Barcelona School of Economics

WORKING PAPERS

# The Roman Familia: A view from the economics of property

**BSE Working Paper 1407| October 2023**

Benito Arruñada

# The Roman *Familia*:

# A View from the Economics of Property

Benito Arruñada*

**Abstract**

This chapter presents an analytical framework that draws upon the economics of personal and real rights, which helps in understanding the institutions of the Roman *familia*. The discussion proceeds in four stages. First, it outlines the central tenets of the theory, which regards the formalization of transactions as a critical, secondary, public "contractual" step for creating a tradable legal commodity, specifically robust property (real) rights that are enforceable *in rem* against everyone but do not increase transaction costs. Second, it applies the theory to the marriage contract, a fundamental component of family law. Third, the chapter examines some of the primary features of Roman personal contracting from this analytical perspective, particularly the standard transactions related to the Roman *familia*, which is better comprehended as a household than as a mere family. Lastly, it focuses on one of the main features of Roman family law: the dowry, explaining the tendency to enforce it as a right in rem.

Keywords: economics of ancient law, economics of ancient societies, economic analysis of Roman law, law and economics, family law, dowry, property rights, transaction costs, personal exchange, new institutional economics.

JEL: D1, D23, K11, K12, K36, L22, N13, O17, P48.

---

* Pompeu Fabra University, BSE and FEDEA. I thank Marco Celentani, Carlos Sánchez-Moreno Ellart, Giorgio Zanarone and participants at the conference "A European Tribute to Henry Hansmann" for comments on previous versions, as well as financial support from the Spanish Research Agency (project PID2020-115660GB-I00 and the Severo Ochoa Program for Centers of Excellence in Research and Development (CEX2019-000915-S). A caveat is in order: the chapter does not present new facts on Roman institutions but merely aims to apply the modern economics of property rights to understand some of the well-known facts.

## 1. General framework: gains, benefits, and difficulties of impersonal exchange

The potential for economic growth is enhanced when transactions move beyond established relationships and become impersonal.[1] This is particularly true when the term "impersonal" implies that contractual fulfillment is entirely independent of the parties' elusive characteristics, such as their reputation, wealth, and legal authority to bind strangers to a contract. Nonetheless, achieving fully impersonal transactions requires that contractual enforcement be grounded in assets, that is, conveying *in rem* rights or general priority to *bona fide* purchasers over previous owners. This, in turn, creates a conflict between those individuals who hold property rights and those who acquire them. Such a conflict between owners and buyers is present in both property and business contexts, even when owners act through contractual agents.

Economic incentives and prosperity rely heavily on property rights. In case of conflict with acquirers, one might assume that assets should always be returned to their owners unless they have given consent. However, such strict enforcement of property rights as rights *in rem* would increase transaction costs by exacerbating the information asymmetry suffered by acquirers of all sorts of rights. In this scenario, acquirers would always need to obtain consent from previous owners even without knowing who they are. Consequently, such strict enforcement of property rights would jeopardize trade. Moreover, it would also threaten specialization since specialization often depends on agents acting as representatives of owners. Universal strict enforcement would lead acquirers to question the legal authority of sellers.

---

[1] This initial section, based on Arruñada (2020:247–52) summarizes and applies the arguments in Arruñada (2003, 2012:15–42) and Arruñada, Zanarone and Garoupa (2019).

Economic growth therefore requires this conflict between property enforcement and transaction costs to be minimized, so that both current owners and acquirers are efficiently protected. Protecting owners' property rights encourages investment, while reducing the transaction costs faced by acquirers encourages them to trade impersonally, thus improving the allocation and specialization of resources. Owners' consent must be preserved but enforced in a way that makes exchanges possible. And current owners have an interest in tackling the conflict, not only because they are potential sellers but also because, being acquirers with respect to the previous owners, they could eventually lose their title.

The nature of the problem can be clarified by considering that most economic transactions are interrelated sequentially, as most transactions legally interact with previous transactions. In the simplest sequence, with only two transactions, one or several economic "principals"—such as owners, employers, shareholders, creditors, and the like—first voluntarily contract with one or several economic "agents"—possessors, employees, company directors, and managers—in an "originative" transaction. Second, the agent then contracts "subsequent" transactions with third parties. Understandably, it is necessary to optimize the total costs of transacting, considering both originative and subsequent transactions.

Sequential exchange is necessary to specialize the tasks of principals and agents—between landowners and farmers, employers and employees, shareholders and managers, wives and husbands, and so on—in the originative contract. But it also gives rise to substantial transaction costs, because, when third parties contract with the agent in the subsequent contract, they suffer information asymmetry regarding not only the material quality of the goods or services being transacted but also the legal effects of the previous originative contract. In particular, third parties are often unaware if they are dealing with a principal or an agent, or if the agent has sufficient title or legal power to commit the principal.

Moreover, principals face a commitment problem when trying to avoid this asymmetry because their incentives change after the third party has entered the subsequent contract. In an agency setup, before contracting, principals have an interest in third parties being convinced that agents have proper authority. However, if the circumstances turn out badly and there are no further incentives in place, principals will be inclined to deny such authority. The typical dispute triggered by the sequential nature of transactions is one in which the principal tries to elude obligations assumed by the agent in the principal's name, whether the agent had legal authority or not.

In principle, judges may adjudicate in such disputes in favor of the principal or the third party. I will refer to favoring the third party as enforcing "contract" or liability rules, as opposed to the seemingly more natural "property" rules that favor the principal. The immediate effects of these two distinct rules are clear. Take the simple case in which an agent exceeds his legal powers when selling a good to an innocent third party (i.e., a good-faith party who is uninformed about the matter in question). When applying the "property rule" that no one can transfer what he does not have, judges have the sold good returned to the previous owner, who is therefore granted a right *in rem*, and give the innocent third party a mere claim *in personam* against the agent. Conversely, judges may apply an indemnity or contract rule so that the sold good stays with the acquiring third party and the owner-principal only wins a personal claim against the agent.

The difference in the value of these legal remedies—real or personal— is substantial because the enforceability of these two types of right is often markedly different. While rights *in personam* are only valid against specific persons, *inter partes*, rights *in rem* are valid against all individuals, *erga omnes*. The latter, therefore, provide the strongest possible enforcement: without the consent of the rightholder, rights *in rem* remain unaffected. When the thing is a parcel of land, the difference in value often ranges from full value for the party being adjudicated the land, to zero value for the party being given a claim to be indemnified by an insolvent person. (Similar differences arise in business, corporate and family contexts, where a parallel distinction is often made, but framed in more general terms: not in terms of rights but in terms of legal priority.)

If judges apply a property rule, maximizing property enforcement, owners will feel secure with respect to future acquisitions, but all potential acquirers will suffer greater information asymmetry with respect to legal title, endangering trade. Conversely, if judges apply a contract rule, minimizing information asymmetry for potential acquirers, they weaken property enforcement, making owners feel insecure, endangering investment and specialization. The choice of rule therefore involves a conflict between property enforcement and transaction costs—more generally, a conflict between the transaction costs of originative and subsequent contracts.

To overcome the conflict, expanding the set of viable contractual opportunities with minimal damage to property rights, different solutions will be appropriate, depending on the circumstances of each type of right and transaction. The legal system may directly choose to enforce some rights in a certain way or, more generally, give freedom to rightholders about which rule to apply. However, when rightholders are free to choose, the legal system must guarantee their commitment, which in some cases is automatic as a byproduct of market interactions but in others requires costly organizations such as public registers.

In general, for judges to apply property rules, which favor owners, owners must have publicized their claims or their rights, which should protect acquirers. That is, owners can opt for a property rule to make their rights stronger, but, thanks to publicity, acquirers suffer little information asymmetry. Conversely, for judges to apply contract rules, which favor acquirers, owners must have granted their consent, which should protect them. That is, when it is in the owners' interest to reduce transaction costs, they choose a contract rule, so that acquirers' rights are stronger, whereas owners' rights are weaker. This weakening of property is safeguarded by the fact that it is owners—in general terms, principals—who choose, e.g., the agent to whom they entrust possession or appoint as their representative, while implicitly, and simultaneously, opting for a contract rule. However, commitment to their choice is also necessary.

Smooth operation of this conditional application of rules poses varying degrees of difficulty for different transactions. The difficulty is relatively minor when the originative transaction produces verifiable facts, such as the physical possession of movable goods by a merchant or a house by a lessee, or the ordinary activity of an employee. For these cases, judges can base their decisions on this public information, which is spontaneously produced without any explicit formal intervention, a situation that can be characterized as enjoying *spontaneous verifiability*. What judges or legislatures have to do is only to clearly define the rules to be applied.

The difficulty is greater when the originative transaction spontaneously produces less verifiable facts, making private (i.e., contractual, as opposed to institutional) solutions harder to apply. Such private solutions may even be impossible if all the information on the transaction remains hidden and its consequences are not verifiable. Consider, for example, the difficulties of using land as collateral when hidden mortgages are enforced on the basis of contractual documents (Arruñada 2003). Given the possibility of antedating mortgage deeds, judges would be basing their decisions on unreliable information, and lenders would be reluctant to contract for fear of previous mortgages emerging. In such a context, rules alone are not enough because applying them requires verifiable information on the titling-relevant elements of originative contracts. To produce such information, it is necessary to enforce only those mortgages that have been made public, usually by entering them into a public register. Something similar happens when the existence of a corporation is established by purely private contract, distinguishing the corporation's assets from the personal assets of its shareholders (Arruñada 2010). This type of situation therefore requires costlier *organized verifiability*.

## 2. Application to marriage transactions

This theory of contract formalization applies especially to marriage contracting, which shares similar challenges and solutions to those plaguing real property and corporate transactions.[2] Consequently, through formalization, a second public contractual step is introduced to create a legal commodity that is easy to trade. This legal commodity consists of strong property rights that can be enforced against anyone, but without increasing transaction costs.

The marriage contract traditionally creates multiple rights: e.g., spouses have rights on their bodies and the fruits of their future work and wealth; and their children (and possibly other family members) have rights on their wealth, including dowry, dower, and estate. However, rights created in marriage may conflict with many others, such as those created by a promise to marry (revealingly, known as *pledging* one's troth), those held by children and former partners of a spouse, and any public-interest rights held by

[2] For more general analysis of marriage contracts, see, e.g., Cohen (1998) and Dnes (2001). For a detailed comparison of how marriage is contracted in different legal systems, see Coester-Waltjen and Coester (1997).

society with a view to avoiding what a given society considers to be negative externalities from mixed race or religion, consanguinity, affinity and the like.

Consequently, marriage poses serious adverse selection and moral hazard problems in complex sequences of originative and subsequent transactions. Let us suppose that *M* marries $W_2$, who works at the family farm *F* and has child $C_2$. As it turns out, *M* had previously married $W_1$ and had child $C_1$ with her. How should *F*'s wealth be allocated between the parties and, in particular, the two children? On what basis? As this simple example shows, the problem is similar to those of real property and corporations, being caused by the possible presence of hidden claims and the possible enforcement of different adjudication rules.

Any *W* will be motivated to marry and invest only if she feels secure about her rights. For example, $W_2$ should be worried before marriage about adverse claims arising from previous commitments by *M*. If her rights and those of their children are not clearly protected, she will be reluctant to marry and to work and invest at the farm. But $W_1$ would also be worried about adverse claims by any future $W_2$.[3] Deep down, the conflict arises because enforcing the rights of married people increases the information asymmetry suffered by future spouses before getting married.

[3] Note that the sexism of the example could respond to different reproductive strategies of the sexes in a biologically constrained setup, such as the one for which traditional marriage institutions may have been devised. Explanations of monogamy from the perspective of evolutionary psychology are in the same spirit. See, e.g., Wright (1994:93–107). In many societies, husbands had and, in some cases, still have few obligations to their wives, who may even lack legal standing. However, even in these cases husbands usually have obligations to their wife's family, the other party to the contract, and mainly to their children, whose rights are often enforced as *in rem* inheritance rights. The absence of individual consent on the part of one or both spouses does not mean lack of consent, as these marriages are most often agreed on by the heads of both families, or by the head of the wife's family and her future husband.

The legal system may enforce hidden claims. In the example, if the first marriage contract so stipulated, $W_1$ and $C_1$ would have priority over $W_2$ and $C_2$. However, as with real property and companies, most legal systems enforce marriage claims based on publicity, so that marriage contracts also have two-steps: a private contractual step, which produces legal consequences only for the parties, plus a public step, which commits everybody in the community. In this case, whatever their dates, if the first marriage was clandestine and the second was public, the courts will give priority to the public one, so that in this case $W_2$ and $C_2$ will prevail over $W_1$ and $C_1$.

Typical components of this public step resemble the solutions used for land and corporate transactions: publicity through announcements and public filing in a public register; a procedure similar to the "quiet title suit" typical of real estate to clarify title; and a sort of "contract rule" to prioritize claims in a way that maximizes gains from trade when conflicts are adjudicated. These elements are clear in the form of marriage that crystallized within the Christian tradition around the twelfth century. It included a judicial purging of previous claims,[4] and gave absolute priority to rights created or arising from formal, non-clandestine, marriage.[5] Marriage was also structured as a two-step process consisting of an engagement and a wedding ceremony: first, a private contract takes place; second, it is publicly purged and sanctioned. The public nature of

[4] The ritual made clear the change that adverse claims experienced as a consequence of marriage. Claimants were given a highly specific and last chance to put their claim when the priest said that "Should anyone present know of any reason that this couple should not be joined in holy matrimony, speak now or forever hold your peace".

[5] Common-law marriages are neither solemnized nor publicly authorized. However, mere consent and cohabitation do not create a common-law marriage. The couple must also hold themselves out to the world as spouses: that is, notoriety is required for defining spouses in a way resembling the requirement in commercial law for defining merchants. Only Muslim countries consider marriage a purely civil contract, a feature that may be related to the legality of polygamy.

the wedding allowed the legal system to enforce marriage-generated rights as a sort of property rights, helped by the use of different devices to “give notice” of marital status, including wedding rings,[6] and more primitive systems based on possession.[7] The disparate treatment of legitimate and illegitimate children was a prominent consequence.

The two elements of the tradeoff between enforcement benefits and transaction costs are clear. First, enforcement advantages were present in making family-specific investments safer. For instance, the bride could trust that she was not about to lose her virginity, once an invaluable signal, in vain and would have a record of potential burdens and claims. She could also trust that her work would not end up being enjoyed by any children her husband may have had in the past or may have in the future with another woman. When a marriage was declared void, the legal standing of most of the rights created through marriage remained intact—mainly, the inheritance rights of children.[8] In order for the rights of a spouse to be protected, good faith on his or her part

---

[6] Rings and gifts surely play many other roles. It has been claimed that valuable engagement rings and other courtship gifts function as signals of commitment and quality (Posner, 2000:71). For the perspective of this work, however, they are better seen as down payments, which are found in the first contract of most kinds of *in rem* transactions. This would explain their legal treatment: when the transaction is not perfected, the bride keeps the engagement ring.

[7] In many legal systems, consummation of marriage used to play a role somehow similar to the titling role played by the taking of possession in land contracting (Arruñada, 2015). It usually happened after the public contract and brought serious legal consequences. More so in the Germanic tradition, from where it was added to the Roman consent-based marriage by the Church. Consummation was even public in the most ancient Rome (Hopkins, 1999:37), as well as among the Bantu Kavirondo in East Africa (Ackerman, 1995:274). More often, however, only some indication of it was publicly displayed after the wedding night.

[8] When considering the enforcement of inheritance rights as well as dowries and dower rights, the marriage contract shares some features with the corporate contract: a sophisticated partitioning of assets arises since spouses and children are in a position of creditors to the different portions of the couple’s and the spouses’ wealth and

was usually required, a condition that is more than familiar in the treatment of property rights of any kind.

Making these property rights viable without increasing transaction costs—that is, reducing the costs of gathering the pertinent consents in order to make the contract rule enforceable—was made possible by a whole array of institutions. These included recordkeeping of marital status at parochial registries; publicity of future marriage by repeated banns; a public wedding procession; a general duty of believers to denounce impediments to marriage; the presence of witnesses and a priest as notary, registrar, and gatekeeper; as well as a rule on dispensations and specific liturgical steps on them.[9]

---

inheritance. For instance, they enjoy absolute priority over illegitimate spouses and children. For a discussion of marriage as an entity and how US states partition marriage assets differently, see Hansmann and Kraakman (2000:397–98).

[9] Many of these institutions play a lesser role today, and some have even all but disappeared. One may conjecture that exogenous changes may have made an evolution from "property" to "contract" marriage advisable. First, modern families produce fewer specific investments, performing more as consumer units than as producer units, making the marriage contract simpler. Second, the possibility of controlling the number of potential claimants has been greatly enhanced by innovation in birth control. This conjecture would be broadly consistent with an evolution towards facilitating divorce and enforcing clandestine rights. The equal treatment of "illegitimate" children would be a major example. Observe, however, that no change is in sight for the treatment of second marriages, which is still treated as equivalent to a double sale of real estate. More generally, despite substantial differences, publicity and some public controls are still required in most jurisdictions. Most European countries have registration systems built on the Church model. In most US states, consanguinity is prohibited, a license is required before marriage, legal authority to perform marriages is often limited to some public and religious officers, and a marriage certificate is issued and filed. Furthermore, some states still require blood tests and may deny a marriage license if a venereal disease is detected.

## 3. Enforcement of personal and impersonal exchange in Rome[10]

Both economic transactions and legal systems substitute between impersonal and personal exchange, relying on the acquisition of, respectively, *in rem* and *in personam* rights. When impersonal exchange is impossible, transactions are either not made at all and become lost opportunities or are made relying on personal safeguards, as modeled in Arruñada (2020:252–57). In particular, the harder it is to enforce rights *in rem*, more rights will be enforced *in personam*. For example, when real securities for credit are weak, credit will tend to be more personal, and transactors will rely more on personal sureties. Informal norms and formal rules might also be adapted to facilitate such substitution.

If a society relies more on personal exchange, one could expect individuals' reputation to play a greater role and personal sanctions to be harsher. For instance, when acquiring *in rem* rights is difficult, legal systems will implement private and public procedures to bolster *in personam* rights. This may involve granting formal guarantees and sureties, expanding liability to witnesses and households, relying on contractual bonding and slavery, and expanding the scope of criminal sanctions to include debtors' prison.

This was seemingly the case in ancient Rome, where informal social norms motivated people to fulfill their personal obligations. Interestingly, as we will see, both formal rules and organizationally supported institutions were used to reinforce such informal social norms.

---

[10] Most of this section is adapted from Arruñada (2020:283–88).

The Romans faced serious difficulties to develop institutions directly supporting impersonal exchange in both types of transactions—those that provided spontaneous verifiability, and those that required organized verifiability. For transactions that spontaneously provided verifiability as a byproduct, they faced difficulties due to incomplete development of the law of agency (Arruñada, 2020:277–83). However, they did use such verifiable information for the crucial purpose of limiting the liability of the *pater familias* to the assets managed by his sons and slaves, and to define the role of managers acting as *institores*.

For transactions requiring organized verifiability, the challenges stemmed from the difficulties in creating and managing contractual registries, which were limited by available archiving technologies and judicial variability (Arruñada, 2020:261–68). Consequently, the Romans initially relied on ceremonial publicity (*mancipatio*) before later transitioning to the informal private delivery of *traditio*. This method relied mainly on the titling role of possession to convey ownership and reversing the risk of moral hazard by using *fiducias* instead of hypothecas (Arruñada, 2020:268–77).

### 3.1. Informal norms and formal rules

Given the shortcomings of these two sets of remedies, it is understandable that the Romans also applied a range of informal and formal solutions to enhance the efficiency of personal transactions.

Roman society placed great importance on personal honor and reputation, which was the basis for strong horizontal and vertical bonds that provided safeguards for all sorts of exchanges. Fulfilling contractual obligations was a matter of personal honor, specially within “the Stoic tradition [which] valued reciprocity in all actions” (Temin 2013:12). Horizontal bonds meant that substantial mutual help was customarily provided by people equal in status, mainly under the informal institutions of *amicitia* and *officium*: respectively, the informal bond and the obligation of friendship. "Friendship (*amicitia*) gave rise to serious and substantial duties. Roman friends made claims on each other which would cause a modern 'friend' to break off the relationship without delay" (Schulz 1951:555).[11] Vertical bonds amounted to several layers of patronage by people of higher status, who acted as patrons for their lower status "clients," the *clientela*. In the early Republic the situation was close to serfdom but survived later mainly (apart from its "philosophy") for the relation between patron and freedman (Crook 1967:93). Moreover, informal personal ties were also important among Roman merchants for gathering information relevant for contractual enforcement. Traders often belonged to the same social groups (Temin 2006:139), were able to exchange information (Kessler and Temin 2007) and, to reduce information asymmetries, relied not only on personal ties, household members and peer monitoring but also on formal guilds and some state institutions (Temin 2013:100).

These personal bonds were based on individuals' informal reputation but were also supported by formal reputational mechanisms. Thus, losing reputation was subject to

---

[11] However, duties of friendship can be understood more as a consequence than as a cause (compare, for instance, Nicholas 1962:204). There are also signs that informal bonds became less effective over time, as indicated by Seneca's complaint in the first century C.E. that *fides* was no longer enough and debt now needed to be formalized by means of written and sealed documents, with the seal giving increased physical protection (Meyer 2004:156). Temin argues that the Roman "economy of friends" served as a complement to the formal market rather than a substitute, as some have suggested. According to Temin (2013:110–11, emphasis added), "Various authors have presented an economy of friends as a substitute for a more formal market, but in fact they are complements." He goes on to explain that a range of social and informal institutions, such as families, extended households of slaves and freedmen, and friends, were utilized to reduce adverse selection and moral hazard. These informal relationships between agents and principals from the same elite social groups supported and facilitated commercial transactions. Therefore, the "economy of friends" complemented the more formal market (Temin 2006:148).

informal sanctions, but these soon acquired the formal version of *ignominia* and *infamia*, with a judicially-imposed exclusion from the legal protections enjoyed by a Roman citizen (Crook 1967:83–85). Interestingly, reputation itself was also formally protected: defaming another person was itself harshly punished with *infamia*. The role of reputation was also reinforced with the *census*, which established a formal classification of individuals defining their rights and duties and including a negative mark for those who offended public morality and providing incentives.[12] In this way, it provided a formal register of reputation. Lastly, the formal legal system relied on and reinforced the informal system of social norms to the extent that the value that Roman judges granted to evidence depended to some extent on the social standing of those providing or witnessing it (Meyer 2004).

Moreover, informal social norms were reinforced by a whole array of formal rules ensuring enforcement of personal obligations by several means, which included a self-help version of debtors' prison, strict punishments, and sophisticated allocations of liability. Personal enforcement or self-help initially consisted of execution of the wrongdoer by the creditor, including victims of crimes, who were entitled to a payment from the wrongdoer. Later, creditors could only privately imprison defaulting debtors but were responsible with respect to other creditors (Nicholas 1962:209–10). The system, starting with the Twelve Tables, was harsh (Crook 1967, 172–74), but probably

---

[12] "The disapproval of a man's peers was channelled through the censors, the customary guardians of public morality, who provided a sharp extra-legal sanction against behaviour that offended accepted canons by their 'censorial mark', the *nota censoria* entered against a man's name in the census-list" (Crook 1967:83). However, "the census was taken only every four or five years and was not taken regularly at all after the end of the Republic (the last was apparently in A.D. 74)" (Nicholas 1962:73). Such disappearance might suggest that reputation incentives were no longer so effective.

did not apply to the nobility. Judicial enforcement was also based on personal execution: the plaintiff was authorized to imprison the judgment debtor and sell his whole property (Crook 1967:82–83, Johnston 1999:108–10). After 326 B.C.E., a borrower could not pledge himself or a son as collateral for a loan (*nexum*), to become the lender's slave in case of default, but debt bondage could still result from the debtor's default (Crook 1967:173). Lastly, the law can be understood to have tried to make personal obligations effective by increasing punishments in line with asymmetric information. In particular, an early legal rule imposed double damages for eviction of *res mancipi* (Nicholas 1962:161, n. 1), which motivated sellers not only to disclose but also to discover and purge title clouds.[13]

Similarly, Roman law aimed to ensure the collection of taxes and facilitate trade by assigning liability in specific ways. For instance, in 57 C.E., Nero instituted a policy that made vendors responsible for transaction taxes. The tax rate for slaves sold at auction was 4 %, while for other property it was 1 %. As Temin (2013:180) explains, this policy made *coactores*, the tax collectors, likely to collect these taxes from vendors. In addition, banks of vendors were held liable for eviction guarantees. If a slave sold by a vendor suffered from undisclosed defects, the vendor would face a penalty of double the sale price. Temin (2013:182) suggests that banks likely guaranteed this amount for their clients who held deposit accounts with them.

---

[13] It was also made a crime to mislead a creditor about prior charges (Johnston 1999:93). Verhagen emphasizes that this happened only by virtue of imperial rescript practice as from the end of the second century C.E. (2020). This relatively late criminalization could have been a response to greater incidence of fraud caused by the slow erosion of personal bonds. This weakening of personal bonds might also have been behind the earlier (first century C.E.) growing reliance on written and sealed legal documents and the increasing physical protection of such seals, as claimed by contemporaries (Meyer 2004:156).

### 3.2. Formalities with respect to household membership

At a more general level, social norms protecting personal exchange were also reinforced by two sets of arrangements enabling the extended *familia* to act as a legal entity: first, those allocating most decision rights to its head, the *paterfamilias*; and, second, those defining the *familia*'s legal boundaries and, therefore, who could inherit and act as his contractual agent, committing the *familia*'s assets to meeting his obligations.

Concentration of property and decision rights in the *paterfamilias* (including those on slaves and *filiusfamilias*) defined an ambit of "forbearance" in which judges would not enter (using the term coined by Williamson (1991) to designate the refusal of courts to hear disputes internal to modern firms, for example, between their divisions). The refusal of judges to enter into intra-*familia* disputes allowed an asymmetric allocation to the *paterfamilias* of property rights on other *familia* members.[14] This should have made it possible for *familias* to fully rely on self-enforcement in their internal transactions and to act as quasi-firms with respect to third parties. This concentration of rights in the *paterfamilias* helped achieving some of the "modularity" provided now by business firms (Smith 2006 and 2009). For instance, reputation was linked not only to individuals but to the whole *familia*, alleviating possible horizon problems.

Enabling the *familia* to act as a legal entity explains the sophisticated formalities and cautions used by Roman law to define its boundaries. All contractually relevant entries and exits of the *familia* were subject to ceremonial formalities and, therefore, to

[14] About agency, it is said that "these were relations that never reached the inside of a courtroom. Their entire tone precludes contract and suit, action and liability; yet they were most effective in fulfilling the roles and needs lawyers associate with agency" (Kirschenbaum 1987:180, cited by Temin 2013:111). Indeed, they precluded contract and suit, but only inside the *familia*, in a similar fashion to modern firms.

publicity: adoption, which was commonly used to achieve succession by adopting adults who entered the *patria potestas* of their adoptive fathers; emancipation, which led to dissolution of *potestas*, and was often used as a sanction; as well as the purchase and manumission of slaves.[15]

Some adoptions were even subject to judicial supervision and popular vote (Drogula 2013): *adrogatio*, being the adoption of a person *sui iuris* (not under the *patria potestas* of another man), often produced the merger of two *familias*, making public approval advisable, not only because it extinguished a *familia* (Nicholas 1962:77) but possibly because it may have had serious consequences for third parties, mainly creditors. Lastly, the very prevalence of adoption in Rome, by indicating the extraordinary importance of succession, indirectly supports the argument as to the legal-entity nature of the *familia*.

Publicity was also necessary for various types of Roman marriages, including the older *manus* marriage, where the wife was in a position similar to that of a daughter to her husband, and any marriages conducted through *coemptio*,[16] *mancipatio*, adoption, emancipation and manumission. At least initially, all of these transactions were ceremonial and required witnesses or some other form of publicity (Crook 1967:103–13, Nicholas 1962:71–83, Scafuro 2013, McGinn 2013a and 2013b). These witnesses had to give testimony in court if the transaction was later challenged (Rüfner 2013).

[15] According to Crook (1967:74), it appears that manumission was initially a formal process that took place before the praetor. However, Nicholas (1962:74) suggests that it underwent similar changes to land ownership over time.

[16] The process involved a fictitious sale that required the consent of guardians, witnesses, and a specific ceremony (McGinn 2013:1599). It bears resemblance to various forms of fictitious transactions and litigation procedures that were commonly employed to provide publicity and reinforce the evidence of title in land transactions (Arruñada 2003:409).

They often played a purging function, as previously mentioned. These publicity requirements align with the Roman family law's emphasis on property issues.[17]

Under the Empire, the consensual nature of the prevalent form of marriage meant that, in principle, no ceremonial requirements were necessary. This ties in with the argument, for two reasons. First, public notice was less necessary since the legal status of the wife remained unchanged—she continued to be under her father's *patria potestas* if *sui iuris*, or she retained her independence and property if *alieni iuris*. Nevertheless, in addition to the private formal engagement known as *sposalia*, marriage typically involved a more public wedding and elaborate public ceremonies (Crook 1967:102–103; Hersch 2010). Second, even though there were no legal constraints or specific forms required, publicity was necessary to produce effects on third parties, which effectively made it indirectly mandatory. This is analogous to modern legal systems, where land recording or registration is optional but necessary to produce effects on third parties (Arruñada 2003). Public knowledge of the marriage among friends and neighbors could also determine the legal effects on children (Frier and McGinn 2003:47).

These requirements of publicity are understandable considering that these legal acts could potentially affect third parties: in the framework of Arruñada (2020:247–57), summarized above, they are originative transactions which may have serious consequences for subsequent transactions. The originative transactions were those

[17] According to Frier and McGinn, "the overriding concern of Roman family law is not with setting standards for a family's life and internal governance but rather with the implications of family structure for the holding and disposition of property" (2003:4).

establishing or modifying individuals' status, such as birth,[18] emancipation, adoption, marriage, manumission, etc. The affected subsequent transactions were those in which the status of the individuals or their children was a key condition for their legal effects. For example, marriage determined the status of children, and adoption affected the right to inherit and the power of the adopted to commit the *paterfamilias*. The effects of marriage were substantial with respect to the status of children (with proper marriage they were in the *patria potestas* of the father), the regimen of the dowry and gifts and the right to prosecute for adultery (Nicholas 1962:81–82). The consequences of slavery and manumission were similarly important, as slavery also made a form of contractual agency viable, and manumission gave the right to have born-free children: freemen could marry (Crook 1967:52) and their children were born free (see a case in Crook 1967:48–49).[19]

When compared to the difficulties suffered by contract-based legal entities (Arruñada 2010:556–62), the relative effectiveness of these mechanisms for making the boundaries of the *familia* verifiable may be essential for explaining why the *familia* played such a

[18] The birth registry was voluntary, but (as often happens with public registries) people were motivated to record to enjoy legal effects (Rowlandson 2013). The evidence can be interpreted as confirming the argument: recordation in the *kalendarium* was declarative within thirty days of birth but in principle illegitimate children (with fewer or no rights) could not be included in the *album*, which suggests some form of purge, especially considering that the *album* was publicly displayed, with both archives working respectively as a mere recording diary and as a proper register. It is consistent with this interpretation that the copies used as proof of status were produced from the *album* and were authenticated by up to seven witnesses.

[19] Potential parties to subsequent transactions must have been affected by information asymmetries on the status of the so-called agent. However, this does not necessarily mean that a conflict would arise between the principal and the third party. In many cases, the judge would not have to adjudicate between them. For example, consider a scenario where a free man, *A*, poses as *P*'s slave to commit *P*. When *T* demands payment from *P*, *P* objects, arguing that *A*, who had posed as his slave, is actually a free person and therefore cannot commit him. This situation could explain the case described by Crook (1967:59).

major role in the economy. This provides an alternative explanation for the paradox raised by Hansmann, Kraakman and Squire (2020:225–29), that the *familia* remained the basic commercial entity in Rome, and "Roman commerce managed to flourish without the benefit of entities that were legally distinct from their human owners" (Hansmann, Kraakman and Squire 2020:199). According to this publicity argument, Roman legal entities likely played a minor role for two reasons. First, purely contract-based entities are inefficient. Second, Romans lacked the institutions (mainly, company registries) that could have made them efficient. In terms of the theory summarized in section 1, the key issue is that the institutions available at the time for legal entities were probably less efficient in making originative transactions verifiable than those available for *familias*.

**4. The role and safeguards of the Roman dowry**

Within this context, the matter of the dowry warrants distinct attention given the substantial obstacles that arose in safeguarding its worth, ultimately necessitating property-based remedies to ensure its preservation.

The economic transactions involved in Roman marriages were notably advanced. In contrast to brideprices,[20] the Romans employed dowries, indicating a relatively sophisticated society (Anderson 2007).[21] Additionally, the Roman dowry system was

[20] During the later Empire, the practice of exchanging engagement gifts did evolve into the *donatio ante nuptias*, which was a significant contribution made by the husband to the wife to be added to her dowry. Eventually, in the Eastern Empire, it even became a requirement along with the dowry (Nicholas 1962:89, Frier and McGinn 2003:69). It was required by Justinian to be equal to the wife's dowry but permitted to be made after the marriage.

[21] In Becker's pioneering analysis (1991), dowries and brideprices were considered equivalent in terms of price, differing only in the direction of the transfer, in order to

highly intricate, leading to significant difficulties in terms of property partitioning and information asymmetries.

Roman dowries were possessed and owned by the husband but had to be returned upon his death or divorce. However, enforcing this return could be challenging. Initially, the wife only held an *in personam* right against her husband, which meant that they could agree contractually that the dowry would be returned to her in case of divorce or his death. Indeed, negotiations over dowries between future spouses or their families were often protracted.[22] However, enforcing such agreements proved difficult. The husband had the power to dispose of the dowry (Frier and McGinn 2003:140–41), including real assets like land, and if he became insolvent when the dowry was due to be returned, the wife could not retrieve the assets from third parties. Thus, the wife bore the risk of her husband's insolvency, making remedies crucial in protecting her rights.

The legal position of wives was strengthened over time by enforcing increasingly *in rem* their right to dowry. Augustus first required a wife's consent to sell Italic land that was part of her dowry. He also declared any mortgage of such land invalid, even with

---

facilitate the division of the joint marriage product. However, this failed to explain why both were often present in the same marriage, a phenomenon common to many cultures, which serves to produce more efficient marriage contracts. Later theories highlighted the crucial role of property rights, particularly in terms of who holds them and how they are protected. For example, Zhang and Chan (1999) modeled dowries as pre-mortem bequests from altruistic parents, which not only increase the wealth of the new household but also safeguard the wife's bargaining power and welfare within the household. Their hypothesis is supported by Taiwanese data, which shows that dowries improve the bride's welfare. Botticini and Iow (2003) argue that transferring dowries to daughters and excluding them from parents' bequests motivates sons to continue working in their parents' household.

[22] As noted by Frier and McGinn (2003:63). Parties had significant freedom to negotiate the terms of the dowry, but they could not eliminate the obligation to return it, nor could they reduce the husband's liability for mismanaging it (Frier and McGinn 2003:73). While some of these restrictions may have initially aimed to safeguard brides and children in a personal context, others were likely established to protect third parties, similar to the ban on gifts between spouses.

her consent. In addition, if the husband became insolvent, the wife enjoyed priority over unsecured creditors. Centuries later, Justinian further strengthened these protections by voiding land sales even with the wife's consent, extending the prohibition to sell to non-Italic land, abolishing retention rights, and granting priority to the wife over secured creditors. Consequently, the dowry became a tacit general hypothec on the husband's entire property, which later was enforced even against securities granted prior to the marriage (Nicholas 1962:89). Being protected from personal creditors, the dowry therefore provided a form of secured lending to the business operations of the husband's *familia.*

Considering Paulus' assertion that dowries were crucial for Roman women to marry (Frier and McGinn 2003:72–73), the aforementioned legal developments can be attributed to a greater need to secure the chances of divorced and widowed women to remarry in the face of rising divorce rates. Consequently, the relative importance of the two functions of the dowry was likely altered, with its role as a mere contribution of resources to the marriage becoming less important in comparison to its function of providing for the wife in the event of divorce or the husband's death.

This evolution of the Roman dowry aligns well with the model proposed by Arruñada, Zanarone, and Garoupa (2019:134–39). In their model, the principal *P* represents the wife or her family, and the agent *A* represents the husband or his family, the asset represents the dowry, and the delegation of control over the dowry corresponds to the marriage transaction, where ownership of the dowry was transferred to the husband. The model suggests that when property rights are not enforced, if the relationship with the agent *A* is too weak the principal *P* does not delegate control of the asset (that is, *P* and *A* do not specialize). A weak relational tie between parties can make it too costly for the principal *P* to persuade the agent *A* not to transfer the asset to a third party *T* and keep the proceeds, resulting in the principal choosing not to delegate control and forfeit the benefits of specialization. Consequently, the principal would retain ownership of the asset, albeit at a lower value. This outcome would endanger marriages in our scenario and, according to the model, they would not occur. In contrast, if property rights were always enforced, the principal would delegate control of the asset, but no *T* would be willing to purchase it. That is, if dowries were in rem rights, marriages would happen but the market for real assets would suffer.

Put simply, a higher divorce rate indicates weak bonds between spouses and their families. This is precisely the kind of setting in which the model would predict *in rem* rights to perform better. In the strict setup of the model, with *in personam* rights, there would be no marriages.[23] In the real world, marriages would be costlier to contract.

It is understandable that this solution would have rendered properties that third parties view as part of the dowry unsuitable as collateral for credit. Protecting the dowry through *in rem* rights would therefore have made it easier to enforce its return to wives, reducing transaction costs in the marriage market, but increasing them in the land market. To avoid this tradeoff, it would have been necessary to strengthen the publicity requirements for the dowry.

---

[23] A similar argument can be made about the decision to have children, which may help explain the low birth rate that seems to have been experienced since the late Republic. It is wort noting that, under Roman law, when there were children, a portion of the dowry (one sixth per child up to three children) was retained by the husband unless the spouse seeking a divorce had a wealthier marriage in mind (Nicholas 1962:86, 88).

## 5. References


Ackerman, Diane. 1995. *A Natural History of Love*. New York: Vintage Books.

Anderson, Siwan. 2007. "The Economics of Dowry and Brideprice." *Journal of Economic Perspectives*, 21(4):151–74.

Arruñada, Benito, Giorgio Zanarone, and Nuno Garoupa. 2019. "Property rights in sequential exchange." *Journal of Law, Economics, and Organization* 35:127–53.

Arruñada, Benito. 2003. "Property Enforcement as Organized Consent." *Journal of Law, Economics, and Organization* 19:401–44.

Arruñada, Benito. 2010. "Institutional Support of the Firm: A Theory of Business Registries." *The Journal of Legal Analysis* 2:525–76.

Arruñada, Benito. 2012. *Institutional Foundations of Impersonal Exchange: Theory and Policy of Contractual Registries*. Chicago and London: University of Chicago Press.

Arruñada, Benito. 2015. "The Titling Role of Possession." In Yun-chien Chang, ed., *The Law and Economics of Possession*:207–33. Cambridge: Cambridge University Press.

Arruñada, Benito. 2020. "The Institutions of Roman Markets." In Giuseppe Dari-Mattiacci and Dennis Kehoe (eds.), *Roman Law and Economics (Volume II): Exchange, Ownership, and Disputes*:247–98. Oxford Studies in Roman Society and Law (Paul Du Plessis and Thomas A.J. McGinn, eds.). Oxford University Press, Oxford.

Becker, Gary S. 1981. *A Treatise on the Family*. Cambridge, MA: Harvard University Press.

Botticini, Maristella, and Aloysius Siow. 2003. "Why Dowries?" *American Economic Review*, 93(4): 1385–98.

Coester-Waltjen, Dagmar, and Michael Coester. 1997. "Formation of Marriage," chapter 3 in Mary Ann Glendon, chief ed., *Persons and Family*, Vol. 4 in *International Encyclopedia of Comparative Law*. Tübingen: Mohr Siebeck.

Cohen, Lloyd R. 1998. "Marriage as a Contract." In Peter Newman, ed., *The New Palgrave Dictionary of Economics and the Law, Vol. II*:618–23. London: Macmillan.

Crook, John A. 1967. *Law and Life of Rome*. Ithaca, NY: Cornell University Press.

Dnes, Antony W. 2001. "Marriage Contracts." In B. Bouckaert and G. de Geest, eds., *Encyclopedia of Law & Economics, Vol. III, The Regulation of Contracts*:864–86. Cheltenham and Northampton: Edward Elgar.

Drogula, Fred K. 2013. "*Adrogatio*." In Roger S. Bagnall, Kai Brodersen, Craige B. Champion, Andrew Erskine, and Sabine R. Huebner, eds., *The Encyclopedia of Ancient History*, First Edition:107–108. Malden, MA; Oxford: Wiley-Blackwell.

Frier, Bruce W., and Thomas A. J. McGinn. 2003. *A Casebook on Roman Family Law*. New York: Oxford University Press.

Hansmann, Henry, and Reinier Kraakman. 2000. "The Essential Role of Organizational Law." *Yale Law Journal* 110:387–440.

Hansmann, Henry, Reinier Kraakman, and Richard Squire. 2020. "Incomplete Organizations: Legal Entities and Asset Partitioning in Roman Commerce." In Giuseppe Dari-Mattiacci and Dennis Kehoe (eds.), *Roman Law and Economics (Volume I): Institutions and Organizations*:199–232. Oxford Studies in Roman Society and Law (Paul Du Plessis and Thomas A.J. McGinn, eds.). Oxford University Press, Oxford.

Hersch, Karen K. 2010. *The Roman Wedding: Ritual and Meaning in Antiquity*. Cambridge: Cambridge University Press.

Hopkins, Keith. 1999. *A World Full of Gods: The Strange Triumph of Christianity*. New York: The Free Press.

Johnston, David. 1999. *Roman Law in Context*. Cambridge: Cambridge University Press.

Kessler, David, and Peter Temin. 2007. "The Organization of the Grain Trade in the Early Roman Empire." *Economic History Review* 60:313–32.

Kirschenbaum, Aaron. 1987. *Sons, Slaves and Freedmen in Roman Commerce*. Jerusalem: The Hebrew University Magnes Press.

McGinn, Thomas A. J. 2013a. "Coemptio." In Roger S. Bagnall, Kai Brodersen, Craige B. Champion, Andrew Erskine, and Sabine R. Huebner, eds., *The Encyclopedia of Ancient History*, First Edition:1599–600. Malden, MA; Oxford: Wiley-Blackwell.

McGinn, Thomas A. J. 2013b. "Manus." In Roger S. Bagnall, Kai Brodersen, Craige B. Champion, Andrew Erskine, and Sabine R. Huebner, eds., *The Encyclopedia of Ancient History*, First Edition:4270–71. Malden, MA; Oxford: Wiley-Blackwell.

Meyer, Elizabeth A. 2004. *Legitimacy and Law in the Roman World:* Tabulae *in Roman Belief and Practice*. Cambridge: Cambridge University Press.

Nicholas, Barry. [1962] 2010. *An Introduction to Roman Law*. Oxford: Oxford University Press.

Posner, Eric A. 2000. *Law and Social Norms*. Cambridge, MA: Harvard University Press.

Rowlandson, Jane. 1981. "Sales of Land in Their Social Context." In Roger S. Bagnall, Gerald Browne, Ann E. Hanson and Ludwig Koenen, eds., *Proceedings of the Sixteenth International Congress of Papyrology*:371–78. New York: Chico Scholars Press.

Rüfner, Thomas. 2013. "Testimonium." In Roger S. Bagnall, Kai Brodersen, Craige B. Champion, Andrew Erskine, and Sabine R. Huebner, eds., *The Encyclopedia of Ancient History*, First Edition:6624–25. Malden, MA; Oxford: Wiley-Blackwell.

Scafuro, Adele C. 2013. "Witnesses, Greek and Roman." In Roger S. Bagnall, Kai Brodersen, Craige B. Champion, Andrew Erskine, and Sabine R. Huebner, eds., *The Encyclopedia of Ancient History*, First Edition:7114–16. Malden, MA; Oxford: Wiley-Blackwell.

Schulz, Fritz. 1951. *Classical Roman Law*. Oxford: Clarendon Press.

Smith, Henry E. 2006. "Modularity in Contracts: Boilerplate and Information Flow." *University of Michigan Law Review* 104:1175–222.

Smith, Henry E. 2009. "Modularity in Property, Intellectual Property, and Organizations." Harvard Law School Working Paper, September 17.

Temin, Peter. . "The Economy of the Early Roman Empire." *Journal of Economic Perspectives* 20:133–51.

Temin, Peter. 2013. *The Roman Market Economy*. Princeton: Princeton University Press.

Treggiari, Susan. 1991. *Roman Marriage: Iusti Coniuges from the Time of Cicero to the Time of Ulpian*. New York: Oxford University Press.

Verhagen, Hendrik L.E. 2020. "Secured Transactions in Classical Roman Law." In Giuseppe Dari-Mattiacci and Dennis Kehoe (eds.), *Roman Law and Economics (Volume II): Exchange, Ownership, and Disputes*, Ch. 16. Oxford Studies in Roman Society and Law (Paul Du Plessis and Thomas A.J. McGinn, eds.). Oxford: Oxford University Press, pp. 113–56.

Williamson, Oliver E. 1991. "Comparative Economic Organization: The Analysis of Discrete Structural Alternatives." *Administrative Sciences Quarterly* 36:269–96.

Wright, Robert. 1994. *The Moral Animal: Why We Are the Way We Are: The New Science of Evolutionary Psychology*. New York: Vintage.

Zhang, Junsen, and William Chan. 1999. "Dowry and Wife's Welfare: A Theoretical and Empirical Analysis." *Journal of Political Economy*, 107(4): 786–808.