REMARKS ON ROMAN MARRIAGE AND DIVORCE

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Roman law acknowledged two kinds of civil law marriage: marriage generating *manus*, that is, husband's power, and marriage without *manus*.[1] In this paper we shall confine our investigation to marriage with *manus*, and as part of that we intend to expound the following issues in detail: the forms of the conclusion of marriage and of obtaining *manus*, specifically *confarreatio*, *coemptio* and *usus* (**I**.), the relation of *uxor in manu* to *agnatio* (**II**.), the husband's punitive power over the wife under *iudicium domesticum* and on the grounds of *lex Iulia de adulteriis coercendis* (**III**.), and the forms of divorce and the termination of *manus*, paying special regard to *remancipatio uxoris* (**IV**.).

I.

As specified by Gaius, *manus* arises in three forms: *usus*, *confarreatio* and *coempio*;[2] by using the term *olim* he unambiguously implies that these institutions were applied not in his own age but in ancient times, and, contrary to other sources,[3] he clearly formulates that they are the forms of obtaining *manus* and not the forms of concluding the marriage itself.[4] The order of the development is disputed, in the literature no *communis opinio doctorum* on the subject has been established until now that can be regarded reassuring. Concerning *confarreatio* we can infer Etruscan origin from its highly sacred character, on the one hand; and from the more liberal status possessed by women among the Etruscans, on the other,[5] which is confirmed by the celebration of the conclusion of marriage under *confarreatio*, as we shall see, to the extent that in this

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1 FÖLDI A.–HAMZA G. *A római jog története és institúciói*. (History and Institutions of Roman Law) Budapest, 2006, 251. sqq.

2 Gai. 1, 110.

3 Serv. *in Verg. Georg.* 1, 31; *in Verg. Aen.* 4, 103. 374; Boet. *in Cic. top.* 3, 14; Arnob. *nat*. 4, 20.

4 BENEDEK, F. Die conventio in manum und die Förmlichkeiten der Eheschließung im römischen Recht. *PTE Dolg.* 88, 1978. 8. About the *sponsio* and the *arrha sponsalicia* see KUPISZEWKSI, H. Das Verlöbnis im altrömischen Recht. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 77, 1960. 128.

5 FERENCZY, E. Eherecht und Gesellschaft in der Zeit der Zwölftafeln. *Oikumene* 2, 1978. 156.

procedure the woman is an equal acting party who actively takes part in the rite, while in *coemptio* she is only the subject of the procedure.[6] Although not taking a firm position confirming the Etruscan origin, Kaser[7] regards *confarreatio* an alien body in the system of Roman *ius sacrum*, since in the procedure it is the religious act itself that leads to legal consequences affecting *ius privatum* without being produced by the joint impact of *ius sacrum* and *ius privatum* usual in other legal institutions, since it does not require the assistance of either persons who might exercise power, or the meeting of the people.[8]

From Gaius's description of *confarreatio* it becomes clear that this ritual comprised a sacrifice offered to Iuppiter Farreus, including *farreum libum*,[9] that is, the joint consumption of *panis farreus*, and offering a part of it to Iuppiter (the term *confarreatio* comes from this), in the first place, and reciting certain ceremonial, sacred texts in the compulsory presence of ten witnesses; Gaius describes this ritual as one generally used in his age, since both the *rex sacrorum* and the *flamines maiores* (*Dialis*, *Martialis*, *Quirinalis*) had to come from a marriage under *confarreatio*, and in order to fulfil their priestly office they had to live in marriage of such kind.[10] The comments made on the ritual itself in Ulpianus's *Liber singularis regularum* corresponds to Gaius's description.[11] From the explanation given by Servius on the relevant locus in Vergilius's *Georgica* it can be ascertained that in the ritual certain fruits and the aforesaid sacrificial fan made of ground spelt with salt (*mola salsa*) were used, and that the marriage was concluded in the presence of the *pontifex maximus* and the *flamen Dialis*.[12] Also in Servius's commentaries on Vergilius's *Aeneis* two additional points are made concerning the *confarreatio*: *dextrarum iunctio*[13] and *in manum conventio* to be interpreted in the literal sense of the phrase,[14] the act of linking the right hands of the couple to be married was carried out over the fire burning on the altar; during the celebration a sacred torch was burning, and there was water in a pitcher to symbolise the two most important elements and their joint presence; that is how the marriage was concluded between the *flamen* and his wife, *flaminica*.[15] During the ritual the couple

6 ZLINSZKY J. *Állam és jog az ősi Rómában.* (State and Law in Ancient Rome) Budapest, 1996. 106.

7 About the connections between *manus* and *mancipium* see KASER, M. La famiglia romana archaïca. In: *Conferenze Romanistiche.* Trieste–Milano, 1960. 61.

8 KASER, M. *Das altrömische ius.* Göttingen, 1949. 343.

9 Dion. Hal. 2, 25.

10 Gai. 1, 112.

11 Ulp. 9.

12 Plin. *nat*. 18, 3, 3, 10; Serv. *in Verg. Georg.* 1, 31.

13 Verg. *Aen*. 4, 102–104.

14 BENEDEK 1979. 10.

15 Serv. *in Verg. Aen.* 4, 103.

to be married was sitting with covered head on two chairs covered with the skin of sacrificial lamb placed close to each other,[16] which was meant to confirm the relation to be established between them.[17] The priestly functions enumerated in the sources, the offices of the *rex sacrorum*, the *flamen* (and the *flaminica*) *Dialis*, the *flamen Martialis* and the *flamen Quirinalis* were allowed to be fulfilled only by *patricii*; and as the so-called *communicatio sacrorum*, that is, offering sacrifice under the supervision of the *pontifex maximus* and with the assistance of the *flamen Dialis*, was not permitted between *patricii* and *plebeii*, it is highly probable that *plebeii* were *ab ovo* barred from the ritual of *confarreatio*, and it was reserved for the conclusion of marriage of *patricii* having sacred consequences that cannot be disregarded.[18]

The question arises how long the institution of *confarreatio* can be considered a living practice. Towards the end of the age of the Roman republic *patricii* took it rather burdensome to assume the office of the *flamen Dialis* heavily delimited by taboos[19] and consequently preventing them from making a political career, and that is how this priestly function was left vacant for a longer period from 87 B.C.; although both the dignity of the *flamines* and *confarreatio* were reinstated by a *senatus consultum* attached to the name of Augustus dating from 12 B.C.,[20] this measure could not bring long lasting results since Tiberius had to deal with the problem again in 23.[21] What happened was that they wanted to elect a new *flamen Dialis* to replace the deceased Servius Malugiensis, but the required conditions – stipulating that the proper person was to be selected from three persons coming from marriages concluded under *confarreatio* – were missing because the *patricii* willingly refrained from concluding such a marriage as in the procedure the wife would have been removed from the subjection to the *patria potestas*, and would have been forced under to husband's *manus*. Eventually, Servius Malugiensis's son became his successor, simultaneously a resolution was adopted on the subject that the *flaminica Dialis* would be subjected to her husband's power only with respect to the *sacra*, otherwise she was entitled to rights equal to rights other women had.[22]

16 Serv. *in Verg. Aen.* 4, 374.
17 LATTE, K. *Römische Religionsgeschichte.* München, 1960. 96.
18 BENEDEK 1979. 12.
19 About these taboos see Gell. 10, 15. Cf. PÖTSCHER, W. Flamen Dialis. In: *Hellas und Rom.* Hildesheim, 1988. 422. sqq.; NÓTÁRI T. The Function of the Flamen Dialis in the Marriage Ceremony. *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae, Sectio Iuridica* 45, 2004. 157. sqq.
20 Dio Cass. 54, 36; Suet. *Aug.* 31; Tac. *ann.* 3, 58.
21 BENEDEK 1979. 14.
22 Tac. *ann.* 4, 16.

The conclusion of marriage had a web of rituals around it belonging to the scope of *fas* but adopted by *ius*, too. For example, certain days and periods were regarded absolutely ineligible for concluding a marriage: such as *Kalendae* and *Idus* (*dies feriati*) every month, since on these days it was forbidden to use force against anybody, and the conclusion of marriage involved a kind of violence to be committed against the *virgo*;[23] likewise, no marriage was concluded on the days following *Kalendae*, *Nonae* and *Idus*, which were deemed *dies atri*, such as the first half of February and the second half of March and the whole month of May; on the contrary, in this respect the second half of June and the whole of July were held fortunate periods.[24] Marriage rites were designed to serve two key purposes: they were to protect marriage from infertility, on the one hand; and to make the fiancée's passage from one house community cult to another secure, on the other.[25] The fiancée was seated in Mutinus Titinus's *fascinus*, whom she offered sacrify while being covered with a veil and wearing a *toga praetextata*,[26] then she offerred her toys from childhood and the *toga praetextata* that she had to take off once and for all on the day of her marriage to the *lar familiaris*[27] (in other tradition to Venus,[28] or Fortuna virginalis[29]). The fiancée's hair was arranged with the tip of a spear a man had been killed with so that its vital force should increase that of the fiancée.[30] The marriage celebration commenced with *auspicium*, then sacrifice was offered (at a later point of the ritual having arrived at the fiancé's house the bride would grease the gatepost of her husband-to-be with the fat or suet of the sacrificial animal, initially a pig, then a lamb); the wedding dinner, *coena nuptialis* following the offering of sacrifices lasted until the evening star rose.[31]

The *coena nuptialis* was followed by the most important part of the ritual, *deductio in domum mariti*, the act of being introduced to the husband's house,[32] whose starting act was the symbolical kidnapping of the fiancée from her mother's lap,[33] which custom is traced back by Plutarch to the abduction of Sabine women,[34] and which was undoubtedly backed by the memory of the one-time custom of adbuction of women as a form of generating marriage.[35]

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23 Macr. *Sat*. 1, 15, 21.
24 BENEDEK 199. 25.
25 LATTE 1960. 96.
26 Arnob. *nat*. 4, 7. 11; Tert. *apol*. 25; *nat*. 2, 11, 12; Aug. *civ*. 4, 11.
27 Varro *Men*. 463; Porph. *ad Hor*. *Sat*. 1, 5, 65.
28 Pers. 2, 70.
29 Arnob. *nat*. 2, 67.
30 Plin. *nat*. 28, 33. 34.
31 Cic. *ad Q. fr*. 2, 3, 7; Gell. 2, 24, 14.
32 Cf. 240; Pomp. D. 23, 2, 5; Ulp. D. 35, 1, 15; Scaev. D. 24, 1, 66 pr.
33 Fest. s. v. *rapi simulatur*
34 Plut. *Quaest*. 31.
35 BENEDEK 1979. 25.

The procession was opened by a boy holding a torch, two other lads were leading the fiancée,[36] who was followed by people carrying a spinning wheel, a reel, a basket and pots, which referred to her later household duties (the fiancée brought three *asses* from her parents' house, she gave one of them to her husband, put the other one on the altar of the *lar familiaris*, and placed the third one in the sanctuary of the *lares* protecting the abode of her husband-to-be); the members of the procession were carrying torches made of hawthorn,[37] they were singing wedding songs, and were throwing money and nuts[38] among the spectators; all these and the *fescennina iocatio*[39] were meant to keep misfortune away.[40] In the course of this the ritualistic shout *talassa* or *talassio* with a meaning having obscured by the time of the historical age was sounded.[41] Having arrived in their would-be home the bridegroom asked the bride: "*Quaenam vocaris*?", and the bride replied "*Ubi tu Gaius, ego Gaia.*", by which they testified *expressis verbis* their intention to marry to their environment, too.[42] (This part of the ritual and the false conclusion drawn from it asserting that every fiancée should have been called Gaia in the ritual were used by Cicero in *pro Murena* to mock the awkwardness of the formalities of archaic law.[43]) The fiancée greased the doorpost, and tied a piece of wool to it.[44] After that the young men following them lifted the fiancée over the threshold of the house, because Vesta[45] guarded every beginning, so the doorstep too, and to touch it would have been regarded an ill omen.[46] Into the *atrium* a burning torch and a pitcher of water were brought, and so welcoming the bride they admitted her into the family cult;[47] even Q. Mucius Scaevola considered this part of the ritual as one of the most certain signs of the conclusion of marriage;[48] housekeeping was assigned by the husband to his wife through handing over the key of the house;[49] in the event of the termination of the marriage one

36 LATTE 1960. 96.
37 Serv. *in Verg. Ecl.* 8, 29.
38 Cat. 61, 128; Serv. *in Verg. Ecl.* 8, 30.
39 Plin. *nat*. 15, 86.
40 Plaut. *Cas*. 118; Ter. *Andr*. 907.
41 Serv. *in Verg. Aen*. 1, 651; Plut. *Quast.* 271. *Rom.* 15.
42 Plut. *Quaest*. 30; Quint. *inst.* 1, 7, 28.
43 Cic. *Mur*. 27. Cf. FORSYTHE, G. Ubi tu gaius, ego gaia. New Light on an Old Roman Legal Saw. *Historia* 45, 1996. 241. sq.
44 Serv. *in Verg. Aen*. 4, 458; Isid. *etym*. 9, 7, 12.
45 About Vesta see HOMMEL, H. Vesta und die frührömische Religion. In: *Aufstieg und Niedergang der römischen Welt.* Hildesheim–New York, 1972. I. 2. 397. sqq.
46 Cat. 61, 171.
47 LATTE 1960. 97.
48 D. 24, 1, 66, 1. (About the *aqua et igni interdictio* see MOMMSEN, TH. *Römisches Strafrecht*. Leipzig, 1899. 72. sqq.; 971. sqq.)
49 Benedek 1979. 26; Zlinszky 1996. 104.

of the symbolic elements of *repudium*, ousting was just the act of taking the keys away.[50]

The bulk of our knowledge of *coemptio* also comes from Gaius's *Institutiones*. In *coemptio* a man obtains manus over the woman with *mancipatio*, i.e., a kind of sham purchase – in this sham purchase the husband is the buyer and the subject of the purchase is the wife – which had to be carried out in the presence of five adult Roman citizens as witnesses and of the holder of the scales;[51] however, the text to be recited in the course of it, which has been unfortunately not preserved by Gaius for us, was not identical with the one customarily used in slaves' *mancipatio*, or when obtaining *mancipium* over a free person.[52] The literary sources, the texts of Sevius, Isidorus and Boethius we can quote regarding *coemptio* are at least two centuries older than Gaius's description, and at several points they misunderstood the essence and process of *coemptio*: namely, Servius[53] and Isidorus Hispalensis following him[54] believed that the husband and wife mutually bought each other, which would, however, result in the wife also obtaining some kind of power over the husband, and the reciprocal question and answer mentioned by Boethius[55] most probably did not belong to *coemptio* itself, it might have been some kind of preparatory process thereof allowing the parties to make it clear that they wanted to conclude the marriage by their free will.[56] The question arises that if the fiancée constituted the subject of the purchase and sale, even if in a sham transaction, who should be considered the seller? Opinions expressed in the literature are highly divided on the matter. Many hold the position that the woman, especially the *mulier emancipata* should be regarded the seller, so she is entitled to the sham purchase price, the *nummus unus*; usually they base their view on two loci from Gaius's *Institutiones*[57] and one locus from *Collatio*[58]; convincingly Benedek expounds why this view based on these sources is totally unacceptable. The two loci from Gaius does not describe the *coemptio* aimed at the actual conclusion of marriage (*coemptio matrimonii causa*) but the *coemptio* designed to terminate guardianship (*coemptio tutelae evitandae causa*), from which it would be hard to draw conclusions on *coemptio* that generates husband's power if the guard's duty had actually been only to grant *auctoritas*; the third *textus* from Paulus, as we shall see later on, is about *lex Iulia de adulteriis coercendis*, and in this

50 See Cic. *Phil*. 2, 28.
51 Gai. 1, 113.
52 Gai. 1, 123.
53 Serv. *in Verg. Aen.* 4, 103; Serv. *in Verg. Georg*. 1, 31.
54 Isid. *etym*. 5, 26.
55 Boeth. *in Cic. top.* 3, 14.
56 KASER 1949. 318.
57 Gai. 1, 115. 195a
58 Coll. 4, 2, 3.

context *auctoritas* should be interpreted not as a *terminus technicus* but only as a term denoting the father's consent to the conclusion of the marriage.[59] Furthermore, Benedek quotes an inscription which can be dated from the end of the age of the Roman republic that sets forth that the girl to be married off to the husband was handed over to the fiancé by the father,[60] and remarks that the relevant passage of *Laudatio Turiae* written between 8 and 2 B.C.[61] does not support the thesis of the *mancipatio* carried out by the woman herself either. Finally, he adds that should the woman receive *mummus unus*, the symbolic purchase price from the fiancé, her later husband in the course of *mancipatio*, then having subjected to the husband's *manus*, she would obtain such purchase price also for the benefit of the husband, which would seem to be rather inconsistent. *Coemptio* was no longer part of generally adopted practice probably at the same time when *confarreatio* went out of use approximately at the end of the 1st c. B.C. Additional informative data is supplied in this respect both by the aforesaid *Laudatio Turiae*, in which the husband left a widower recalling his own marriage without *manus* mentions his sister-in-law's marriage concluded with *coemptio*, and by Cicero's statement that the orators who were not well-versed in the depths of jurisprudence, albeit the place of their operation was identical with that of *iuris consultii* giving advice on the *forum*, were no longer fully aware of what words were uttered when concluding *coemptio*.[62]

And the form of expounding his point, i.e., that Gaius speaks about *coemptio* in the present tense, should be most probably interpreted in view of the fact that in the enumeration of the forms of the generation of *manus* he makes a reference to former times (*olim*) at the outset.[63] Benedek ranks the following institutions among the types of *coemptio* still used in the age of Gaius. *Coemptio tutelae evitandae causa*[64] was to ensure that if the woman having her own rights but necessarily being under guardianship[65] wanted to get rid of her guardian, then with his *auctoritas* she was allowed to enter into *coemptio fiduciaria* with somebody who later remancipated her for a person selected for a new guardian; this new guardian emancipated her with *manumissio vindicta*, and she became his *tutor fiduciariusa*.[66] *Coemptio testamenti faciendi causa* was meant to make up for the lack of the testimentary capacity of the woman having her own rights, the procedure was similar to the previous procedure, after entering into

59 BENEDEK 1979. 17.
60 *Pulbius Claudius ... Antoniam Volumniam virginem volentem ... a parentibus suis coemit et ... vir domum duxit.*
61 *Sororem omnium rerum fore expertem quod emancupata esset Cluvio.*
62 Cic. *De orat.* 1, 237.
63 BENEDEK 1979. 18.
64 Gai. 1, 114.
65 See Gai. 1, 144–145.
66 BENEDEK 1979. 19.

the *coemptio* the husband remancipated his wife for one of his fiduciary persons, who subsequently released her from *mancipium.*[67] This institution, however, was made unnecessary by a *senatus consultum* adopted during the reign of Hadrianus, which acknowledged the testimentary right[68] of women having their own rights.[69] Through the *coemptio sacrorum interimendorum causa*[70] the woman was relieved of the burden of the house community's religious celebrations; to attain this goal usually the assistance of elderly, childless men was used whose death terminated the house community cult once and for all too. It should be added that this type of *coemptio* had to be clearly distinguished from actual *coemptio* as far as the rituals and external features of the application were concerned, which proves that it was still used, albeit not too often, in the age of Cicero.[71]

The act of obtaining *manus* through *usus* is dealt with by three important sources, the first of them comes from Gaius,[72] the second one from Servius's commentaries on Vergilius's *Georgica*,[73] the third one from Boethius's explanations of Cicero's *Topica*[74]. These loci reveal that through cohabitation maintained with the given man for one year without any interruption a woman was subjected to his power without *confarreatio* and *coemptio* too, and their community of life was regarded marriage simply due to the intention to conclude a marriage (*affectio maritalis*), before the one year has elapsed.[75] So the commencement of marriage was clearly separated from the date of the generation of *manus* since the husband prescribed it only after one year; and if the wife did not want to become subjected to her husband's *manus*, then spending three consecutive nights each year away from home (*trinoctium*), this institution was introduced, asserts Gaius, by the Twelve Table Law, she could interrupt the prescription of the husband's power.[76] Thus, the act of obtaining *manus* through *usus* is nothing else but prescibing the husband's power,[77] which was implemented by proper application of the *usus-auctoritas* rule[78] of the Twelve

67 Gai. 1, 115a
68 FÖLDI–HAMZA 2006. 600.
69 BENEDEK 19.
70 See Cic. *Mur*. 27. *Sacra interire illi noluerunt, horum ingenio senes ad coemptiones faciendas interimendorum sacrorum causa reperti sunt*. Cf. NÓTÁRI T. *Jog, vallás és retorika. Studia Mureniana.* (Law, religion and rhetoric. Studia Mureniana) Szeged, 2006. 100. sqq.
71 BENEDEK 1979. 19.
72 Gai. 1, 111.
73 Serv. *in Verg. Georg*. 1, 31.
74 Boet. *in Cic. top*. 3, 14.
75 BENEDEK 1979. 20.
76 FÖLDI–HAMZA 2006. 252.
77 FERENCZY 1978. 158.
78 *XII tab*. 6, 3. (Cic. *top*. 4, 23.) Cf. ZLINSZKY 1996. 59.

Table Law.[79] The act of obtaining the husband's power through *usus*, however, disappeared from pratice partly through *desuetudo*, partly through certain statutes (most probably Augustus's laws on marriage).

II.

For a long time it was a generally accepted view in the literature that the *uxor in manu* was regarded agnate kin;[80] however, Róbert Brósz convincingly proved that the *uxor in manu* did not belong to *agnatio* – what follows is a brief account of his argumentation.[81] In view of the occurrences of the terms *agnatus* and *agnascor*, in the most general and widest sense of word they denote increase, growth through birth, more specifically through *postumi*, the successors who are born after the death of the *pater familias*.[82] In addition to that, *agnatus* occurs, as a matter of fact, in the sense of artifical kinship created by law (*legitima cognatio*),[83] that is why Paulus remarks that the person adopted with *adoptio* joins, "is born to" the members of the family of the *pater familias* and by that becomes their *cognatus*;[84] in sources concordant with the above we can find the short word *quasi* supplementing the term *agnatio* used regarding adoption.[85] The relevant locus of *Sententiarum libri*[86] states that the main difference between *agnati* and *cognati* is that *agnati* are at the same time *cognati*, however, *cognati* are not necessarily *agnati*.[87] Consequently, on the grounds of the above it can be ruled out that the *uxor* is an agnate kin, since the law forbids for a blood relation,[88] that is, a cognate kin of the husband to become his wife.[89] Several definitions of *agnatio*, differing mostly in their formulation while being concordant in their content, can be found in sources, the most well-known definition comes from Gaius: *"sunt autem agnati per virilis sexus personas cognatione iuncti, quasi a patre cognati*",[90] i.e., *"agnate relatives are those who are linked by kinship passed on by men, that is, they are relatives*

79 KASER 1949. 319.
80 Cf. BONFANTE, P. *Instituzioni di diritto romano*. Milano, 1912. 146; KASER, M. *Das römische Privatrecht I.* München, 1971. 52. sqq.
81 Brósz, R. Ist die uxor in manu ein Agnat? *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös nominatae, Sectio Iuridica* 18, 1976. 1. sqq.
82 Ulp. 22, 18.
83 Gai. 3, 10; Ulp. D. 23, 2, 12, 4.
84 Paul. D. 1, 7, 23.
85 Gai. 2, 138.
86 FÖLDI–HAMZA 2006. 91.
87 Paul. 4, 8, 14.
88 Gai. 1, 59–62.
89 BRÓSZ 1976. 4.
90 Gai. 1, 156.

(descending)[91] *from the (same) father*".[92] In each case the basis is decent from the same father, therefore, *agnatio* can be passed on only in this form; and the members of the same family, more specifically as the loci stress those in the descending line, belong to the *agnatio*, that is, agnate relatives are relatives in the father's line of descent (the agnation) who belong to the same family; and none of the texts mentions either the wife or the institution of *manus*.[93]

This is supported by Gaius when he states that while men obtain the inheritance falling to them from women pursuant to *iure agnationis*, women can obtain inheritance that falls to them from men only as *legitima heres*, and this applies also to a mother or step-mother concluding a marriage with *manus*, who inherit *sororis loco*, that is, not *agnationis iure*.[94] In what capacity does the *uxor in manu* inherit? Gaius emphasizes at several points that the *uxor in manu* inherits not as an agnate relative, and *manus* makes her only *filiae loco quasi sua heres*,[95] elsewhere he asserts that being *filiae loco* she obtains the inheritance as *sua heres*.[96] The *Liber singularis regularum* compiled from the works of Ulpianus[97] calls the wife under *manus sua heres*,[98] the enumeration in *Sententiarum libri*, however, does not even include her among them.[99] So when the *uxor in manu* is referred to as *sua heres*, the sources do not justify it with *agnatio* but with the husband's power; presumably it was the *adoptivus* who was first admitted to the row of *sui heredes* through *interpretatio extensiva*, and later on the *uxor* standing *filiae loco* in the place of the female child, initially ranked with the term *quasi* that allows minute distinction.[100] Brósz demonstrates that the Romans did not know the concept of agnate family, i.e., *familia agnata*, since *agnatio* is not one of the forms of *familia proprio iure*,[101] and it follows from this that belonging to *familia proprio iure* is not subject to agnate relation.[102] *Agnatio* usually arises in a natural way, through birth, but in an exceptional case it may be generated by *adoptio*, as it can be read in several loci of the *Digest* and in one locus of Iustinianus's *Institutiones*;[103] and the paragraph

91 FÖLDI–HAMZA 2006. 240.
92 Ulp. 11, 4. Cf. Ulp. 26, 1; Gai. 3, 10; Ep. Gai. 2, 8, 3; Coll. 16, 2, 10; 16, 3, 13; 16, 4, 1; 16, 7, 1; Paul. 4, 8, 14; I. 1, 15, 1; 3, 5, 4; D. 26, 4, 7; 38, 8, 4;38, 10, 4, 2; 38, 10, 10, 2; 38, 10, 10, 6; 38, 16, 2, 1.
93 BRÓSZ 1978. 5; 10; cf. Gai. 3, 10; Coll. 16, 2, 10.
94 Gai. 3, 14.
95 Gai. 1, 115b; 2, 139.
96 Gai. 3, 3.
97 Cf. FÖLDI–HAMZA 2006. 91.
98 Ulp. 22, 14; 29, 1.
99 Paul. 4, 8, 4. 7.
100 BRÓSZ 1978. 7. sk.
101 Ulp. D. 50, 16, 195, 2.
102 BRÓSZ 1978. 9.
103 Ulp. D. 38, 16, 2, 3. Cf. D. 1, 7, 7. 23.

of *Liber singularis regularum* which expounds the cases of becoming *suus heres* enumerates the changes in the range of possible inheritors pursuant to *ius civile* rather than the cases when *agnatio* arises:[104] *"Agnascitur suus heres aut agnascendo, aut adoptando, aut in manum conveniendo, aut in locum sui heredis succedendo, velut nepos mortuo filio vel emancipato vel manumissione, id est si filius ex prima secundave mancipatione manumissus reversus sit in patris potestatem."*[105] On the grounds of these it can be unambiguously pointed out that the *uxor in manu* does not belong to *agnatio*.[106]

III.

Of the husband's right and obligation to hold *iudicium domesticum* with the relatives because of the wife's capital offences, adultery and wine drinking, and of the husband's option to punish his wife at his discretion in cases of delinquencies of lower weight Dionysius Halicarnassensis gives an account.[107] The husband and his relatives passed a judgment on his wife in the event of adultery and if a woman was found guilty of drinking wine since a *lex regia* attributed to Romulus allowed to punish both cases with death sentence. The locus of Dionysius describes the investigation of the relatives to be conducted together with the husband, so it is the husband and the relatives (and friends) who take part in the procedure, the latter constitute the *consilium necessariorum*. The term e*dikadzon* can be translated into the Latin word *cognoscebant*,[108] which is a *terminus technicus* of the investigation of Roman criminal procedure; apparently the *auctor* knowingly uses a term of Roman law, which supports what can be read in the text of Cato passed on to us by Seneca (*illis ius dicere permiserunt*) and Gellius: *"Verba Marci Catonis adscripsi ex oratione quae inscribitur De dote, in qua id quoque scriptum est, in adulterio uxores deprehensas ius fuisse maritis necare: 'Vir', inquit, 'cum divortium fecit, mulieri iudex pro censore est, imperium quod videtur habet. Si quid pervorse taetreque factum est a muliere, multitatur; si vinum bibit, si cum alieno viro probri quid fecit, condemnatur.' De iure autem occidendi ita scriptum: 'In adulterio uxorem tuam si prehensisse, sine iudicio impune necares; illa te, si tu adulterares sive tu adulterare, digito non auderet contingere, negque ius est.'"*[109] This excerpt comes from Marcus Porcius Cato's oration entitled *De dote*, of which unfortunately only this fragment has been left to us without any other information available.

[104] BRÓSZ 1978. 11.
[105] Ulp. 23, 3. Cf. Paul. 4, 8, 7.
[106] BRÓSZ 1978. 13; FÖLDI–HAMZA 2006. 240.
[107] Dion. Hal. 2, 25.
[108] GIRARD, F. *Textes de droit romain.* Paris, 1923. 6.
[109] Gell. 11, 23, 4–5.

The reference to the husband's rights is not enough to give a clue to the purpose and type of the *oratio.* The use of the second person *singularis* does not necessarily mean that the second person *singularis* generally and impersonally used in Latin is usual and quite frequent regarding any of the participants of the lawsuit.[110]

Here Cato gives a fairly clear-cut formulation of the husband's power over his wife, compares it to the *magistratus*'s power, authority over citizens. So in divorce the husband shall have the right, provided that his wife has engaged in an immoral conduct during the term of the marriage (*propter mores*), to make certain deductions from the endowment that he must return as it were in the form of moral adjudication, *regimen morum* (moral adjudication). So for the woman the husband substitutes the *censor* (*vir iudex pro censore est*) since he has primary power, *imperium* over the wife (*imperium quod videtur habet*). This *imperium* holds, as a matter of fact, during the marriage, and does not enter into force on the date of divorce like the *censor*'s *regimen morum* the husband is entitled to in this case instead of the *censor.*[111] Just as the *magistratus* may exercise his punitive power in two different forms owing to the *imperium* he is entitled to, the husband has the same alternatives: in the case of the wife's wrongs of less significance (*si quid pervorse factum est a muliere*) he was allowed to punish her independently (*multitat*) – this corresponds with the disciplinary right of the *magistratus* under *coercitio*. In the case of the wife maintaining a relation with another man, or when the woman had drunk wine, in compliance with the exercise of the jurisdiction of law of the *magistratus* the husband also exercised *iurisdictio* (*comdemnat*). Consequently, *multitare* and *condemnare* are *termini technici* of *coercitio* and *iurisdictio* respectively, and as an author well-versed in law Cato used these two terms not at all accidentally as the opposites of one another. Cato's text sets forth that *multitare* was applied in the divorce procedure, consequently, upon and after the termination of *manus,* here the husband's *imperium;* whereas the *magistratus* was allowed to exercise this disciplinary right during the term of his office, i.e., while he possessed *imperium*. On the other hand, it cannot be ruled out at all that by *multitare* Cato meant the disciplinary punishment imposed by the husband on the wife during the term of the marriage. After describing the process of condemning the wife for adultery or drinking wine (*condemnatio*), the author expressly underlines the unequal legal status of the spouses since while the husband was allowed to kill his wife caught in the act of adultery with impunity without convening *consilium necessariorum* – in Dionysius Halicarnassensis's work '*syngeneis'* – and without conducting *iudicium domesticum* (*sine iudicio*

[110] MENGE, H. *Repetitorium der lateinischen Syntax und Stilistik*. Darmstadt, 1995. II. 1.

[111] KUNKEL, W. Das Konsilium im Hausgericht. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung* 83, 1966. 234.

impune necares), the wife was not allowed to touch her husband with a finger. If the husband was allowed to kill his wife caught in the act of adultery with impunity, this means that the principle in place in the criminal law of the state was enforced that set forth that the offender caught in the act of the offence (*manifestus*) might be punished without judicial proceedings, too; so, e.g., the Twelve Table Law did not punish the killing of a night time thief or a thief defending himself with weapon it being lawful self-power.[112]

On the grounds of the sources we can state the following as a brief summary of *iudicium domesticum*: in his letter addressed to Lucilius Seneca remarks that the people of ancient times allowed the *dominus*, i.e., the family head to fulfil offices in his house community and exercise *iurisdictio*; consequently, they believed that the home and the house community was a reduced-size copy of the state.[113] While exercising his punitive power, the *dominus*, explains Suetonius, proceeded pursuant to *mos maiorum*.[114] The *iudicium* usually took place in a formal procedure in the *atrium* of the *pater familias's* home.[115] To hold a *iudicium domesticum* in cases of the wife's and the family child's punishment for capital delinquency was both a moral and actual legal obligation the *pater familias* was bound to fulfil, which can be traced back to the limitations of *manus* and *patria potestas* made right from the outset. It was obligatory to involve the relatives in the *iudicium* necessary for punishing more serious acts committed by the wife. The exercise of the *ius vitae ac necis* in force over the Jilius familias was not left to the father's arbitrariness, either; according to the locus of Gaius's *Institutiones* left to us in the fragment from Autun quoting the Twelve Table Law death sentence was not allowed to be imposed unless a legal cause (*iusta causa*) existed,[116] and to prove the existence of this *iusta causa* a *consilium necessariorum* constituting *iudicium domesticum* was indispensable.[117] As a matter of fact, it was possible to dispense with these proceedings if the person under power confessed his/her guilt (*confessus*), or was caught in the act of such guilt (*manifestus*).[118] The *consilium necessariorum* was logically composed of relatives and friends, whose circle was, however, determined presumably by the *pater familias*, albeit he had to accept the judgment of the persons invited into and involved in the *consilium* regarding the guilt or innocence of the accused – he was unambiguously bound by this decision; the members

[112] Coll. 7, 3, 3.
[113] Sen. *ep*. 47, 17.
[114] Suet. *Tib*. 35.
[115] Val. Max. 5, 8, 3.
[116] Gai *inst. frg. Augustodunensia* 86. *De filio hoc tractari crudele est, sed ... non est ... post ... occidere sine iusta causa, ut constituit lex XII tabularum, sed deferre iudicibus debet propter calumniam.*
[117] NÓTÁRI T. De iure vitae necisque et exponendi. *Jogtudományi Közlöny* 53, 1998. 424. sqq.
[118] KUNKEL 1966. 249.

passing a judgement in the *iudicium* usually voted orally in the order determined by their rank.[119] First of all, they had to decide guilt; however, they were allowed to make a statement on the form of punishment, too. For example, they could expressly protest against imposing death sentence even if the accused had been found guilty.[120] How did this element of the husband's power change later on and in cases where the husband was not obliged to hold *iudicium domesticum*?

The *lex Iulia de adulteriis coercendis*[121] contains not exclusively and perhaps not primarily new norms created by Augustus[122] but rules taken over from former laws.[123] Let us make a brief survey to what extent and to whom the law gives right to kill adulteresses/adulterers.[124] The *pater familias* – in this respect the law does not distinguish blood father from adoptive father[125] – may kill his daughter caught in the act of adultery,[126] but only in the event that he caught her in the act at his own or at his son-in-law's house,[127] since the *legislator* regards it greater daring, greater recklessness shown by the woman if she has committed adultery at her father's or husband's house.[128] The father, however, was obliged to kill also his daughter when killing the adulterer because if he killed only the *adulter*, and left her own daughter alive, he would incur the charge of *homicidium*, that is, murder.[129] But if the father was not able to kill his daughter because she had fled, and not because he wanted to save her life, then he was not to be punished for murder.[130] Although the law makes no difference as to who the *pater familias* must kill first, but if he kills one of them and only injurs the other one, he will be held responsible for it pursuant to the *lex Corneia de sicariis et veneficiis.*[131] Nevertheless, Marcus Aurelius's and Commodus's *rescriptum* does not let the father be punished in the case when the adulteress – after she has been so seriously injured that she should have died – is left alive not by the father's intention but by as it were fatal accident.[132] A prerequisite for exercising this right was that the father had to catch

[119] Sen. *clem*. 1, 15, 2–6. Cf. NÓTÁRI 1998. 426.
[120] Ios. *ant. Iud*. 6, 356.
[121] Cf. CSILLAG, P. *The Augustan Laws on Family Relations*. Budapest, 1976.
[122] MOMMSEN 1899. 624; Kunkel 1966. 122.
[123] Coll. 4, 2, 2.
[124] See CANTARELLA, E. Adulterio, omicidio legitimo e causa d'onore in diritto romano. In: *Studi in onore di Gaetano Scherillo*. Milano, 1972. 244. sqq.
[125] Pap. D. 48, 5, 23 (22) pr.
[126] Pap. D. 48, 5, 21 (20); Ulp. D. 48, 5, 22 (21)
[127] Coll. 4, 12, 1.
[128] Ulp. D. 48, 5, 24 (23), 2.
[129] Coll. 4, 2, 6.
[130] Coll. 4, 9, 1. Cf. Quint. *inst*. 5, 10, 104.
[131] CANTARELLA 1972. 246.
[132] Macer D. 48, 5, 33 (32) pr.

the adulteress/adulterer in the act inflagranti, that is, *in ipsis rebus Veneris* indeed;[133] and he had to kill both of them as it were at one blow (*uno ictu et uno impetu*), so after killing the *adulterer* he was not allowed to wait several days before killing his daughter. But it did not interrupt the continuity of *unus ictus*, or *animus*[134] if the father killed his daughter, who had fled, several hours later when he caught her up or found her.[135] Consequently, the *pater familias* was supposed to catch the adulteress/adulterer either at his own or at his son-in-law's house, and had to immediately attack them, and if he wanted to exercise *ius occidendi*, he had to kill both the man and his daughter.[136] A locus in Ulpianus's work asserts that in order for the father to be able to exercise this right, the daughter had to be subjected to his *potestas*,[137] but two fragments of *Collatio* do not strictly tie the right of killing to the father's power; it provides the father with the option of exercising this right also in the case when his daughter has already been subordinated to the husband's power.[138] Behind this legislative extension most probably stood the highly practical reason that Augustus was aware of the libertine marital conditions of his age, on the one hand; and that is why he put *ius occidendi* in the father's hand even for the period after the term of the *potestas*. And through that Augustus wanted to ensure to the soldiers stationed permanently within the boundaries of the empire that in their absence their wives would continue to be under strict control.[139]

A *filius familias* under power is not entitled *expressis verbis* to the right to kill his wife caught in the act of adultery if she is under her father-in-law's *potestas*, yet the legislator provides him with this option, since he does not order that his act should be punished.[140] The husband was not entitled to the right of killing the *adulter* and his wife jointly, which the law justified by the consideration that while the father would deliberate with more *pietas* if he wanted to exercise this right, the husband would make the decision much sooner driven by his temper.[141] Pursuant to the provisons of *lex Iulia* if the husband kills his wife caught in the act of adultery, he will be responsible for murder, *homicidium*, so he had the right to kill "only" the *adulter*, the „seducer";[142] notwithstanding, the law definitely narrowed the range of adulteresses/adulterers on the basis of

133 Ulp. D. 48, 5, 24 (23) pr. Cf. CANTARELLA 1972. 247.
134 Coll. 4, 2, 6–7.
135 Ulp. D. 48, 5, 24 (23), 4.
136 CANTARELLA 1972. 248.
137 Ulp. D. 48, 5, 24, 1; Pap. D. 48, 5, 21 (20); Ulp. D. 48, 5, 22 (21)
138 Coll. 4, 2, 3; 4, 7.
139 SCHAUB, V. Der Zwang zur Entlassung aus der Ehegewalt und die remancipatio ohne uxor. *Zeitschrift der Savigny-Stiftung für Rechtsgeschicte, Romanistische Abteilung* 82, 1965. 123.
140 Coll. 4, 12, 2; Paul. 2, 26, 2.
141 Pap. D. 48, 5, 23 (22), 4.
142 Coll. 4, 10, 1.

their social standing who could be killed by virtue of the above,[143] since out of them only slaves, *infamis* persons – in this category the law emphasized, among others, those condemned to gladiator's and animal fights, convicts sentenced under *iudicio publico*, actors/actresses and prostitutes – and certain *libertinii* could be killed by the husband with impunity.[144] The father's right was further narrowed to the extent that the husband was allowed to take such action only in the case of adultery that took place at his own house.[145] After killing the *adulter*[146] he had to immediately dismiss his wife, and had to report the case in three days to the competent person exercising *iurisdictio*.[147] And if the husband killed his wife caught in the act of adultery, Marcus Antonius and Commodus – referring to a *rescriptum* of Antoninus Pius – stipulated that it was not necessary to impose death sentence on the husband pursuant to *lex Cornelia de sicariis*, because he had committed his act in his righteous pain, driven by sudden passion, it was sufficient to sentence him to forced labour if he was ranked among *humiles*, or to *relegatio* if he belonged to *honestiores*.[148] Likewise, referring to *iustus dolor*[149] Alexander Severus ordered less severe adjudication.[150]

To sum up the elements of the state of facts of *lex Iulia de adulteriis coercendis*, the *pater familias* is entitled wihout limitation to *ius occidendi* with respect to *uxor in manu* and his daughter caught in the act of adultery – regarding the female child also in the event that she has already lived under her husband's *manus*. Although *filius familias* under power shall have no right to kill his wife in this case, he has the option to do that *de facto* without being punished. If he does not exercise power over his wife, the husband has no *ius occidendi* either *de iure*, or *de facto*, but if he should kill his wife driven by *iustus dolor*, his act will be less severely adjudged.[151] From this Schaub draws the conclusion that the existence and extent of *ius occidendi* holding in the case of *adulterium* is determined by the fact of being under power rather than by the exercise or possession of power. The *maritus*, whose interest does not deserve less protection by law than that of the *pater familias*, may not kill his wife if she is not under power; although not having power over his wife the *filius familias* as husband yet may kill his wife because she is under her father-in-law's *potestas*; and the *pater familias* may kill his daughter even if she is no longer

143 CANTARELLA 1972. 249.
144 Macer D. 48, 5, 25 (24) pr.; Paul. 2, 26, 4 = Coll. 4, 12, 3; Coll. 4, 3, 1-4.
145 Macer D. 48, 5, 25 (24). Pr.; Coll. 4, 3, 2.
146 About the *adulter* see Hor. *Sat.* 1, 2, 41–46.
147 Paul. 2, 26, 6; Coll; 4, 3, 5.
148 Pap. D. 48, 5, 39 (38), 8; Coll. 4, 3, 6.
149 Cf. CANTARELLA 1972. 260. sqq.
150 C. 9, 9, 4.
151 SCHAUB 1965. 126.

under his *potestas* but under her husband's *manus*.[152] So the structure of power existing during the marriage is more closely linked to adultery than adultery to the marriage itself, as it comes from the basically and primarily power based nature of Roman family relations.[153] (In the event that the husband does not divorce his wife caught in the act of adultery, the relevant loci do not reveal whether a marriage with *manus* or without *manus* is concerned,[154] pursuant to *lex Iulia de adulteriis coercendis* he shall be punished because of *lenocinium.*[155] In this context the *uxorem retinere* appears as the opposite of *uxorem dimittere*, which occurs several times in loci[156] expounding *lenocinium.*[157] The term *dimittere* carries a wider sense than the phrases *nuntium remittere*, *repudiare*, or *divortium facere* that can be read in similar contexts, because it expresses not only the fact of divorce, but implies reference to actual ousting in a much wider sense. If the husband wanted to avoid the charge of *lenocinium*, then he had to break all the ties that linked him through *dimittere* to his wife and the ties that linked his wife to him, so he had to release her from his *manus* too; a terminologically more precise phrase would have been *repudiare et remancipare*, but due to its somewhat complicated structure the legislator chose the *verbum dimittere* that embraces these two aspects.[158])

IV.

A marriage without *manus* was terminated without any other assistance by the authorities both by *divortium*, which was carried out with the parties' common will, and *repudium* implemented with a unilateral statement,[159] which was referred to as early as in the Twelve Table Law.[160] The *lex Iulia de adulteriis coercendis* stipulated that the husband who intended to oust his wife should declare his such intention in the presence of seven witnesses; Constantinus made the application of *repudium* subject to the existence of certain ground for divorce.[161] The husband ousting his wife without legal ground was ordered to be punished by Romulus, one half of his properties had to be offered to Ceres, and the other half fell to his wife.[162] A marriage with *manus* was terminated by the

[152] SCHAUB 1965. 126.
[153] FÖLDI–HAMZA 2006. 238. sqq.
[154] Schaub 119.
[155] Ulp. D. 48, 5, 2, 2; Ulp. D. 48, 5, 30 pr.
[156] About the *lenocinium* see MOMMSEN 1899. 700.
[157] Pap. D. 48, 5, 12, 13.; ibid. 40, 4; Ulp. D. 48, 5, 2, 6; Ulp. D. 38, 11, 1, 1; C. 9, 9, 25.
[158] SCHAUB 1965. 120.
[159] FÖLDI–HAMZA 2006. 255.
[160] *XII tab.* 4, 3. (Cic. *Phil.* 2, 28.)
[161] C. Th. 3, 16, 1; FÖLDI–HAMZA 2006. 255.
[162] Plut. *Rom.* 22. (Cf. ZLINSZKY 1996. 48.)

termination of the manus.[163] It was carried out in the form of *contrarius actus*, that is, the opposite of the legal act generating *manus*, so the *manus* generated through *confarreatio* was terminated by *diffarreatio*,[164] which was implemented also with the assistance of the *pontifex* and in the presence of witnesses, and as part of that the *panis farreus* held out to the parties who intended to divorce was refused by them, and they recited some alien, hateful and terrific formula as we know from Plutarch's account,[165] the text of which has unfortunately not been left to us. The *manus* obtained with *coemptio*, or *usus* was terminated by *remancipatio*.[166] The reference made in *leges regiae* coming also from Plutarch that sets forth that the husband who sells his wife shall be sacrificed in serious cases to the gods of the underworld[167] mentions sale together with unlawful ousting, so most probably it pertains to divorce without legal ground, from which the general prohibition of *remancipatio* cannot be inferred.[168]

Remancipatio, however, did not serve divorce as its only purpose since it provided the husband with the option to remancipate his wife under the *potestas* of an earlier exerciser of power, usually the *pater familias* on condition that he was to pass on the wife with *mancipatio* to a third party determined by the husband. Later this became the basis of the aforesaid *coemptio fiduciara* that furthered the process of making women have their own rights.[169] Regarding the law of the archaic age there are indeed certain accounts available to us which assert that the husband handed over his wife through *mancipatio* to a third party who was bound to return her after the purpose had been achieved; it is an especially interesting case when the husband was allowed to deliver his wife to another husband for a period in order for her to give birth to a successor, and after it had taken place – as it was stipulated by a *pactum fiduciae (ut remancipetur)* during *mancipatio* – the wife was returned to him.[170]

Accordingly, *remancipatio* terminated the marriage and the second husband was granted *manus* over the wife, which held until the first husband demanded the wife to be returned to him on the grounds of the *pactum* set forth in the *mancipatio*. Regarding this point Düll mentions several sources on the law of Sparta that give accounts of legal practices which can be compared to similar

163 FÖLDI–HAMZA 2006. 255.
164 Fest. s. v. *diffareatio*
165 Plut. *Quaest.* 50.
166 DÜLL, R. Studien zur Manusehe. In: *Festschrift für Leopold Wenger I.* München, 1944. 210.
167 Plut. *Rom.* 22.
168 DÜLL 1944. 213.
169 Cf. Gai. 1, 115a
170 DÜLL 1944. 213. sq.

Roman customs. [171] Polybios asserts that it was a generally accepted custom for three or four, or if they were brothers, even more men to live together with a single woman, who gave birth to a child for all of them, and if one of the men believed she had given birth to a sufficient number of children, he was allowed to hand over his wife to his friend so that she should give birth to children for him.[172] Pausanias gives an account of king Anaxandrides' double marriage, namely, the king's first marriage was childless, and the *ephoroi* requested him to divorce his wife but the king was not willing to do that, instead he obtained another wife beside the first one.[173] Plutarch also describes the Spartian practice that although the husband continued to live with his wife to maintain the marriage but was allowed to hand her over to another man who asked him to do so in order to beget children. In Rome this custom was maintained in the form where a man who had enough children could be asked by any childless man to assign his wife to him either once and for all or on condition that he would return her to him later.[174] Of the existence of this marital institution in the last decades of the age of the Roman republic we can learn from Plutarch's biography on Marcus Porcius Cato minor:[175] referring to Lucius Thrasea Paetus, the historian living during the reign of Nero, Plutarch narrates that Q. Hortensius, an excellent orator of his age, wanted to confirm his friendship with Cato through some kind of kinship. Therefore, he asked Cato to marry off his daughter, Porcia to him, who was at that time Bibulus's wife, whom she had presented with two children; and if Bibulus insisted on having Porcia, then he would return her to her former husband after she had given birth to children for him too. Cato did not consent to his daughter becoming Hortensius's wife; then Hortensius demanded that Marcia herself, Cato's wife should be married off to him, although he knew that they had not got estranged from each other since Marcia was just expecting a child from her husband. Seeing that Hortensius's resolution was quite firm, Cato having asked for the consent of Marcia's father, Philippus gave consent to the marriage of his wife, Marcia and Hortensius. He himself was also present at the enagegment, which was expressly requested by Hortensius.[176] When Hortensius died, Marcia became a widow, then Cato married her again, for which Caesar reproached Cato for considering marriage a

[171] DÜLL 1944. 214.
[172] Polyb. 12, 6 b, 8.
[173] Paus. 3, 3, 9.
[174] Plut. *Lyc. comp. c. Numa* 3, 1–2.
[175] About Cato minor see BERTHOLD, H. Cato von Utica im Urteil seiner Zeitgenossen. In: *Acta Conventus XI. Eirene 1968.* Warschau, 1971. 133. sqq; PECCHIURA, P. *La figura di Cato Uticense nella letteratura latina*. Torino, 1965.
[176] Plut. *Cato min*. 25.

source of profiteering since in his last will and testament Hortensius bequeathed his properties to Marcia.[177]

Appianos also touches upon this case,[178] and Strabo establishes in line with the comparison of Lykurgos with Numa Pompilius made by Plutarch[179] that Cato's procedure complied with ancient Roman customs.[180] In the same spirit, that is, deeming it being in harmony with ancient Roman morals and the interest of the state, Augustinus recalls this event of Cato's life,[181] and Tertullianus demonstrates the differences between Roman and Christian values with this case. Nevertheless, he connects the history of Marcia's marriage erroneously to Cato Censorius and not to Cato Uticensis.[182] It proves that this case was part of public knowledge that Quintilianus states that the Cato-Marcia-Hortensius marriage could serve as proper grounds for argumentation and counter-argumentation in orator's training.[183] Undoubtedly, this marriage must have been a marriage with *manus* since that is why the consent of Marcia's father, Philippus was required because Cato's *manus* was terminated by the *remancipatio* for the *pater familias*, and in the conclusion of the marriage to be concluded with Hortensius, most probably entered into with *coemptio*, the assistance of the exerciser of power could not be dispensed with.[184] This is supported by the locus of Lucanus's *Pharsalia* which asserts that Marcia was the subject of these transactions as *iussa*, that is, a person fulfilling an order and not as an active participator. The phrase *conubii pretium mercesque soluta* and another expression *tertia iam suboles* concerning Marcia also refer to *coemptio* and *mancipatio*,[185] since as *prima filia* she was Philippus's daughter, being *filiae loco* as *secunda filia* she was a wife in the marriage with *manus* concluded with Cato, and she became *filiae loco tertia filia* again under Hortensius's *manus*.[186] The former husband's right to demand his wife to be returned to him from under the second husband's *manus* was ensured by *muncupatio* related to *mancipatio*, which was in terms of its content a *pactum fiduciae* that could be claimed through the courts[187] with the infamous *actio fiduciae*.[188]

[177] Plut. *Cato min*. 52.
[178] App. *civ*. 2, 99.
[179] Plut. *Lyc. comp. c. Numa* 3, 1–2.
[180] Strab. 11, 515.
[181] Aug. *fid. et op.* 7.
[182] Tert. *apol*. 39, 12.
[183] Quint. *inst.* 3, 5, 8. 11. 13; 10, 5, 13.
[184] DÜLL 1944. 220. sqq.
[185] Luc. 2, 326–339.
[186] DÜLL 1944. 221.
[187] FÖLDI–HAMZA 2006. 442.
[188] DÜLL 1944. 222.

SUMMARY

Remarks on Roman Marriage and Divorce

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Roman law acknowledged two kinds of civil law marriage: marriage generating *manus*, that is, husband's power, and marriage without *manus*. In this essay the author confines his investigation to marriage with *manus*, and as part of that he expounds the following issues in detail: the forms of engagement, the conclusion of marriage and of obtaining *manus*, specifically *confarreatio*, *coemptio* and *usus*, the relation of *uxor in manu* to *agnatio*, the husband's punitive power over the wife under *iudicium domesticum* and on the grounds of *lex Iulia de adulteriis coercendis*, and the forms of divorce and the termination of *manus*, paying special regard to *remancipatio uxoris*.

As specified by Gaius, *manus* arises in three forms: *usus*, *confarreatio* and *coempio*. He clearly formulates that they are the forms of obtaining *manus* and not the forms of concluding the marriage itself. A marriage without *manus* was terminated without any other assistance by the authorities both by *divortium*, which was carried out with the parties' common will, and *repudium* implemented with a unilateral statement. A marriage with *manus* was terminated by the termination of the *manus*. It was carried out in the form of *contrarius actus*, that is, the opposite of the legal act generating *manus*, so the *manus* generated through *confarreatio* was terminated by *diffarreatio*, and the *manus* obtained with *coemptio*, or *usus* was terminated by *remancipatio*.

RESÜMEE

Anmerkungen zur Eheschließung und Ehescheidung im römischen Recht

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Das römische Recht erkannte zwei Arten der zivilrechtlichen Eheschließung an: das *matrimonium cum manu*, d.h. die Eheschießung, bei welcher der Ehemann die Gewalt über seine Frau erwarb, und die Eheschließung ohne *manus*. Der Verfasser beschränkt seine Untersuchungen auf die Ehe mit *manus*, und kommt im Rahmen dessen auf folgende Fragen detailliert zu sprechen: die Verlobung, die Arten des Zustandekommens der Ehe, bzw. des Erwerbs der *manus* durch *confarreatio*, *coemptio* und *usus*, das Verhältnis der *uxor in manu* zur *agnatio*, die Strafgewalt des Ehemannes über die Ehefrau im Rahmen des *iudicium domesticum* und auf Grund des *lex Iulia de adulteriis coercendis*, sowie die Arten der Ehescheidung, bzw. der Aufhebung der *manus*, mit besonderem Blick auf die *remancipatio uxoris*.

Gaius nennt drei Formen der Entstehung der *manus*: den *usus*, die *confarreatio* und die *coempio*; darüber hinaus formuliert er klar, dass diese die Arten des Erwerbs der *manus* sind, und nicht die Formen der eigentlichen Eheschließung. Die Ehe ohne *manus* wurde ohne jegliche behördliche Teilnahme sowohl durch *divortium*, das infolge des gemeinsamen Willens der Parteien erfolgte, als auch durch *repudium* aufgelöst, das mit einer einseitigen Erklärung erfolgte. Die Ehen mit *manus* wurden durch die Aufhebung der *manus* mit einem *contrarius actus*, d.h. dem Gegenteil des zur Erschaffung der *manus* bestimmten Rechtsaktes aufgelöst. Auf diese Weise wurde die Gewalt des Ehemannes durch die *diffareatio* und die *remancipatio uxoris* aufgehoben.