

## Aspects Relating to the Family Status in the Roman Law

**Ligia-Roxana Rotaru**

Legal counsellor, TCM Nord, Baia Mare, Romania

ligia\_sunflower@yahoo.com

**ABSTRACT:** The status of the family has evolved over time until it formed what we call today the basic cell of society. It is interesting to observe how in the old Roman law, for the valid start of a marriage it was required the consent of the head of family also known as *pater familias* and not of the future bride and groom. They had no rights of their own, the father even having the right of life and death at first. As Rome moves towards the Imperial Age, marriage also begins to take on another form and becomes from marriage *cum manu* (under the power of *pater familias*) to *sine manu* (where only the consent of future bride and groom was needed).

**KEYWORDS:** status, family, marriage, Roman law

### Introduction

Nowadays the family is thus defined according to DEX (2009): “the basic social form, made by marriage, which unites the spouses (parents) and their descendants (unmarried children)”. Family is the cell of society having a connection with many branches and social domains. Even the Romanian poet Bolintineanu (2004, 5) refers in his works to this basic core, saying: “... *I did not know what happiness tastes the one who has a family...*”

Still, to reach this form, the family and, in particular, its status has undergone numerous changes over the years. In Roman law, the notion of family was much more extensive, including in its very term all persons under one power (*pater familias*) and the goods owned by him. Helped by the branch of law, *status familiae* (the family) has now come to a vast and thorough regulation.

On the other hand, the law is a conglomerate of norms and principles that have the role of impregnating high social and moral conduct in the public mind and conscience. Renowned jurist Ulpian defined the law as follows: "*Turis praecepta sunt haec: honeste vivere, alterum non laedere, suum quique tribuere, meaning the teachings of the Law are these; to live in honor, not to harm another, to give to everyone what is due. Another wording that remains famous since the time of Roman law is IUS EST ARS BONI ET AEQUI. Meaning the Law is the science of what is good and fair*" (Hanga and Bob 2009a,18).

## The form of the family in Ancient Rome

Next, we will take a leap in history until Ancient Rome where we will look at and analyze more closely the form of the family at that time. The most important role in society and in the family was this *PATER FAMILIAS* that I mentioned in the previous paragraphs. This term is related to power and not to procreation, Ulpian states that *Patres familiarum are, qui sunt suae potestatis sive puberes sive impubere*, meaning the family bosses are the ones under their own power, be they *puberi* or *impuberi*. (*Digestele 1.6.4*) *Pater Familias* had his wife, children (*aliens iuris*) and slaves (*res*) in his possession, this power over them was generically named *MANUS*. In time, however, instead of this single term of *manus* designating the general power over all the people under his rule, *patria potestas* (power over children), *dominica potestas* (power over the slaves), *dominium* (the power over things) appear, and *manus* remains to designate only power over the woman.

The most important prerogatives that the *pater familias* had on those under his power ranged even to the right to life and death (*ius vitae necisque*). He was also the sole owner of the family heritage, and the others were only entitled to increase it, but in no way diminish the value by the acts they would have concluded. *Patria potestas* in Ancient Rome was unlimited. The father could drive out his children from the house, sell, punish, or even kill them. Regardless of the age of the male descendants or whatever high rank that they would have occupied in society, they could not get away from their parental power or acquire any of their own patrimony, so there was no such thing as coming of age (Hanga and Bob 2009a,140-142).

This unlimited power was facilitated by the fact that Rome was a fortress with an agricultural structure, and such a structure allowed the total independence of a single head of household. With time however the development of commerce is beginning to take the place of agriculture more and more and with this phenomenon come into force new laws and decrees that considerably weaken the power of *pater familias*. In Athens, a greater freedom of family members, required by the conditions of the new society, makes its presence felt much earlier, as opposed to Rome, which begins to see some restrictions only towards the end of the Republic, being thoroughly regulated only in the Imperial age. Until Emperor Constantine who puts an end to the parent's life and death right over the child, it was adopted in year 18 A.D. *LEX IULIA DE ADULTERIIS* which allowed the parent to kill his daughter caught in adultery but only if he applied the same treatment to the one the daughter was committing adultery with, in order to guarantee the fairness of the act and his decision (Hanga and Bob 2009a, 140-142).

The personal freedoms of the descendants of *pater familias* are slowly joined by some patrimonial independence, the child beginning to be regarded as a juridical personality distinct from that of his father. It is even possible during Emperor Constantine to regulate a mass of distinct goods of the child, the patrimonial mass made up of goods acquired by the mother's devolution. Although this *bona adventicia* was the property of the child, still the father kept his right to use and administer the goods throughout his life (Hanga and Bob 2009a, 140-142).

However, Rome knows its greatest changes with the arrival of the Emperor Justinian to the throne, also called the "man of the great restorations" (Hanga and Bob 2009b, 7). Justinian dreamed of a political and religious unity for his vast empire, being aware that this can be accomplished and can only be maintained by a legislative unit, thus making a new codification. Justinian's new legislation is made up of four parts: the *Code*, *Digeste*, *Institutions* and *Novelle*, and gets the name *CORPUS IURIS CIVILIS* (*Civil Law Collection*) (Hanga and Bob 2009b, 10) in the Middle Ages. *Institutions* are particularly concerned with the legal regulation of the family and the power of the *pater familias*, which is significantly diminished with the weakening of the agnatic system. The first signs in achieving total children's independence arise in banning marriage against their will, as well as prohibiting the father from selling the children, with only renting out for work being allowed. An element of absolute novelty arises when *pater familias*' former discretionary power is joined by some obligations, among which we name the food obligation to those under his power, the obligation to endow the daughters in marriage, etc (Hanga and Bob 2009a, 142-145).

An interesting aspect to analyze is the institution of marriage with all the changes it suffers from the earliest times of the Roman age to the present day. The Roman legal counsel, Modestius, defined marriage as follows: “*coniunctio maris et feminae, conscientium omnis vitae divini et humani iuris communicat*, that is, the union of the man with the woman, a community for the whole life, the sharing of divine and human cult” (*Digeste* 23.2.1). Emperor Justinian also does not leave this important juridical and religious construction unfinished, defining it in his *Institutions*: “the union of the man with the woman, which is a unit of life, inseparable” (*Institutions* 1.9.1).

In the early epoch of Rome, marriage was preceded by a *sponsalia*, meaning engagement. *Sponsalia* had impregnated a strong moral character, and it did not produce any legal consequences until Emperor Constantine came to the throne, thus transforming *sponsalia* into a relationship with legal consequences and giving the future spouses the right to personally express their consent to its conclusion, and not through family bosses. Once an engagement was completed, certain conditions would be met in order for a marriage to be validly concluded. Interesting to note is that over the years these conditions remained essentially the same, suffering only small changes. Thus, the background conditions were as follows: consensus, age and *conubium* (Hanga and Bob 2009a, 142-145).

In the beginning, the consent totally belonged to *pater familias*, even if it was against the will of those who married. But as the rigidity of the Roman system began to weaken, alongside the *pater familias*, it was also necessary for the future husband. It even begins to be assumed that if *pater familias* does not oppose marriage directly or does not express its consent at all, he agrees with the conclusion. The imperial age is bringing more and more changes in this area, with the edict of the *IULIA* law during Emperor Augustus, which allows future spouses to address justice if *pater familias* opposed unjustifiably to their marriage. The next essential condition was the age, which was considered to be fulfilled when the boy was a *puber* and the woman was nubile. The boy was considered to be a *puber* at the age of fourteen and the girl at the age of twelve (Hanga and Bob 2009a, 145).

However, the most interesting and complex condition to be fulfilled was *conubium*, namely the right to get married, both subjectively and objectively. In ancient Rome, only Roman citizens could validly get married, so that in objective terms in order to benefit from the *conubium*, you would have to be either *prisci Latini* (ie old Latins) or those of whom Rome granted this favor. A marriage done without respecting this first condition was not recognized (Hanga and Bob 2009a, 145).

But subjectively however, *conubium* knows a number of conditions that needed to be met cumulatively. First of all, the future spouses were not allowed to be relatives between them in a straight line to infinity and in collateral line to a certain degree. Because the degree of kinship from which marriage was permitted varied, Emperor Justinian also offers some clarifications in this regard in his *Institutions*: “*The marriage to the brother or sister’s daughter is not allowed as well as that of his brother or sister’s niece, for if one is not allowed to marry someone’s daughter, he is not allowed to marry the niece either. Nor is anyone allowed to marry his father’s sister, even if she is a sister through adoption, nor his mother’s sister because these people are considered to be relatives. For the same reason the marriage to the grandfather or grandmother’s sister is forbidden. The children of two brothers or two sisters or of a brother and a sister can however marry between them*” (Hanga and Bob 2009b, 51).

Future spouses were not even allowed to have affinity between them. *Adfinitas* (affinity) is the kinship created by the marriage between one of the spouses and the relatives of the other. It was also forbidden for the spouses to be married, bigamy or polygamy being forbidden in Rome. Another interesting condition was the case of the widow. She was not allowed to remarry until after a period of time has passed (first 10 months, then one year). Although this interdiction was based on moral grounds (pain and mourning after *de cuius*), its true reason however was to avoid uncertainty about a future child’s fatherhood. The last condition imposed by *conubium* was the social condition. So until the *Canuleia* law was enacted, the marriage between *the plebs* and *the patricians* was forbidden, and the marriage between the free-born citizens (*ingenui*) and former slaves was forbidden until the time of Emperor Augustus (Hanga and Bob 2009a, 146).

## Marriage in the new Romanian Civil Code

A particularly important aspect worth paying attention to is the fact that some of these background conditions regarding marriage have survived for so many centuries, reaching us today, in Romanian society, almost unchanged. Going forward we will briefly present them according to the existing model in the Romanian law. Firstly, in order to have a valid marriage, the new Romanian Civil Code regulates the consent of the future spouses, stating in art. 271: “*Marriage in between man and woman through their personal and free consent*”. We note that the efforts of Rome’s Imperial epoch to remove the consent of *pater familias* or any other person in order to get married were successful; today this institution depends exclusively on the free and unquenchable will of the two parties.

The next condition under Roman law was age. At present the matrimonial age is 18, according to art. 272 of the New Civil Code: “*Marriage can be done if the prospective spouses are 18 years old.*” However, the Code also admits an exception to this rule: “*For well-founded reasons, a minor who has reached the age of 16 may be married on the basis of a medical opinion, with the consent of his parents or, where appropriate, of the guardian and with the approval of the guardianship court in which district the minor resides. If one of the parents refuses to approve the marriage, the guardianship court also decides on this divergence, given the child’s best interest*”. Analyzing the age from the time of the Roman law with the one nowadays we observe a significant increase of the moment when a marriage can be started. Because in our time only the consent of the future spouses is needed without the approval of any other person, it is imperative that the future partners are mature enough to understand the importance of this institution and the responsibilities that come with it. That is why we are explaining the significant change in age that took place over time.

If we take a step further, we will notice that the following two conditions have remained unchanged. Thus, in art. 273 of the New Civil Code bigamy is forbidden: “*It is forbidden to start a new marriage by the person who is married.*” And in art. 274 marriages between relatives are forbidden: “*It is forbidden to marry between relatives in a straight line, as well as between those in collateral line up to and including the fourth degree.*”

Analyzing more thoroughly some of these important conditions for starting a valid marriage in our days, we conclude that the norms enacted in the New Romanian Civil Code owe much to the Roman law.

An interesting aspect of the Rome era is the forms of marriage. In the course of time, Rome knows two forms of marriage, namely *cum manu* and *sine manu*. The *cum manu* marriage is the oldest form of Roman marriage, and it lasts up until somewhere at the end of the Republic. It meant that the future wife was totally under the power of *pater familias* from the man’s family. The woman broke any connection with her family of origin and got the status of a daughter in the man’s family, meaning that the *pater familias* had at that time full power over her. This form of marriage could begin in three ways: by *confarreatio*, a procedure that only the Patricians enjoyed which meant speaking some sacramental formulas in the presence of Jupiter’s priest and 10 witnesses, through *coemptio*, the procedure reserved for plebeians, representing the fictitious sale of the wife by *pater familias* to her future husband. One thing worth noting is the far inferior position of the woman at that time, because her fictitious selling was done in the same way as selling a piece of land, only the words spoken differed. And the last procedure used for making a *cum manu* marriage was *usus*, which simply means

cohabitation for 1 year, after which the woman enters the man's family (Hanga and Bob 2009a, 146).

But once with the development and flourishing of trade, the freedom of family members began to emerge more and more so that women were becoming more free and more independent and *cum manu* marriage gets to be considered obsolete, making room for the new form of marriage that better suited the needs of the time, namely the *sine manu*. In *sine manu* marriage, the woman no longer enters the man's family and no longer falls under the power of the head of the family. Thus, for its existence, only two elements were required: " *affectio maritalis si honor matrimonii*. By *affectio maritalis* it is understood the mutual intention of the future spouses to establish a common life, to behave as a husband and wife, and by *honor matrimonii* - material cohabitation as such" (Hanga and Bob 2009a, 147).

Regarding the patrimonial relations in these two forms of marriage, we mention that in the *cum manu* marriage the woman's whole fortune was transferred into the property of the man's family and in the *sine manu*, the woman could benefit and keep the *dota* if it were opened the husband's succession, which was sort of a dowry given to the husband at the beginning of the marriage to provide and sustain the material needs inherent in family life (Hanga and Bob 2009a, 147).

A last aspect regarding the status of the family in the old Roman law is the dissolution of marriage. The ancient age of Rome was impregnated by high moral values, so the possibility of dissolution of a family was regarded very cautiously, and rarely happening. First of all there were two ways of ending a marriage, a forced dissolution, and a voluntary one. A forced dissolution of marriage occurred when there were events that could not be controlled by the spouses, such as death or loss of the freedom of one of the spouses, thus becoming a slave or loss of his liberty, thus becoming a peregrine. It was necessary to abolish marriage in such cases because between a Roman citizen and a slave or peregrine there could not be a marriage recognized by the Roman state (*justae nuptiae*). As far as the voluntary ending of marriage is concerned, a distinction must be made again between the *cum manu* and *sine manu* marriage. Thus, if the *cum manu* marriage was concluded in the presence of witnesses and the priest by speaking the sacramental formulas specific to the solemn marriage framework, it now unfolds through solemn formulas that would release the spouses of one another in the same solemn frame. But if it had concluded by the other two processes, the dissolution was made simpler by *remancipatio*, which meant that the woman was transferred into the power of another man who then released her (Hanga and Bob 2009a, 148-152).

## Conclusion

With the affluence of wealth that Rome has come to enjoy after conquests and the Punic wars, the moral values start to decline more and more, so divorce becomes almost a “monden” thing. Although the Emperors of the time tried to stop and restrain the unmotivated separations through norms and edicts, the results were of little significance. *Sine manu* marriage is now allowed to end once one of its two elements ceases to exist, without the need for any other formality. Although Emperor Justinian punishes the divorces unmotivated by the fault of one of the spouses, that marriage still remained ended (Hanga and Bob 2009a, 148-152).

In conclusion, we believe it is vitally important to know the evolution and legal status of the family over the centuries, as George Santayana (1905, 284), who was a philosopher, essayist and 20th century writer, said, “*Those who forget the past are condemned to repeat it.*”

## References

- Bolintinanu, Dimitrie. 2004. *Manoil*. Bucharest: Aldo Press.
- Dex Online. 2009. “familie” (family), accessed February 5, 2018, <https://dexonline.ro/definitie/familie>.
- Hanga, Vladimir, and Mircea Dan Bob. 2009a. *Curs de drept privat roman (Romanian private law course)*. Bucharest: Ed. Universul Juridic.
- Hanga, Vladimir, and Mircea Dan Bob. 2009b. *Institutiile lui Iustinian (Institutions of Justinian)*. Bucharest: Ed. Universul Juridic.
- Popa, Adrian. 2014. *Cei care uită trecutul sunt condamnați să îl retrăiască (Those who forget the past are condemned to relive it)*. Accessed April, 2018. <http://www.gandul.info/puterea-gandului/cei-care-uita-trecutul-sunt-condamnati-sa-il-retraiasca-12663695>
- Santayana, George. 1905. *The Life of Reason: Reason in Common Sense*. NY: Charles Scribner's Sons.