her husband and be faithful to him. To guarantee this obligation, Emperor Augustus punished the violation of this obligation by *lex Iulia de adulteriis*. Other Roman legal texts also mention the fact that when the wife violates this obligation, the husband could withhold part of her dowry. Just as the wife had to be faithful, so the husband was obliged to protect his wife and be faithful to her. If he violated this obligation, he had to return to his wife the dowry he had received at the time of the marriage. The husband could prosecute the injuries caused to his wife through *actio injuriarum,* he was prohibited from suing his wife and could not file defamatory actions against his wife (Hamangiu and Nicolau 2022, 206-207).

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