THE IMPACT OF THE ROMAN LAW OF SUCCESSION AND MARRIAGE ON WOMEN'S PROPERTY AND INDEPENDENCE

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[Roman law and society were patriarchal and outwardly predicated on the inequality and inferiority of women. The law continued to reflect an agnatic kinship structure throughout a gradual transition to a cognatic kinship system. Significant aspects of the Classical Roman law relating to paternal authority, marriage and succession had a gender neutral application. Their interaction provided the potential for a considerable degree of female autonomy and influence, but did not guarantee it. The available evidence, while limited by its aristocratic bias and the usual problems of random survival, suggests that it was not unusual for women to achieve high levels of independence and authority within the family. It is suggested that the enduring agnatic bias of Roman law, together with the high value placed on women within their natal family, facilitated their acquisition of wealth and attendant powers of independent disposition. This, in turn, underpinned the relatively high standing and favourable legal position of women in Classical Roman society.]

INTRODUCTION

Relative to the known juridical codes of comparable ancient cultures[1] and, indeed, to Anglo-Australian law prior to the twentieth century,[2] Roman law accorded women considerable standing as legal persons, and extended to them significant potential for independence.

Despite this, however, women were not endowed with equal legal capacity. The abiding Roman cultural ideal confining them to the private and domestic sphere was expressed in a continuing and total legal exclusion from magisterial, civil and public functions.[3] As they were also disqualified from holding military office, women were denied participation in the open exercise of government and power. They were also debarred from direct access to important sources of wealth — such as governorships and military spoils — in a society where elitist contempt for trade severely limited the financial options of the higher classes.[4] Nevertheless, within the context of that fundamental limitation and the patriarchal Roman social structure, the surprisingly gender-neutral application of the inter-related laws of succession, marriage and dowry, simultaneously reflected the high familial and social status of women, while securing a legal and material basis for their maintenance.

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1 See *e.g.* the comparative studies in Lerner, G., *The Creation of Patriarchy* (1986).

2 Holdsworth, W., *A History of English Law* (5th ed. 1942) Vol. III, 520-33.

3 *Digest* 50.17.2: 'Women are debarred from all duties, whether civic or public, and thus cannot be judges or hold magistracies.'

4 Nevertheless, women were alleged to involve themselves indirectly in such activities and fundraising. See Tacitus's report of women's provincial exploitations in *Annals* III.33, where it is alleged that: 'whenever men are accused of extortion, most of these charges are directed against their wives. It is to these that the vilest of provincials instantly attach themselves'.

The law relevant to a woman's autonomy comprised an amalgam of interacting variables. These were the central institution of *patria potestas* (paternal power); marriage either *cum manu* (with control) or *sine manu* (without control); *tutela* (guardianship) either *legitimus* (by law) or *testamentarius* (testamentary); private pacts and standing rules governing dowry; the scheme of intestate succession; praetorian modifications; testamentary capacity; and, from time to time, particular legislation restricting freedom of testation in the pursuit of social goals. Each of these factors will be discussed in more detail below.

While some aspects of the interacting package were apparently gender neutral, others affected women only, or affected them less favourably to varying degrees. However, even institutions such as *tutela* or legislation such as the *Lex Voconia*, which ostensibly discriminated against women, were in practice frequently qualified or eroded by various factors. They included supplementary praetorian rulings or modification, the evolution of legal devices, evasive practices and customs, complicity, lack of effective enforcement, and inertia.[5] As a consequence, the law (itself interacting with contingencies such as the death of a *paterfamilias*) provided a spectrum of different, co-existing potentials for female autonomy. These ranged from effective total independence for a wealthy widow *sui iuris* (independent) with a compliant tutor, to significant subordination for a woman married in the strict *cum manu* form to an authoritarian spouse. And there were many gradations in between. In each case, the bare legal framework governing an individual woman's situation could be influenced for better or worse by the individual males who, until the abolition of tutelage, exercised theoretical authority over her.

As Just points out in his study of Athenian women,[6] however, it is difficult to draw firm and comprehensive conclusions on women's status in daily life from a formal outline of their legal position. The difficulty is aggravated in the context of an ancient society. Nevertheless, non-legal evidence relating to Classical Rome, such as letters, plays, graffiti, inscriptions, speeches and wills, indicate that, at least amongst women of the higher classes, a favourable legal position frequently facilitated considerable personal autonomy, an important role in family affairs,[7] and significant, if indirect, political and public influence.[8]

THE RELATIONSHIP OF PROPERTY RIGHTS TO STATUS

It is a 'chicken and egg' question whether women obtain extensive proprietary and succession rights because they enjoy high value and esteem within a particular culture, or whether, conversely, they acquire esteem and

5 See Crook, J. A., 'Women in Roman Succession' in Rawson, B. (ed.), *The Family in Ancient Rome* (1986); Gratwick, A. S., 'Free or Not so Free? Wives and Daughters in the Late Roman Republic' in Craik, E. M. (ed.), *Marriage and Property* (1984); Crook, J. A., *Law and Life of Rome* (1967).

6 Just, R., *Women in Athenian Law and Life* (1989).

7 See, generally, Hallett, J. P., *Fathers and Daughters in Roman Society* (1984).

8 See, generally, Tacitus, *Annals*; The Younger Pliny, *Letters*.

status due to their proprietary powers. Certainly, in Roman society, the two factors were both co-existent and mutually reinforcing. The wealth of women provided a material basis for a level of familial power and intervention in public affairs which conflicted with received ideals. Similarly, in ancient Egypt, the relatively high standing of women was accompanied by extensive property and succession rights.[9] The high status enjoyed by women in Heian Japan deteriorated contemporaneously with their property rights.[10] In ancient Athens, women had significant property-holding capacities, but no corresponding power to control or alienate it due to their perpetual subjection to a *kyrios*, or male guardian.[11] In contrast to the Roman tutor, the Athenian *kyrios* consistently exercised substantial power over the life, property and legal affairs of his female charge. The evidence suggests that an Athenian woman's social role and legal identity derived from her familial relationship with men.[12] In consequence, it has been argued that Athenian women functioned as a conduit for the transmission of property between males.[13] Clearly, the mere legal capacity to acquire property cannot guarantee independence if divorced from the usual incidental powers of usage, management, exclusion and alienation.

However, the position of women in modern Western societies indicates that even the achievement of ostensibly gender-neutral laws of property, succession and civil rights will not, of itself, guarantee equality or independence if grafted onto social structures and cultural values inimical to equal status. In modern Western society, many feminists have identified the family as the principal *locus* of women's oppression.[14] In contrast, the Roman family has been cited as women's major powerbase and source of status.[15] An obvious distinction is that, in capitalist systems, women have typically been excluded from access to living wages and ownership of the means of production.[16] Consequently, it is more difficult for them to accumulate independent property. That may have been the case for many Roman women too, although the evidence indicates that they exercised a variety of occupations.[17] However, in the well-documented upper echelons of Roman society, individuals of both sexes typically inherited, rather than earned, their wealth. At most times and in most contexts, women's rights of succession were not markedly inferior to those of men. Accordingly, a husband

9 Gardiner, A., *Egypt of the Pharaohs* (1961); Wilson, J., *The Culture of Ancient Egypt* (1951).

10 Morris, I., *The World of the Shining Prince* (1969). Murasaki Shikibu's 11th century work *The Tale of Genji* illustrates the important political role played in Heian Japan by women at court, for which families assiduously groomed their daughters.

11 Just, *op. cit.* n. 6.

12 *Ibid.*; Sealey, R., *Women and Law in Classical Greece* (1990) 45-8.

13 *Ibid.* 98-104. Just does not assert that this was the only function or contemporary perception of Athenian women, but recognizes that their legal status precluded influence in public life and independence in the domestic sphere. Ironically, the very importance of women's role as 'pawns' in property transmission may have had an adverse effect on their freedom. They were 'pressed into service' in ways which would have been avoided if they had had no property rights at all.

14 Delphy, C., *Close to Home — A Materialist Analysis of Women's Oppression* (1984); Barrett, M., *Women's Oppression Today* (1980).

15 Hallett *op. cit.* n. 7.

16 Walby, S., *Patriarchy at Work* (1986).

17 See Lefkowitz, M. and Fant, M. B., *Women's Life in Greece and Rome: A Source Book in Translation* (1984).

was unlikely to exercise dominance on the basis of superior wealth. On the contrary, the tyrannous conduct of the well-dowered wife was the stock-in-trade of Roman comedy, satire and the occasional serious complaint.[18]

In derogation of those who argue that history is progress, the legal status of Western women entered a long period of eclipse following the decline of Rome, and did not begin to recover until the late nineteenth century.[19] During the Classical Roman era, the kinship structure was in transition from agnate to cognate. That is, it was moving from the early system in which relatives were identified chiefly through descent on the father's side, to a system in which they were counted through descent from both father and mother. The Roman legal system long trailed the social reality by retaining a distinct agnatic bias, especially in intestate succession. In practice, however, it made many complex adjustments and *ad hoc* accommodations for the increasingly cognatic character of Roman kinship.[20] It is interesting to speculate whether the tension between a woman's strong and enduring link with her usually beneficent, agnatic family, and the competing claims of her conjugal family, functioned to prevent her complete subsumption under either rival source of authority. The available evidence indicates that Roman fathers valued their daughters highly and frequently enjoyed significant emotional ties with them. Further, there is evidence that strong bonds existed between brothers and sisters, and sisters and sisters, often entailing life-long loyalty and mutual material support.[21] Backed by an equitable share of familial resources and the capacity to terminate an unsatisfactory marriage — with the attendant reclamation of her separately vested property and dowry — a woman might attain a high level of independence.

Following the Roman era, the development of indissoluble marriage (together with the ascendancy of the cognatic kinship system) was associated with increasing female dependence. From Norman times, the English common law position was that a married woman's legal identity was absorbed into that of her husband.[22] She lacked independent legal capacity, and was generally unable to enter contracts, pay tortious compensation,[23] or execute a will without her husband's consent.[24] Her personal chattels and any earnings from personal exertion vested in her husband absolutely. Her leaseholds and real estate, whether pre-existing or acquired afterwards,

18 See the plays of Plautus, such as *The Swaggering Soldier, The Brothers Menaechmus*; Juvenal, *Satire VI*.

19 See the classical account of Mill, J. S., *The Subjection of Women* (1861); *cf.* Married Women's Property Act 1870 (U.K.); Married Women's Property Act 1882 (U.K.).

20 Hallett, *op. cit.* n. 7; Crook, 'Women in Roman Succession', *supra* n. 5.

21 Hallett, *op. cit.* n. 7.

22 Blackstone, *Commentaries* Vol. I, 442: 'the very being or legal existence of a woman is suspended in marriage, or at least is incorporated and consolidated into that of the husband'. See also Williams, G. L., 'The Legal Unity of Husband and Wife' (1947) 10 *Modern Law Review* 16.

23 Holdsworth, *op. cit.* n. 2, 528-33.

24 *Ibid.* 541-2, where the complexities of the testamentary capacity of married women are discussed. In contrast to the restrictive approach of common law, the ecclesiastical law preserved the liberality of Roman law, on which it was based.

vested in her husband for the duration of the marriage.[25] While the husband was theoretically representative of both spouses, the doctrine of the legal unity of married persons effectively conferred dominion on him.[26] Any divergence of individual interests was likely to be resolved to his advantage. Further, the feudal law of succession, predicated on primogeniture (preference of the first-born son) inherently discriminated against women. Originally there was little freedom of testation. A landowner could not designate his or her heirs. Rather, land would descend according to a mandatory scheme, in which males were accorded priority. Collateral kin related through the father were preferred to those related through the mother. Moreover, males inherited in priority to women of the same degree. Thus, a daughter would not inherit land unless the deceased tenant had no sons.[27] In view of the feudal imperative of primogeniture and the fact that a woman's property vested in her husband, a woman's natal family had only limited capacity and incentive to provide for her. In contrast to the Roman tradition, relatively modest dowries were typically supplied, rather than equal inheritance rights.[28] Ultimately, married women lacked the leverage of independent property. Compared with Roman law, there were few legal mechanisms available for effective intervention and protection by the woman's supportive natal kinship group. However, equity did evolve devices for overcoming the bleak prospect of total dependence established by the common law doctrine of unity of husband and wife, together with its restrictive incidents. But the benefit of these devices, such as settlements of property to the use of (on trust for) the woman, were largely limited to members of the wealthiest classes.[29]

The amelioration of women's disadvantaged position under property law began only in the nineteenth century. It proceeded gradually. Full formal equality and the abolition of the doctrine of unity were not achieved until the twentieth century.[30] The extension of suffrage and full rights to educational opportunities occurred in Western nations broadly between the last quarter of the nineteenth century and the 1940s, at different times in different countries. Despite the achievement of formal equality, women as a group remained subordinate with some exceptions. It is likely, for example, that the new legal rights were accorded in recognition of a pre-existing improvement in the status of women, rather than *vice versa*. Nevertheless, the potential for legal independence has provided a basis for further improvements in status. Many modern feminists, such as Michelle Barrett, argue that the dependent position of women within the family underwrites

25 *Ibid.* 525-7.

26 *Ibid.* 521. The doctrine gave legal expression to the canonical view of the sacrament of marriage.

27 *Ibid.* 171-85.

28 See *e.g.* Lucas, A. M. and Labarage, M. W., *Women in the Middle Ages* (1983); Ennen, E., *The Medieval Woman* (1989); Labarage, M. W., *Women in Medieval Life* (1986); Hill, B., *Eighteenth Century Women — An Anthology* (1984).

29 For a detailed study of the devices, see Staves, S., *Married Women's Separate Property in England 1600-1833* (1990).

30 *Ibid.* See also Walby, S., *Theorizing Patriarchy* (1990) 187-92.

the disadvantages women experience at work.[31] Most recently, Sylvia Walby has asserted that, on the contrary, the subordinate position of women within the family *derives* from their disadvantages in the work place.[32] In that context, Walby argues that Western women first achieved new civil, educational and legal rights as a result of nineteenth century 'first wave feminism'. In consequence, they acquired a new access to paid employment which, Walby argues, has increasingly freed them from subjection to 'private' patriarchy — that is, domination by an individual male within the family.[33] Nevertheless, Walby maintains that the diminution of 'private' patriarchy has increasingly exposed modern women to a more public form of systemic subordination embodied in welfare practices, 'double' work-loads, poverty after marriage breakdown, and continued principal responsibility for child care.[34] Upper class Romans of both sexes inherited their property, rather than working for it, so there is no direct analogy to the modern debate over whether workplace or familial subordination is primary and causal. However, it can be stated that Roman males were equally subject to legal patriarchal control within the family. Further, Roman women received their inherited property as a direct result of the standing and esteem they enjoyed as family members. Their property holdings also helped to maintain and enhance their high status. Unlike most modern working women, Roman women obtained their income from within their natal family. They applied their property within the conjugal family to achieve relative freedom from domination by a husband, much as Walby suggests modern women may apply independent income derived from personal exertion. In sum, the relationship between the legal property rights and the social status of a given group remains complex. It may be unproductive to search for single primal causes. Nevertheless, a broad correlation between significant property rights and high standing can frequently be demonstrated. Modern Western societies have only recently accorded women legal standing and property rights equivalent to those enjoyed in Classical Rome.

LIMITATIONS OF LAW AS A SOURCE OF HISTORICAL EVIDENCE

Even when a body of law is accessible intact, legal rules constitute a potentially misleading indicator of historical reality. They may, for example, represent the elusive ideals of the legislators rather than their successful implementation or enforcement. Accordingly, the Augustan moral legislative 'package' promoted marriage, class stability and increased birth-rate amongst the governing classes.[35] It sought to achieve its goals by, *inter alia*, imposing penalties on unmarried or childless persons of either sex in the form of taxation, exclusion from magistracy, and restriction of the benefits available under a will. Men of the senatorial class were prohibited from

31 Barrett, M., *op. cit.* n. 14, chs 6 & 8.
32 Walby, *Theorizing, supra* n. 30; Walby, *Patriarchy, supra* n. 16.
33 *Ibid.* ch. 8.
34 *Ibid.* 195-7.
35 *Lex Iulia de maritandis ordinimbus*; *Lex Iulia de adulteriis coercendis*; *Lex Papia Poppaea*.

marriage with freed-women, and mandatory penalties were applied for adultery. Conversely, women who produced at least three children were rewarded by freedom from the legal restriction of *tutela* (guardianship).[36] The Augustan moral legislation constituted an attempt by a governing elite to recapture an idealized past of rigid hierarchy and effective leadership.[37] Tacitus's acknowledgment that 'marriages and the rearing of children did not become more frequent, so powerful were the attractions of a childless state'[38] exemplifies the contemporary recognition of the legislation's failure. The Augustan package may, therefore, more accurately indicate problems of population patterns, transitional social values, destabilizing trends, and infiltration of the 'pure' Roman elite by new elements which were, in fact, beyond effective governmental diagnosis or control.[39] The assumption that statutory imperatives are universally translated into practice is often unfounded. Further, though frequently characterized as an unbiased source in its modern context, legislation may itself be propagandist both in language and intent. As such, it must not be construed in isolation from its formative social context. The problems of comprehensively evaluating that context are exacerbated in relation to ancient societies, due to the abiding evidentiary problems of *lacunae*, the contingencies of random survival, and the unbalanced nature or coverage of the available sources.[40]

Further, a functioning legal system frequently comprises a number of different interacting sources, any of which may be misleading if viewed in isolation. As various aspects may mutually modify or even undercut each other, it must be possible to identify the interrelated strands of formal law, modifications, available evasive devices, and variations in temporal, geographical and personal application, before 'the law' potentially relevant to a particular individual can be evaluated. Again, in relation to Roman law, evidentiary problems are encountered. Despite the mass of surviving sources, it is not possible consistently to discriminate between original and doctored interpolations, or real and hypothetical examples, in the *Digest*.[41] The most comprehensive evidence of 'working' property transactions illuminates the affairs of the upper class, although wills and documentation of ordinary citizens have also survived.[42] It is often difficult to chart the impact of local custom, geographical variants, and coverage of different sections of the population.[43]

In this context, Roman law in the nature of a statutory enactment, such as the *senatus consulta* or imperial constitutions,[44] whilst foremost in the

36 Crook, 'Women in Roman Succession', *supra* n. 5; Gardner, J., *Women in Roman Law and Society* (1986). Freedwomen required four children to gain exemption from *tutela*.
37 See, generally, Dixon, S., *The Roman Mother* (1988) ch. 4.
38 Tacitus, *Annals* III.25.
39 Treggiari, S., *Roman Marriage* (1991) 60-80.
40 Crook, J. A., *Law and Life of Rome* (1967) ch.1; Just, *op. cit.* n. 6.
41 The *Digest* was compiled by Tribonian at the direction of the Emperor Justinian and published in A.D. 533. It incorporated Roman juristic writings of the past, especially from the second and third centuries A.D.
42 Crook, J. A., *Law and Life of Rome* (1967) 135.
43 *Ibid.* 27-32.
44 *Ibid.* 20-3.

hierarchy of sources of law, may, ironically, constitute the least informative indicator of practice. Such law shares a tendency, evident in all cultures and epochs, to become frozen, encapsulating concerns and aims current at the time of its enactment. As such, it may remain ostensibly in force 'on the books', but subject to modification or even effective repeal by a variety of supplementary rulings or practices.[45] For example, the scheme for intestate succession established by Roman legislation contained in the early Twelve Tables was subsequently greatly modified in operation by the development of praetorian rulings. This demonstrates the crucial effect of the *ius honorarium* (broadly equivalent to the equitable jurisdiction of English law) as a less formalized *ad hoc* source of legal rules.[46] Similarly, there is evidence to suggest that the provisions of the *Lex Voconia*, restricting bequests to women of senatorial class, were subverted by testamentary gifts elaborately disguised as unpaid dowries,[47] although it may be difficult to assess the frequency of such evasions. Alternatively, people could avoid the operation of *Lex Voconia* by adopting evasive tactics in their conduct rather than legal devices proper. They could, for example, exploit the uncertainties of the Census to avoid registration in the targeted social class or, ultimately, they might avoid *Lex Voconia* by dying intestate despite the moral pressure to execute a will.[48]

THE GENERAL LEGAL BASIS OF INDEPENDENCE

It has been argued that the Roman law of succession and marriage, despite the existence of legislation and institutions ostensibly restrictive of women, offered women the potential for independence which compared favourably with that of men.

The legal basis for female independence lay in the fact that the institution of *patria potestas* (paternal power), which imposed an indefinite legal minority on Roman adults, applied equally to both men and women. Further, the asymmetry of *tutela* (legal guardianship), directed at circumscribing the legal powers of adult women, was, in practice, significantly undercut. In addition, laws of inheritance, including both intestacy and testation, broadly supported equality of treatment for women as beneficiaries, and indirectly permitted them freedom of testation. This was reinforced by the powerful moral conventions of *pietas* (piety). Therefore, even when specific legislation aimed to reduce the traditional even-handedness, it was frequently avoided. As a consequence, women were not only able to accumulate wealth, but could also personally oversee, control, donate, and devise it without undue restriction from their tutors.

In relation to marriage, the less strict form (*sine manu*) grew increasingly

45 A significant Anglo-Australian example is the Statute of Frauds, enacted in the seventeenth century. Although not repealed, it has been substantially eroded by judicial construction.

46 Crook, J. A., *Law and Life of Rome* (1967) 24.

47 Hallet, *op. cit.* n. 7; Crook, 'Women in Roman Succession', *supra* n. 5.

48 Gardner, *op. cit.* n. 36, ch. 9; Crook, 'Women in Roman Succession', *supra* n. 5; Treggiari, *op. cit.* n. 39, 365-6.

common, and even with marriage *cum manu*, a wife might survive the application of *potestas* by out-living her husband. The ready, symmetrical right to seek dissolution, coupled with the typical provisions governing the return of her dowry, also facilitated independence.

PATRIA POTESTAS *(PATERNAL POWER)*

Independence is a relative concept informed by social and cultural context. In the patriarchal Roman system, the most significant obstacle to the legal independence of both men and women was the enduring institution of *patria potestas*. People remained *alieni iuris* — within the legal power of their senior male ancestor (*paterfamilias*) — for as long as he lived. They were deprived of independent legal personhood and, consequently, were unable to own property, enter contracts, or marry without his permission. If the *paterfamilias* was the grandfather, the father — if living — would, in turn, become *paterfamilias* on his death.[49] *Patria potestas* did have an assymetrical application to men and women, in that men — even while *alieni iuris* — were free to pursue public office.[50] Nevertheless, that freedom is likely to have been merely theoretical if not supported by familial financial backing. Accordingly, adults of both sexes experienced an indefinite and prolonged legal minority until *potestas* was determined by a relevant circumstance. Such circumstances included the death (or loss of status) of all relevant ancestors, adoption, emancipation, sale into slavery, or, in the case of a woman, a marriage *cum manu*.[51]

Roman marriage was founded primarily on intention and fact. Divorce was readily obtainable on the same basis. It would seem that it was necessary for the *paterfamilias* to obtain the consent of a male *alieni iuris*. It is not clear whether a woman's consent was necessary throughout all phases of Roman law. It seems, however, that she could refuse a proposed candidate on the grounds of moral turpitude. Given the nature of Roman familial relations, forced marriages were unlikely.[52] As the evidence suggests that parents frequently arranged marriages for girls as young as fourteen (in contrast to a probable average age of twenty for males),[53] it can be inferred that daughters, especially, would have had little independent input even if their formal consent to marriage were required.

The two types of marriage (marriage *cum manu* and marriage *sine manu*) had different effects on *potestas*. A marriage *cum manu* terminated the *potestas* (legal power) of the woman's father. However, she did not become *sui iuris* (in her own power or right) by reason of such a marriage. Instead,

49 See, generally, Crook, J. A., *Law and Life of Rome* (1967) 107-10. Daube, D., *Aspects of Roman Law* (1969) 75-91; Gratwick *op. cit.* n. 5.

50 Crook, J. A., *Law and Life of Rome* (1967) 109.

51 *Supra* n. 49. A marriage *cum manu* determined existing *potestas* but the woman would henceforth be in her husband's *potestas* (or that of the husband's ancestor).

52 Treggiari, *op. cit.* n. 39, 146-7. A woman's consent was necessary under classical law. See also Crook, J. A., *Law and Life of Rome* (1967) 108; Hallett, *op.cit.* n. 7.

53 Hopkins, K., 'The Age of Roman Girls at Marriage' (1965) 18 *Population Studies* 309.

her father's *potestas* was simply transfered to her husband or, where relevant, his lineal ancestor. If the woman's own *paterfamilias* were already dead, she would, of course, be *sui iuris* at the time of marriage, and would remain so if she married *sine manu*. It was possible, but rare, for a woman who was *sui iuris* to marry in the *cum manu* form. In that case, she would revert to *alieni iuris* status as a consequence of the marriage.[54] While marriage *cum manu* was arguably the original norm, marriage *sine manu* (in which a woman remained within her father's *potestas*) was prevalent by Classical times. The later predominance of marriage *sine manu* has been attributed to women's liberation[55] or, alternatively, the enlightened desire of Roman men to accord women freedom.[56] Gratwick[57] challenges both the received opinion as to the rapid rise in marriage *sine manu*, and the usual explanations. She argues that the incidence of marriages *sine manu* prior to the second century B.C. cannot be accurately ascertained. It may have been common prior to that date. Further, rather than springing from conceptions of women's freedom, a preference for marriage *sine manu* could indicate the value of a father's retained power to direct the marriage, divorce, and affairs of his daughter in the context of political alliances. Moreover, marriage *sine manu* may have had the financial advantage of justifying a smaller dowry.[58]

In any event, it is likely that the practical effect of a father's *potestas* was mitigated for both men and women by the existence of *peculium*[59] (a personal fund), the civilized conventions of familial consensus, and, ultimately, the prevailing short life expectancy of Roman times.[60]

TUTELA

Although many people became *sui iuris* by early adulthood due to their father's early death, a discriminatory asymmetry applied to women. Even when *sui iuris*, they were subject to the perpetual guardianship of *tutelage*. Males remained subject to *tutelage* only during their minority. In contrast, Table V of the Twelve Tables provided that 'women, even though they are of full age, because of the levity of their minds shall be under guardianship.'[61] Women were formally prohibited from executing most significant legal acts without the consent of their tutor, such as making a will, alienating *res mancipi* (property such as land and slaves) or disposing of themselves in a *manus* marriage beyond agnatic control.[62] Accordingly, if the tutor's

54 Crook, J. A., *Law and Life of Rome* (1967) 103. Such a woman would gain the advantage of agnatic succession rights in her husband's family.
55 Baldson, J. P. V. D., *Roman Women* (1962).
56 Schulz, F., *Classical Roman Law* (1951).
57 Gratwick, *op.cit.* n. 5.
58 *Ibid.* 46-9.
59 Crook, J. A., *Law and Life of Rome* (1967) 110.
60 Hopkins, K., 'On the Probable Age Structure of the Roman Population' (1966) 20 *Population Studies* 245; Crook, J. A., *Law and Life of Rome* (1967) 100.
61 Twelve Tables Table V.1; Crook, J. A., *Law and Life of Rome* (1967) 113-6.
62 Crook, J. A., *Law and Life of Rome* (1967) 113-8. Gratwick *op. cit.* n. 5.

powers were strictly enforced, a woman would have little autonomous control over the property she was legally permitted to accumulate.

In many instances, however, it would seem that a variety of circumstances reduced the institution to a mere formality, although that outcome could not be universally guaranteed. There seems little doubt that the original function of the tutor was to preserve and oversee the woman's property in the interests of her agnatic kin, who would inherit on her intestacy. The nearest male agnate automatically assumed tutorship when a woman became *sui iuris*. *Tutela*, in its early form, thus reflected the relatively primitive agnatic and agricultural context of the world of the Twelve Tables, exemplified by the tutor's power over property of agricultural significance (*res mancipi*).[63] Subsequently, permissive modifications of *tutela* emerged. Fathers could stipulate an alternative tutor in their wills.[64] Such persons, in contrast to the agnatic *tutor legitimus*, would have no self-interested motive for restricting the woman's control over her property and legal affairs. A similar result could be achieved by the device of fictitiously selling oneself into slavery (*coemptio*), or the tutor might voluntarily renounce his power.[65]

A woman's dowry usually represented a substantial proportion of her family's wealth. Although it did not necessarily correspond to the share she would receive on intestacy,[66] in some senses, the dowry may have represented an anticipated inheritance. On a father's death, an averaging would normally occur, by which dowries already paid were deducted from married daughters' shares of the estate. The precise status of a woman's dowry, whether provided by her father (*dos profecticia*) or otherwise (*dos adventicia*) was a matter of contemporary debate. In early *manus* marriages, the dowry may have vested in the husband absolutely, with no liability to return it in the event of divorce. Subsequently, the interest of the wife was increasingly recognized. Some authorities held that the dowry remained the property of the wife, whereas others ambiguously suggested that it belonged to both spouses.[67] In practice, the dowry seems to have been administered by the husband, but was regarded as forming part of the wife's assets.[68] It can be regarded as notionally vested in the husband, but subject to divestment in the event of marriage dissolution. The parties were free to negotiate the terms of return of the dowry on marriage breakdown. In the absence of express agreement, standing rules applied. They were based on a general principle of complete restoration, subject to possible deductions based on moral fault (*propter mores*) or child maintenance if the wife herself had initiated the divorce (*propter liberos*). Even in the most extreme case of such permitted deductions, the husband could retain only a maximum of 50%.[69]

63 Crook, J. A., *Law and Life of Rome* (1967) 104-5; Gardner *op. cit.* n. 36, ch. 9.
64 *Ibid.*
65 *Ibid.*
66 Crook, J. A., *Law and Life of Rome* (1967) 104-5; Crook, 'Women in Roman Succession' *supra* n. 5.
67 Crook, 'Women in Roman Succession', *supra* n. 5.
68 Crook, J. A., *Law and Life of Rome* (1967) 103-4.
69 See, generally, Treggiari, *op. cit.* n. 39, 327-66.

This ensured that a woman could always reclaim at least half her dowry, and usually much more. Moreover, in addition to her dowry, a woman, if *sui iuris*, was capable of outright ownership of property from other sources, such as gifts and inheritance. Some prominent examples indicate that a Roman woman married *sine manu*, with a complacent tutor, enjoyed unrestricted control over her independent property and affairs. That proprietary control could support a high degree of influence in family affairs and participation in decision-making.

Thus, in the detailed surviving accounts of the financial affairs of Terentia,[70] Cicero's wealthy wife, no mention is made of her tutor. Terentia must have had one, but it can be inferred that he played a merely token role. The records indicate that Terentia conducted her financial affairs separately and applied her large personal fortune as she saw fit, without reference, or even in opposition, to Cicero's wishes. She sold various properties to raise funds to assist him in his political exigencies, despite Cicero's protests. Moreover, she supported their daughter, Tullia, and provided funding for their son when Cicero, legally responsible for their support, was unable to raise finance. Terentia's cognatic loyalties directed the use of her fortune and it is probably no coincidence that she also exercised considerable authority in family matters. Despite Cicero's reluctance, Terentia unilaterally arranged Tullia's marriage with Dolabella.[71] As either husband or wife (or their *paterfamilias* if in *potestas*) could unilaterally initiate divorce,[72] a husband stood to lose both the ancillary advantages of a wife's separate property, and her dowry, which must ordinarily be completely restored. While it is dangerous to generalize from examples of prominent wealthy women, the Plautine stereotypes and Juvenal's satirical vignettes of overbearing wealthy wives must have had some familiarity in fact.

The famous funeral inscription known as the *Laudatio Turiae*[73] reinforces the impression of financial independence. While it reflects the conventional idealization typical of funerary testimonials, the *Laudatio Turiae* also reveals important implicit assumptions about women's rights and abilities to handle their wealth. In the lengthy inscription, which remains anonymous, a surviving husband celebrates the virtues of his deceased wife by lengthy reference to, *inter alia*, her capable and generous management of independent property. While the eulogized wife of the *Laudatio Turiae* is very remote from the termagant wives of Roman comedy, the inscription accords with literary sources by indicating that unrestricted control of a woman's separate property was the civilized norm of upper-class circles. It reveals that the unnamed wife was married *sine manu*. Prior to her marriage, she had single-handedly shaken off a trumped-up attempt by spurious relations (*gens*) to invalidate her father's will in order to assert intestate *tutela* over her.

70 Crook, 'Women in Roman Succession', *supra* n. 5. See accounts in Gratwick, *op. cit.* n. 5, and Dixon, S., 'Family Finances' in Rawson, B. (ed.), *The Family in Ancient Rome* (1986).

71 *Ibid.*

72 Crook, J. A., *Law and Life of Rome* (1967) n. 5.

73 Dessau, H., *Inscriptions Latinae Selectae* (1892-1916) 8393 translated by Wistrand, E., *The So-Called Laudatio Turiae, Studia Graeca et Latina* (1976) 34.

The (husband's) account indicates that it was possible, but difficult and praiseworthy, for a lone woman to conduct litigation successfully. As in the case of Terentia, there is no mention of the wife's tutor:

> [You] preserved all the property you inherited from your parents under common custody, for you were not concerned to make your own what you had given me without any restriction. We divided our duties in such a way that I had the guardianship of your property and you had the care of mine.[74]

Similarly, during political emergencies, the wife sold her personal property to support her husband in exile. As in the case of Terentia, her mutual sharing and contribution of property were characterized as a generous favour, and singled out for praise. Roman law prohibited gifts between spouses. Although there were means available to circumvent the legal prohibition, the examples of Terentia and the *Laudatio Turiae* indicated that women were not morally expected to provide for their husbands from their separate property. Further, the following monologue from the *Laudatio Turiae* demonstrates the generosity of both husbands when the wife and her sister provided dowries for their poorer female relations:

> [B]y common accord [we] took it upon ourselves to pay, and since ... we did not wish that you should let your own patrimony suffer diminution [we] substituted our own money and gave our own estates as dowries.[75]

Like Cicero's reluctance to accept Terentia's property for his own purposes, this suggests that ensuring the maintenance of a wife's separate property was something of an honourable convention amongst upper-class Roman husbands.

Although the financial affairs of an occasional wealthy woman might remain subject to control by a domineering *tutor legitimus*, it seems clear that *tutela* was largely a hollow and obsolescent institution when Augustus instituted major exemptions as a reward for demonstrated fertility. Presumably, however, it retained nuisance value for both parties. Indeed, its burdens, divorced from any prospect of power or self-interest, rendered the office of tutor increasingly unpopular. Widespread reluctance to assume its obligations doubtless accelerated its ultimate abolition under Claudius.

It is possible, however, that tutelage did provide some residual protective value for women. The *Senatus consultum Velleianum*, dated from the period A.D.41-65, prohibited women from acting as guarantors. The Roman prohibition is of particular interest in view of the current Australian debate on the problems faced by female guarantors.[76] The legislation was traditionally interpreted as a reactionary attempt to obstruct female emancipation. More recently, Crook[77] has observed that it coincided with the Augustan/Claudian abolition of agnatic guardianship. He therefore suggests that the *Senatus consultum Velleianum* may have been intended to counter new pressure on women to guarantee their husband's liabilities.

74 *Ibid.*
75 *Ibid.*
76 Victorian Consumer Affairs Committee, Forum, *Women and Credit*, March 1991.
77 Crook, J. A., 'Feminine Inadequacy and *Senatus consultum Velleianum*' in Rawson, B. (ed.), *The Family in Ancient Rome* (1986).

INHERITANCE

Intestacy

Even in its earliest and most primitive form, Roman law established an even-handed, gender-neutral scheme of inheritance on intestacy based on the principles of agnatic succession and equal shares. There was no preference for male descendants and male agnates, and no concern to concentrate wealth in the hands of individuals on the basis of primogeniture. The Twelve Tables, which Livy described as expressing community consensus,[78] provided that all *sui heredes* (that is, everyone within the *potestas* of the deceased) would inherit equally, irrespective of sex.[79] Failing *sui heredes*, the nearest agnates would take, again irrespective of sex. Although, at a certain stage, a modification reduced the rights of women on intestacy by providing that female agnates more distant than sisters (*consanguineae*)[80] could not inherit, Roman intestacy generally afforded equivalent rights to women.

It has been argued that, in earliest times, both wills and marriage *sine manu* were relatively uncommon.[81] Accordingly, most women married *cum manu*, breaking their agnatic link with their natal family and transfering it to their matrimonial family. Consequently, these women would not profit by the intestacy of their natal agnates, but *would* benefit by intestacies within their new agnatic kinship group. Subsequently, praetorian modification of intestacy laws occurred, permitting claims by *liberi* — persons whose original status as *sui heredes* had been lost due to a variety of factors such as emancipation, *manus* marriages, or adoption.[82] Such persons had a chance of double benefits, and women who had made a *manus* marriage may often have profited.

Even the praetorian modifications, however, remained predicated on agnatic links. *Affines* (such as married couples) were ranked last to benefit. There was an enduring disjunction between the rules of intestacy, which were agnatic, and the social reality of close ties between women and their children, who were cognates.[83] Such ties were often reflected in a voluntary assumption of responsibility which belied the thin legal relationship.[84] For example, Terentia, Cicero's wife, made major financial contributions to her children, although they were neither legally nor perhaps morally required.[85] Pliny's central kinship ties were clearly with his mother and maternal uncle, who, as cognates, were legally remote.[86] Although women could acquire testamentary capacity through a legal device (discussed below) and thus

78 Livy, *The Early History of Rome* 3.35.
79 Twelve Tables in Crook, J. A., *Law and Life of Rome* (1967) n. 5.
80 Crook, 'Women in Roman Succession', *supra* n. 5.
81 *Ibid.*
82 *Ibid.*
83 See generally Hallett, *op. cit.* n. 7; Dixon, *op. cit.* n. 37, 44-6.
84 Gratwick, *op. cit.* n. 5.
85 *Ibid.* for a lengthy analysis of Terentia's and Cicero's financial affairs. See also Dixon, S., 'Family Finances' in Rawson, B. (ed), *The Family in Ancient Rome* (1986).
86 See *e.g.* The Younger Pliny, *Letters*, VI.16, 20.

evade the agnatic bias of intestacy in many cases, that would not always be possible. Moreover, wills could fail.

Accordingly, intestacy could remain relevant, and obstructive of a woman's desire to benefit her children, and indeed, *vice versa*. Eventually, ameliorating legislation specifically recognized the significance of the cognatic link. The *Senatus consultum Tertullianum* first permitted intestate succession by the mother, perhaps reflecting the high incidence of infant mortality, and the inability of minors to evade agnatic succession by executing a will. Further, in 178A.D., the *Senatus consultum Orfitianum* permitted children to inherit in the event of their mother's intestacy.

Wills

The relevance of intestacy, itself generous to women, was reduced by the prevalent moral imperative to execute a pious will. However, women were so extensively benefited by testators in practice that specific legislation was deemed necessary to reduce freedom of testation advantageous to women. Such legislation was frequently evaded, and women's capacity to accumulate wealth appears to have been unimpaired. Moreover, although formally denied testamentary capacity, women could acquire it through the device of *coemptio*. Accordingly, they were able to control the disposition of the wealth they accumulated, and exert a corresponding social and familial influence.

In order to achieve testamentary capacity, a woman had to break her existing agnatic links by a fictitious sale of herself into slavery (*coemptio fiducias causa*). The fictitious new master would immediately manumit her and was thus constituted tutor of the new 'freedwoman'.[87] Although the consent of the tutor was required in order to write a will, it would be likely to be forthcoming as doubtless only compliant and trustworthy persons were selected for *coemptio*. Moreover, it would seem that consent to the specific content was not required.[88]

In the case of both male and female testators, freedom of testation was decreased by legislation such as *Lex Voconia*, and the Augustan moral 'package'. *Lex Voconia* prohibited instituting women of the senatorial class as heirs. Heirs were potentially liable for both debts of the estate and expensive funerary ceremonials (*sacra*). Therefore, the restriction might have been aimed at the protection of women, who, similarly, required their guardian's consent to accept an inheritance. However, there was a distinction between heirs and legatees. A will could benefit a person by bequeathing a legacy, as distinct from nominating him or her as an heir. Thus, even under *Lex Voconia*, a woman of senatorial class could still receive a legacy under a will. *Lex Voconia* also provided that no person of either sex was to receive a legacy greater than the total bequest to the heir or heirs.[89]

87 Gardner, *op. cit.* n. 36.
88 *Ibid.*
89 *Ibid.*

That restriction might accord with the wishes of a testator who had a family with equal numbers of sons and daughters and aimed to leave equal shares, but it did mean that a person could leave only half his estate to an only daughter, unless he elected to die intestate.[90]

The aims of the legislation remain unclear. It may be that *Lex Voconia* was calculated to reduce the amount of wealth concentrated in women's hands. Perhaps this was due to misogynist resentment of the threat to a husband's authority posed by female financial independence or, as Gardner suggests, a perception that the wealth vested in women did not circulate adequately in public affairs. Certainly, it is established that from the time of the Punic Wars, enormous concentrations of wealth did accumulate in women's hands, and at least some contemporaries viewed the development with concern.

Nevertheless, the *Lex Voconia* did not achieve its likely goal. Apart from the option of remaining intestate, techniques such as disguised dowry payments, trusts (*fideicommissum*) in favour of women, and failing to register in the Census were available. *Lex Falcidia* later provided that a quarter of the assets must be left to the heirs.[91] This may have been inspired by the desire to improve the position of heirs *vis à vis* legatees, who were more likely to be female, or outsiders.

SOCIAL CONVENTIONS OF TESTATION

Whatever the theoretical freedom of testation, it was in practice circumscribed for both men and women by the powerful expectations of *pietas* and social duty. Although the notion of a 'horror of intestacy' may have been exaggerated,[92] undoubtedly upper class Romans were under a moral obligation to execute a will, which was considered a lasting testimony to their character and reputation. Legacies to friends and associates were an expected convention. In consequence, legacy hunters abounded. Some, typified in Pliny's account of the avaricious Regulus, could be outrageously aggressive, showing up at the deathbeds of even remote acquaintances to demand a legacy. Others, more subtly, offered soothing attentions to their childless relatives. Some sources attribute the persistent Roman predilection to childlessness to the pleasing flattery of legacy-hunting younger relatives. Nevertheless, a testator was expected to exercise moral discrimination in the face of competing claims.[93] Even those who had defied the conventions of decency during life could succumb to the intense pressure of testamentary obligation. Pliny mentioned 'the popular belief that a man's will is a mirror of his character' only to recount the exception of Tullus, a disreputable testator, who 'proved himself to be much better in death than life.'[94]

90 Treggiari, *op. cit.* n. 39, 365-6.
91 *Ibid.*
92 Daube, *op. cit.* n. 49, 71-5.
93 Cicero viewed a will as evidence of the immortality of the soul: *Tusc. Disp.* 1.14.31, cited in Daube, *op. cit.* n. 49, 73-4.
94 The Younger Pliny, *Letters*, VIII.18.

Although surrounded by legacy hunters, Tullus had disappointed them. Instead, he complied with the demands of piety and decorum, leaving his property within the family, designating his niece (and adopted daughter) the principal heir. Further, Pliny noted with satisfaction an ample legacy to Tullus's deserving wife, observing that 'this will is all the more creditable for being dictated by family affection, honesty and feelings of shame, and in it, Tullus acknowledges his obligations to all his relatives . . . as he does to the excellent wife who had borne with him so long'.[95]

Pliny's account of the whole town debating the merits of Tullus's will reinforces the impression that lasting infamy could result from an undutiful will. This is supported by other sources, such as Tacitus's example of Junia, who dared to omit the Emperor Tiberius from her will. He noted that 'her will was the theme of much popular criticism for, with her vast wealth, after having mentioned almost every nobleman by name, she passed over the Emperor'.[96] Evidently, similar conventions bound both male and female testators. Pliny chronicles with approval the will of Ummidia Quadratilla.[97] While eccentric enough to keep a disreputable troupe of mimic actors, she at least excluded them from contact with her grandson, and ultimately 'died leaving an excellent will' in conventional terms — two-thirds of the estate to her grandson and one-third to her granddaughter.[98] Pliny concluded enthusiastically: 'I like to dwell on my pleasure by writing about it. It is a joy to witness the family affection shown by the deceased.'[99]

Similarly, the funeral inscription of Murdia[100] demonstrates the centrality of dutiful testation to *pietas* and reputation. In the inscription, the deceased woman's son details the meritorious provisions of her will at considerable length. The inscription claimed that Murdia deserved public praise due to her scrupulous observation of accepted testamentary principles. She had applied a basic scheme of equality and comprehensive coverage: she provided for her husband and 'made all her sons equal heirs after she gave a bequest to her daughter'.[101] However, Murdia had also responded honourably to the complexities of having children by different husbands. As serial monogamy was common amongst the Roman upper classes, the situation must have arisen frequently.

The eulogizer was the son of her first husband, who had placed property in trust with Murdia, so she bequeathed it separately to that son as his representative:

> She did so not in order to wound my brothers by preferring me to them but . . . she decided that I should have returned to me the part of her inheritance which she had received by the decision of her husband, so that what had been taken care of by his orders should be restored to my ownership.[102]

95 *Ibid.*
96 Tacitus, *Annals* III.76.
97 The Younger Pliny, *Letters*, VII.24.
98 *Ibid.* The granddaughter may have received a prior gift.
99 *Ibid.*
100 Cited in Lefkowitz, M. and Fant, M. (eds), *Women's Life in Greece and Rome* (1982) 135.
101 *Ibid.* The bequest was presumably property of equivalent worth.
102 *Ibid.*

As such, Murdia had not transgressed against the ideal of equality. The relevant property belonged to a particular family, imprinted with a trust which she had faithfully fulfilled.[103]

It may be argued that less opprobrium attached to a woman who overlooked her conventional heirs, so that she could exploit her relative freedom to achieve further leverage and influence within the family. However, the evidence suggests that women, too, were constrained by inculcated moral values, familial ties and public opinion. Similarly, if a male testator wished to disinherit *sui heredes*, it was possible, but both blameworthy and subject to challenge if unreasonable.[104] The asymmetry of disherison, requiring a specific exclusion of male heirs while a general exclusion would suffice in the case of females,[105] may be more a technicality of legal formulae than of substantive significance. However, it probably reflects a stronger association of males with the burdens and status of heirship, and perhaps an implicit recognition that women were more likely to receive a share of familial wealth in alternative forms, such as legacy or dowry.

CONCLUSION

Roman law provided considerable potential for female independence within the limitations of a patriarchal social structure. Its effects should not be overstated. It is likely that the benefits were usually confined to women of the wealthiest classes. While in some respects it might be argued that the considerable legal capacity of women served the interest of men, there can be little doubt that it also reflected the esteem they enjoyed in Roman society. The subsequent decline in the legal standing of women is also instructive. Some commentators would argue that it illustrates the longevity and protean nature of patriarchy, the impact of which may vary according to changing social and economic conditions. Equally, the decline in legal standing seems to be associated with the decline of a particular kinship system in which women were lifelong, valued members of a natal family, whose usually beneficent influence was an important constant in Roman life.

103 See Crook, *Law and Life of Rome* (1967) 125-7.
104 *Ibid.* 122-3; Gardner, *op. cit.* n. 36, ch. 9.
105 *Ibid.*

APPENDIX

*CHRONOLOGY**

c. 753-510 B.C. — Period of the kings
509 B.C. Foundation of republic

451 — 450 B.C.	Twelve Tables
100 — 44 B.C.	Julius Caesar
49 — 44 B.C.	Civil wars — government by Julius Caesar
27 B.C. — A.D. 235	Principate
27 B.C. — A.D. 14	Augustus Caesar
59 B.C. — A.D. 17	Livy (historian)
18 B.C.	*Lex Julia de maritandis ordinibus*
c. 18 B.C.	*Lex Julia de adulteriis*
9 B.C.	*Lex Papia Pappaea*
14 — 37 A.D.	Tiberius Caesar
37 — 41 A.D.	Gaius Caesar (Caligula)
41 — 54 A.D.	Claudius Caesar
54 — 68 A.D.	Nero Caesar
69 A.D.	Otho, Vitellius, Galba
69 — 72 A.D.	Vespasian
23/24 — 69 A.D.	Pliny the Elder
71 — 81 A.D.	Titus
81 — 96 A.D.	Domitian
96 — 8 A.D.	Nerva
98 — 117 A.D.	Trajan
50 — after 12 A.D.	Plutarch
c.56 — after 112/13 A.D.	Tacitus
c.61 — c.112 A.D.	Pliny the Younger
?60 — after 127 A.D.	Juvenal
117 — 38 A.D.	Hadrian
306 — 37 A.D.	Constantine
527 — 65 A.D.	Justinian
533 A.D.	*Digest*

* A full chronology can be found in Treggiari, *Roman Marriage* (1991) 520-2.