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„For better or for worse, till death...” The symbols of the legal customs related to marriage in the European Legal Culture¹

European legal culture is primarily rooted in Roman-Germanic heritage and Jewish-Christian revelation – although it is not intact from Asian and Islamic effects. The words “Qaenam vocaris, Ubi tu Gaius, ibi ego Gaia” from the Roman culture, expressing the union between husband and wife are still well-known just like the so called chupa from the Jewish culture, which is a “canopy” stretched above cedar and cypress wood poles and decorated with innumerable stars as a sign of being blessed with a lot of children. The two cultures have common features in respect of wedding traditions such as the ring, the symbol of endlessness, which was originally made of iron and was without any decorations, however, there are substantial differences as well. While similarities can be attributed to marriage as a factual phenomenon of life and to its legal regulation, differences primarily stem from the philosophy of religion and morals.

The ideal concerning marriage and family according to which marriage is the long-lasting cohabitation of a man and a woman for begetting offsprings (*liberorum quaerendorum causa*) was developed quite early by Roman thinking.² If a free man and a free woman who had a *ius conubium* in respect of each other entered into cohabitation – without any formalities – with the intention of permanently living in matrimony, their relationship was

¹ Much of the material of this study is based on Eszter Cs. Herger, *A nővételtől az állami anyakönyvvezetőig. A magyar házassági köteléki jog s az európai modellek* (Budapest-Pécs, 2006).

² See Orsolya Péter, *Család és gyermekáldás – eszmény és valóság a római forrásokban*, Manuscript (Miskolc, 1993), p. 3.

considered to be a marriage by the legal order. Regardless of the fact whether it was a marriage with or without manus, which latter was rendered possible even by the Law of the Twelve Tables,³ the establishment of the cohabitation were usually demonstrated for outsiders by certain customs which obviously changed substantially during times. In ancient Roman society the time and character of ceremonies were determined by religion in accordance with the fact that a certain character of sanctity was attributed to marriage (*divini et humani iuris consortium*).⁴ As the consummation of the marriage entailed violence against the woman, religious festivals were not considered suitable for entering into a marriage since all kinds of violence had to be refrained from on such occasions. The second part of June and the whole of July were considered especially favourable, which obviously meant that childbirths were avoided in winter months.

The first step in the sequence of nuptial traditions was giving out the maiden (tradition) then a piglet was offered as a sacrifice to Juno. The gall of the piglet was taken out in order to ensure the marriage would be free from any bitterness. The bride took off her toga and offered it to Fortuna Virginalis, then put on a white tunic, fastened a girdle around her waist which was later to be unfastened by the groom and covered her head with a red or yellow veil. The heelpost of the bride's future house was smeared with the grease of the slaughtered sheep or pig. The meat of the animal was eaten on the sacrificial feast which lasted till the rise of the evening star. After the feast the bride accompanied by the wedding guests was lead to the house of her husband (*deductio uxori in domum mariti*). Two of the nuptial maidens (*paranymphae*) took her by her arm and the third carried a burning torch in front of her. According to Plutarch the custom of pretending to abduct the bride before the *deductio* could be traced back to the rape of the Sabine women. The groom threw walnuts all over the place for the children gathering outside the house as a sign of giving up the light-mindedness of youth and childish jokes and hoaxes. The bride left the parental house with three as-es, she brought the first for her husband, the second for the family altar and she left the third in the sanctuary by the nearest trifurcation. When arriving at the threshold of the house decorated with flowers and green branches, the groom lifted the bride over the threshold. Then was the question, “What's your name?” asked, to which the answer could only be, “Where you are Gaius I am Gaia”.

³ Ferenc Benedek, *A manusszerzés és a házasságkötés alakításai a római jogban*, Dolgozatok az állam- és jogtudományok köréből X (Pécs, 1979), p. 7.

⁴ „Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio”, Dig. 23. 2. 1.

The traditions coloured with sacred elements and the ancient rites began to decline together with the fading away of pagan religion during the Dominate. Whether this can be linked to the moral decline of Roman society in the Classic Age is not subject to question. It should be noted that adultery was sanctioned only in the case of the wife even under ancient law. Marriages without the acquisition of manus became more frequent due to the influence of the idea of humanism inherited from the Greeks (“Man is the measure of all things”). Fritz Schulz⁵ also blames the thesis of homo mensura from Protagoras for the spreading of sexual liberty and the aversion to marriage in public thinking. By that time not much had been left from marriage with a divine character, entered into in order to generate children, and in which Gaius and Gaia became united. The discrepancy between the ideal and the real, which primarily manifested itself in abortion, the ritual killing of children born with bodily defects and abandoning infants in ancient law,⁶ by the end of the Republican Period had manifested itself in the legal regulation of dissolution: dissolution (divortium) on the ground of mutual agreement was unlimited, no ground for divorce had to be proved. This was modified by the Christian emperors after 380 A.D. inasmuch as the conditions of unilateral dissolution (repudium) were made stricter.⁷

During the decline of the Western Empire, according to the customary laws of the Germanic tribes which got settled down marriage was a dissolvable cohabitation with the strong dominance of the husband. The purpose of marriage – like in Rome – was to generate lawful offsprings. The power of the husband over his wife derived from the fact that in most of the cases the form of contracting marriage was buying a woman (Kaufehe/Muntehe), through which the wife was placed under the power of the husband (Munt, mundium).⁸ Originally the form of buying and selling was applied only exceptionally in the case of a marriage outside the tribe (exogamous marriage). In the beginning the contracting party on the side of the woman was the tribe, later the father of the maiden, while on the side of the husband the activities of the relatives were restricted to giving consent and enhancing the solemnity of the proposal of marriage. This co-operation was degraded to a custom – together with the decline of its legal importance – but as a custom it remained in existence for long.

⁵ For the influence of the idea of humanism on the way of the moral thinking see Fritz Schulz, *Classical Roman Law* (Aalen, 1992), p. 103.

⁶ See Péter, pp. 3-10.

⁷ See Mihály Móra, A házassági kereseti jog eredete és kialakulása, *Notter Antal emlékkönyv* (Budapest, 1941), p. 791.

⁸ For the content of the mundium see Clausdieter Schott, *Trauung und Jawort* (Frankfurt, 1992), pp. 19-20. and also see Heinrich Mitteis, *Deutsches Privatrecht* (München, 1980), p.54.

Following a successful proposal of marriage the tribe of the woman and the groom concluded a contract in which the power over the bride was transferred to the future husband. The legal act was followed by a number of symbolic acts. First the woman was handed over within the circle of relatives. She was placed under the power and protection of the husband: this was also expressed by the tools handed over, such as a sword, a spear or maybe a hat or gloves. In Swabisch provincial law gloves symbolised the following promise: if a free Swabisch man married a free Swabisch woman, he gave her seven pairs of gloves representing seven promises concerning the husband's obligations. Then the groom grasped the hands of his bride, stepped on her foot, seated her on his lap or covered her with his cloak. The wedding ceremony ended with solemnly seeing the bride home. The fact that the nuptial bed was made in the presence of the guests was of special importance. On the one hand – citing *Sachsenspiegel* – the wife “trit in sin recht, swen se in bedde geit”, on the other hand later the persons present could prove at any time that the marriage had been consummated. This custom first disappeared in towns becoming more and more civilian, however, it was kept among nobles and villains until the age of civic societies.

Germanic tribal customs⁹ were really practical and profane, they had no divine or strong moral character at all. Polygamy was in existence in the circle of the notability until the Carolingian Age. Only the woman was obliged to conjugal fidelity. The widow originally followed her husband even to the grave, though later common-law granted her a possibility to remarry. From the end of the 5th century the Franks belonged to the Roman Church, then the subjugated tribes were rapidly converted to Catholicism. Nevertheless, clerical principles hardly prevailed and customs passed down from ancestors seemed a lot stronger. According to the laws of Salian and Ripuarian Franks the husband had an unrestricted right to dismiss his wife, moreover, Alemans allowed dissolution on the ground of mutual agreement. If elsewhere, for example among the Burgundians or Visigoths an appropriate ground for dissolution was required, it included first of all adultery on the side of the woman. The tribal laws of the Visigoths can be regarded exceptional since there the wife also had the right to dissolution if her husband committed sexual perversion or forced the woman to commit adultery. Nowadays, when the institution of family is said to be in the state of crisis in European culture, on the basis of historical experience it seems that the Roman-Germanic heritage according to which *the core of the institution of marriage was to ensure lawful*

⁹ For the tribal laws see Móra, 804-809. and also see Konrad Maurer, *Über altnordische Kirchenverfassung und Eherecht, Vorlesungen über altnordische Rechtsgeschichte II* (Osnabrück, 1966), pp. 545-547.

succession and conjugal fidelity was primarily essential for this reason should be taken into consideration.

Although the Jewish-Christian revelation also attaches exceptional significance to the command “Be fruitful and multiply”,¹⁰ the core of marriage is something different here: it is a certain “threefold cord”,¹¹ a relationship of *covenant* (b’rit, diathéké), in which Adam becomes one with Eve, who is fit for him and was created for him.¹² And then marriage is really peaceful – according to Solomon, the king “showing peace”. Although the Torah made it possible for a husband to dismiss his wife with a letter of divorce (get) if he found any “indecent” in her¹³ and in Talmudic times – just to be on the safe side – the amount of “severance pay” due to the wife in the case of a divorce was stipulated right in the marriage contract (ketuba). Nevertheless, all this may only be regarded an expedient arrangement since the Holy Scripture clearly declares that the Creator “loathes dismissal”.¹⁴ Relying on the third component of the threefold cord, the Creator, this unique biblical covenant always made it possible to resolve a marriage conflict by reconciliation and not by dismissal provided the divine law was followed from deep-seated personal conviction.

Let us now turn our attention to the symbolic representation of all this.¹⁵ Engagement ceremonies could take place after the marriage vow and its putting into writing. This included putting on an engagement ring and saying a certain engagement formula. While in Talmudic times usually one year had to lapse between engagement and wedding, later the two events often took place at the same time. Wedding – as it has already been mentioned – took place under a chupa which symbolised the free sky and the stars referring to the promise God had made to Abraham according to which God would give Abraham as many offsprings as many stars there were in the sky. Fathers planted a cedar tree when they had a son born and a cypress tree when they had a daughter born so that they would be able to make the poles of the chupa from them. The marriage was often contracted on a Tuesday after the monthly period of the maiden. The head of the bride was covered with a shawl, the groom wore a

¹⁰ The Holy Bible, Translated from the Original Texts (Dillenburg, Reprint 1995), Genesis, chap. 1, v. 28.

¹¹ Ecclesiastes, chap. 4, v. 12.

¹² Genesis, chap. 2, v. 21-23. See Ignác Süsz, *A zsidó házassági jog tekintettel hazai törvényeinkre* (Köszeg, 1882), p. III., Andreas Eberharter, *Das Ehe- und Familienrecht der Hebräer mit Rücksicht auf die ethnologische Forschung dargestellt* (Münster, 1914), and also see A Billauer, *Grundzüge des babylonisch-talmudischen Eherechts* (Berlin, 1910), pp. 9-23.

¹³ Deuteronomy, chap. 24, v. 1.

¹⁴ Malachi, chap. 2, v. 14-16.

¹⁵ See J. H. Hertz (ed.), *Mózes öt könyve és a Háftárak* (Budapest, 1984) and also see Tamás Féner – Sándor Scheiber, ... és beszéld el fiaidnak ... (Budapest, 1984).

white burial robe, a kittel, his head was often sprinkled with ash. These signs of mourning were meant to keep the angel of death away from the marriage. The groom was made to stand facing east and his bride was led up to him and made to walk around him three or seven times. From the 16th century the wedding ceremony was started by reciting seven blessings over a cup of wine among the Jews in Europe. Some lines of one of these blessings well illustrate the Jewish concept of marriage: “Gladden the beloved companions as you made glad your creation in the Garden of Eden from days of old. Blessed art thou, Lord, who gladdens groom and bride.” Following the blessings came the essential moment of the ceremony, the declaration of intent by the groom. He placed a ring on the forefinger of his bride’s right hand and said, “Behold, you are consecrated to me by this ring, according to the ritual of Moses and Israel.” From the 1st century on – so as to protect the bride – the marriage contract was also read out under the chupa. Rabbinic law regarded engagement as a pure legal transaction that is why substitution was allowed then. Wedding, however, was regarded as the symbol of connubial union, consequently both parties had always to be present. After the wedding two feasts were given, one on the day of the wedding and the other a week later. Guests were entertained by the groom’s friends and the two bride leaders the so called susbins. The veiled bride was then accompanied from the parental house to the house of the groom. Meanwhile a wreath was put on the head of the bride, walnuts and almonds were thrown among the onlookers and singers praised the beauty of the bride just like Solomon had praised the beauty of Sulamit in the Song of Songs.

According to the revelation of the whole Holy Scripture marriage is a holy covenant ordained by God. However, while Mosaic Law rendered the dismissal of a wife possible, the New Testament returned to the marriage concept of the covenant made with Adam – and with him by all men. Jesus regarded marriage such a tight relationship that it could only be dissolved in the case of adultery: „But I say unto you, that whosoever shall put away his wife, not for fornication, and shall marry another, commits adultery; and he who marries one put away commits adultery.”¹⁶ Although by the end of the antique age marriage was contracted without any formalities by the consensus of the two parties (*consensus facit nuptias*),¹⁷ the solemn customs concerning wedding survived though with some Christian flavour. Instead of

¹⁶ Matthew, chap. 19, v. 9.

¹⁷ Ulpianus, Dig. 35. 1. 15.

the pagan Roman customs, parties usually took a marriage vow with their hands on the Bible, although obviously it had no legal significance.¹⁸

Following the Catholicisation of Germanic tribes, religious syncretism, that is the mixing of Christian principles and tribal customary law in most cases resulted in the survival of ancient customs, but afterwards a religious ceremony took place as well. The benediction ceremony was established in order to get the blessing of the church and was available on condition the parties had met the canon law requirements. The oldest known marriage liturgy dates back to the 6th century. According to it the parties gained the blessing in the course of the so called *velatio* when the priest covered the new couple by a canopy or veil. Oddly enough, this custom was justified by words taken from the Letter to the Hebrews, “...by the new and living way that he opened for us through the curtain, that is, through his flesh.”¹⁹ All this took place publicly at the door of the church or in the church where the hands of the parties were joined and sometimes it was supplemented by an oath. Although there were several variations of gaining the blessing in western church, all such acts were acknowledged only as a confirmation of marriage and not as acts bringing about and establishing marriage by canon law up to the 13th century. In 1215 the Fourth Council of the Latheran found it sufficient to prohibit marriages contracted without church formalities²⁰ but in the middle of the 16th century the Council of Trent rendered all such marriages null and void, in other words, what had been customs or Christian obligations became essential to the validity of the marriage.

To what extent the canon law of Catholic and Protestant denominations adhered to biblical morals is another issue. Before the 12th century the position as to whether the lack of conjugal fidelity or any other cause may be a ground for allowing only separation or also the dissolution of the bond and re-marrying the divorcees changed several times in the Council Decrees of the Catholic Church and in the writings of the Fathers of the Church. It had become unequivocal that Catholic canon law ruled out the dissolution of marriage raised to the rank of sacrament (*perfectum matrimonium*) approximately by the time the collection of canon law, *Decretum Gratiani* was compiled in 1140 under the influence of the Cluny reform

¹⁸ See Schott, pp. 19-28.

¹⁹ Hebrews, chap. 10, v. 20.

²⁰ See Péter Erdő, *Az egyházjog forrásai. Történeti bevezetés* (Budapest, 1998), pp. 165-179.

movement.²¹ If someone committed adultery (adulterium), his or her spouse could only request a clerical court to grant separation (separatio a thoro et mensa). As opposed to it, the law of the protestant denomination exceptionally made dissolution possible mainly in the case of adultery or grievously assaulting or deserting one's spouse in order to remedy an unbearable situation. Thus the laws of denominations safeguarded conjugal faithfulness but if family relationships deteriorated irrevocably and the parties did not voluntarily and wholeheartedly feel that they should stick to their partner, no external moral compulsion could settle the problem. In Hungary, where religious plurality has prevailed since the 16th century, the lack of conjugal faithfulness could be regarded the most frequent matrimonial conflict even in the 18th and 19th centuries according to the known matrimonial cases. Long-lasting cohabitation out of marriage occurred in everyday life as well as having lovers and businesslike sexual relationships.

As opposed to the absolute values of Jewish-Christian culture, nowadays relativism concerning good and bad, right and wrong is “trendy”. According to it values are what one considers as such and man is the exclusive measure of valuable and valueless things. As the idea of homo mensura is growing in popularity, legal order often reacts to social expectations by further relaxing laws on marriage. It is open to question in European and Hungarian law likewise, whether marriage is a relationship between a man and a woman or merely between two parties and whether it is a moral fellowship where faithfulness plays an important role. When experts encourage the formation of positive and community orientated attitudes to values in response to family problems²² and other symptoms of social crises and at the same time highlight that the formations of the power of the state play a part in forming and educating people and forming their consciousness, the vow “till death do us part” occurs to the legal historian together with other traditional values without which the peoples of Europe could hardly have lived to see the 21st century.

²¹ See Imre Kazali, *A katolikus egyházjogtan kézikönyve különös tekintettel Magyarország jogi viszonyaira II* (Vác, 1877), pp. 396-398. and also see Péter Erdő, *Egyházjog a középkori Magyarországon* (Budapest, 2001), pp. 229-231.

²² See Antal Ádám, Az alkotmányi értékek fejlődési irányairól, *Jura*, Vol. 1. (2002) and by the same author, Az emberi jogok mint értékek, *Acta Humana*, Vol. 34. (1999), p. 21.